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Contents

Federal Register

Vol. 85, No. 148

Friday, July 31, 2020

Reader Aids
Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents electronic mailing list, go to https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

CFR PARTS AFFECTED IN THIS ISSUE

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

6 CFR
5.....45967

8 CFR
103.....45968

12 CFR
44.....46422
248.....46422
351.....46422

14 CFR
39.....45990
71 (3 documents).....45993, 45995, 45997

Proposed Rules:
39 (2 documents).....46010, 46012
71.....46015

15 CFR
740.....45998

16 CFR
1225.....46000

17 CFR
75.....46422
255.....46422

Proposed Rules:
240.....46016
249.....46016

26 CFR

Proposed Rules:
40.....46032
49.....46032

38 CFR
71.....46226

39 CFR

Proposed Rules:
3050.....46044

40 CFR
180 (2 documents).....46002, 46004

Proposed Rules:
22.....46046
52.....46046
124.....46046
257.....46046

47 CFR

Proposed Rules:
1.....46047
2.....46047
27.....46047
64.....46063

50 CFR
218.....46302
679.....46008

Rules and Regulations

Federal Register
Vol. 85, No. 148
Friday, July 31, 2020

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2020–0020]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/ALL–045 Statistical Immigration Data Production and Reporting System of Records

AGENCY: Department of Homeland Security.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security is issuing a final rule to amend its regulations to exempt portions of a newly established system of records titled, ''Department of Homeland Security/ALL–045 Statistical Immigration Data Production and Reporting System of Records'' from certain provisions of the Privacy Act. Specifically, the Department exempts portions of the ''Department of Homeland Security/ALL–045 Statistical Immigration Data Production and Reporting System of Records'' from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: This final rule is effective July 31, 2020.

FOR FURTHER INFORMATION CONTACT: For general and privacy questions please contact: Constantina Kozanas (202) 343–1717, *Privacy@hq.dhs.gov,* Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

Background

The Department of Homeland Security (DHS) published a notice of proposed rulemaking in the **Federal Register**, (85 FR 14174, March 11, 2020), proposing to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. The associated system of records with this rulemaking is DHS/ALL–045 Statistical Immigration Data Production and Reporting System of Records, published concurrently in the **Federal Register** at 85 FR 14223 on March 11, 2020, which permits DHS/Office of Immigration Statistics (OIS) to collect and maintain records on members of the public for whom federal agencies have collected information related to individuals' interactions with the federal government's immigration system.

Comments were invited on both the Notice of Proposed Rulemaking (NPRM) and System of Records Notice (SORN).

Public Comments

DHS received two comments on the NPRM and one comment on the SORN.

NPRM

DHS received two comments on the published NPRM: One regarding the need for a database of law enforcement investigations other law agencies may have access to and the other regarding the need for collection in a transparent and non-discriminatory manner. DHS appreciates the public comments. First, DHS does not collect information in this system of records for law enforcement purposes for itself nor for other federal agencies. Second, DHS always strives to be transparent regarding its collection of immigration data for statistical purposes and does so in conformance with law.

SORN

DHS received one non-substantive comment on the published SORN.

After consideration of the public comments, DHS has determined that the exemptions should remain in place and will implement the rulemaking as proposed.

List of Subjects in 6 CFR Part 5

Freedom of information, Privacy.

For the reasons stated in the preamble, DHS amends Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

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

Authority: 6 U.S.C. 101 *et seq.;* Pub. L. 107–296, 116 Stat. 2135; 5 U.S.C. 301.

Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

■ 2. Amend Appendix C to Part 5 by adding paragraph 82 to read as follows:

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

82. The DHS/ALL–045 Statistical Immigration Data Production and Reporting System of Records consists of electronic and paper records and will be used by DHS and its Components. The DHS/ALL–045 Statistical Immigration Data Production and Reporting System of Records is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; national security and intelligence activities. The DHS/ALL–045 Statistical Immigration Data Production and Reporting System of Records System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other federal, state, local, tribal, foreign, or international government agencies.

For records created and aggregated by DHS OIS, the Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(k)(4), has exempted this system from the following provisions of the Privacy Act: 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f). In addition to the reasons stated below, the reason for exempting the system of records is that disclosure of statistical records (including release of accounting for disclosures) would in most instances be of no benefit to a particular individual since the records do not have a direct effect on a given individual.

Where a record received from another system has been exempted in that source system under 5 U.S.C. 552a(j)(2) or (k)(2), DHS will claim the same exemptions for those records that are claimed for the original primary systems of records from which they originated and claims any additional exemptions set forth here.

Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures for records derived

from DHS operational systems could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process. When an investigation has been completed, information on disclosures made may continue to be exempted if the fact that an investigation occurred remains sensitive after completion.

(b) From subsection (d) (Access and Amendment to Records) because access to the records contained in this system of records that are derived from records from DHS operational systems could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity, including statistics records covered by this system that derived from records originating from DHS operational systems.

(f) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

Constantina Kozanas,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2020–15513 Filed 7–30–20; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 103

[DHS Docket No. ICEB–2017–0001]

RIN 1653–AA67

Procedures and Standards for Declining Surety Immigration Bonds and Administrative Appeal Requirement for Breaches

AGENCY: U.S. Immigration and Customs Enforcement, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: The U.S. Department of Homeland Security (DHS) is promulgating two changes that apply to surety companies certified by the Department of the Treasury, Bureau of the Fiscal Service (Treasury), to underwrite bonds on behalf of the Federal Government. First, this final rule requires Treasury-certified sureties seeking to overturn a surety immigration bond breach determination to exhaust administrative remedies by filing an administrative appeal raising all legal and factual defenses. This requirement to exhaust administrative remedies and present all issues to the administrative tribunal will allow Federal district courts to review a written decision addressing all of the surety's defenses, thereby streamlining litigation over the breach determination's validity. Second, this rule sets forth ''for cause'' standards and due process protections so that U.S. Immigration and Customs Enforcement (ICE), a component of DHS, may decline bonds from companies that do not cure their deficient performance. Treasury administers the Federal corporate surety bond program and, in its regulations, allows agencies to prescribe in their regulations for cause standards and procedures for declining to accept bonds from a Treasury-certified surety company. ICE adopts the for cause standards contained in this rule because certain surety companies have failed to pay amounts due on administratively final bond breach determinations or have had in the past unacceptably high breach rates.

DATES: This rule is effective August 31, 2020.

FOR FURTHER INFORMATION CONTACT: Melinda A. Jones, Management and Program Analyst, MS 5207 Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, Bond Management Unit, 500 12th Street SW, Washington, DC 20536; email *BLM-Treas@ice.dhs.gov* or *HQ-ERO-BOND@ice.dhs.gov.* Telephone 202–271–9855 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Abbreviations

AAO Administrative Appeals Office
APA Administrative Procedure Act
CFR Code of Federal Regulations
DHS Department of Homeland Security
DOJ Department of Justice
FY Fiscal Year
ICE U.S. Immigration and Customs Enforcement
INA Immigration and Nationality Act
INS Immigration and Naturalization Service
OMB Office of Management and Budget
ROP Record of Proceedings
Treasury Department of the Treasury, Bureau of the Fiscal Service
USCIS U.S. Citizenship and Immigration Services

II. Background

A. ICE Immigration Bonds Generally

ICE may release certain aliens from detention during removal proceedings after a custody determination has been made pursuant to 8 CFR 236.1(c). ICE may require an alien to post an

immigration bond as a condition of his or her release from custody. *See* Immigration and Nationality Act (INA) 236(a)(2)(A), 8 U.S.C. 1226(a)(2)(A); 8 CFR 236.1(c)(10). This rule applies to all immigration bonds issued by ICE. There are currently three types of immigration bonds issued by ICE. A delivery bond is posted to guarantee the appearance of the bonded alien for removal, an interview, or at immigration court hearings; a voluntary departure bond is posted to secure the timely voluntary departure of an alien from the United States, 8 CFR 1240.26(b)(3)(i), (c)(3)(i); and an order of supervision bond is to secure compliance with an order of supervision, 8 CFR 241.5(b). *See also* INA 103(a)(3), 8 U.S.C. 1103(a)(3) (authorizing the Secretary of Homeland Security to ''prescribe such forms of bond'' as the Secretary deems necessary to carry out his immigration authorities).

ICE immigration bonds may be secured by a cash deposit (''cash bonds'') or may be underwritten by a surety company certified by Treasury pursuant to 31 U.S.C. 9304–9308 to issue bonds on behalf of the Federal government (''surety bonds''). 8 CFR 103.6(b). Treasury publishes the list of certified sureties in Department Circular 570, available at *https://www.fiscal.treasury.gov/surety-bonds/list-certified-companies.html.* For cash bonds, ICE requires a deposit for the face amount of the bond and, if the bond is breached, ICE transfers that deposit into the Breached Bond/Detention Fund as compensation for the breach of the bond agreement. 8 U.S.C. 1356(r); 8 CFR 103.6(b), (e). In contrast, when a surety bond is breached, ICE must issue an invoice to collect the amount due from the surety company or its agent. ICE Form I–352 (Rev. 12/17). This rule applies to surety bonds only, and not to cash bonds.

B. Surety Bonds

Pursuant to the terms of the bond, surety companies and their agents serve as co-obligors on the bond and are jointly and severally liable for payment of the face amount of the bond when ICE issues an administratively final breach determination. In this rule, the singular term ''bond obligor'' refers to either the surety company or the bonding agent. The plural term ''bond obligors'' refers to both entities.

ICE officials may declare a bond breached when there has been a ''substantial violation of the stipulated conditions.'' 8 CFR 103.6(e). Bond breach determinations are issued on ICE Form I–323, Notice—Immigration Bond Breached. ICE makes such a determination when a bond obligor fails to deliver the alien into ICE custody when requested, when an obligor fails to ensure that the alien timely voluntarily departs the United States, or when an obligor fails to ensure that the alien complies with an order of supervision, as required by the terms of the bond.

Bond obligors have a right to appeal the breach determination by completing Form I–290B, Notice of Appeal or Motion, and submitting the form together with the appropriate filing fee and a brief written statement setting forth the reasons and evidence supporting the appeal within 30 days after service of the decision. 8 CFR 103.3(a)(2)(i). If a bond obligor does not timely appeal the breach determination to the U.S. Citizenship and Immigration Services (USCIS) Administrative Appeals Office (AAO), or if the appeal is dismissed, the breach determination becomes an administratively final agency action. *See* 8 CFR 103.6(e); *see generally United States* v. *Gonzales & Gonzales Bonds & Ins. Agency, Inc.,* 728 F. Supp. 2d 1077, 1086–91 (N.D. Cal. 2010); *Safety Nat'l Cas. Corp.* v. *DHS,* 711 F. Supp. 2d 697, 703–04 (S.D. Tex. 2008).[1]

For surety bonds, if a bond obligor does not timely appeal to the AAO or if the appeal is dismissed, ICE will issue a demand for payment on an administratively final breach determination in the form of an invoice to the bond obligors. 31 CFR 901.2(a). The bond obligors have 30 days to pay the invoice or submit a written dispute; otherwise, the debt is past due. 31 CFR 901.2(b)(3). During this 30-day period, the bond obligors may seek agency review of the debt. *See* 6 CFR 11.1(a); 31 CFR 901.2(b)(1), (e). If the bond obligors ask to review documents related to the debt, ICE will provide documents supporting the existence of the debt. If the bond obligors dispute the debt, ICE will review the breach determination and issue a written response to any issues raised by the bond obligors. Under the terms set forth in ICE's invoice, if a debtor, such as a bond obligor, does not pay the invoice within 30 days of issuance of the written response to the dispute, the invoice is past due. *See* 31 CFR 901.2(b)(3).

C. Need for Exhaustion Requirement

Treasury-certified surety companies that receive a breach determination need to know when that decision is final to plan their next steps. When a decision is final, the bond obligor can seek further review of the decision in the federal courts. 5 U.S.C. 704. An initial agency action, such as a bond breach determination, is considered final and subject to judicial review unless exhaustion of administrative remedies is required, *i.e.,* unless (1) a statute expressly requires an appeal to a higher agency authority, or (2) the agency's regulations require (a) an appeal to a higher agency authority as a prerequisite to judicial review, and (b) the administrative action is made inoperative during such appeal. *Darby* v. *Cisneros,* 509 U.S. 137, 154 (1993) (explaining that when the Administrative Procedure Act (APA) applies, an appeal to ''superior agency authority'' is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review).[2] An agency may also by regulation require issue exhaustion, meaning that a litigant cannot raise an issue in federal court without first raising the issue in the litigant's administrative appeal. *See generally Sims* v. *Apfel,* 530 U.S. 103, 107–10 (2000).

In this rule, DHS requires *Darby* exhaustion by revising DHS regulations such that before a surety can sue on ICE's bond breach determination in federal court, the surety must appeal such determination to the AAO. Consistent with *Darby,* the rule also provides that the agency's breach determination remains inoperative during the pendency of such appeal. In addition, this rule requires issue exhaustion by requiring sureties to raise all factual and legal issues in an administrative appeal or waive those issues in federal court.

The need for exhaustion of administrative remedies and issue exhaustion requirements for bond breach determinations is evidenced by two cases where district court judges required ICE to issue written decisions addressing defenses raised by surety companies and their agents for the first time in federal district court litigation. In these cases, filed by the United States in federal district court to collect

[1] Courts have also held that certain AAO decisions are final agency actions when the AAO issues opinions on non-bond appeals within its jurisdiction in other contexts. *See, e.g., Herrera* v. *U.S. Citizenship & Imm. Servs.,* 571 F.3d 881, 885 (9th Cir. 2009).

[2] *See also Air Espana* v. *Brien,* 165 F.3d 148, 151 (2d Cir. 1999) (noting that section 273 of the Immigration and Nationality Act does not impose an exhaustion requirement); *DSE, Inc.* v. *United States,* 169 F.3d 21, 26–27 (D.C. Cir. 1999) (party may seek judicial review without pursuing intra-agency appeal because filing of appeal did not make agency decision inoperative); *Young* v. *Reno,* 114 F.3d 879, 881–82 (9th Cir. 1997) (by regulation, appeal was not required).

amounts due from surety companies and their agents for breached bonds, the courts issued remand orders requiring ICE to prepare written decisions addressing whether over 100 breach determinations were valid after evaluating the defenses raised by the bond obligors. *United States* v. *Int'l Fidelity Ins. Co.,* No. 2:11–cv–396–FSH–PS, ECF No. 86 at 8 (D.N.J. July 30, 2012); *United States* v. *Gonzales & Gonzales Bonds & Ins. Agency, Inc.,* 2012 WL 4462915, at 9 (N.D. Cal. Sept. 25, 2012).

Requiring exhaustion of administrative remedies and issue exhaustion will streamline this type of litigation and conserve judicial resources because the bond obligors will be required to raise all factual and legal issues in an administrative appeal, and the AAO will issue a written decision addressing all defenses. The administrative appeal process will allow errors to be corrected without resort to federal court litigation and will avoid the delay associated with remanding breach determinations to the agency to issue written administrative decisions addressing defenses. As noted by a district court, appropriate review of an agency determination would be simplified by requiring exhaustion of administrative remedies. *See Int'l Fidelity Ins. Co.,* ECF No. 86, at 9. This regulation will promote judicial economy by requiring obligors to present their defenses to the AAO in the first instance, thus allowing federal courts to review a written decision addressing those defenses under the APA's arbitrary and capricious standard of review, rather than remanding cases to ICE for necessary administrative determinations.

D. Need for Ability To Decline Bonds From Non-Performing Surety Companies

For decades, certain surety companies and their agents have failed to pay invoices for breached bonds timely (within 30 days) or to present specific reasons to the agency why, in their view, the breach determinations are invalid. This non-performance has compelled litigation in federal court to resolve thousands of unpaid breached-bond debts valued in the millions of dollars and has also resulted in ICE filing claims in state receivership proceedings when sureties cannot pay past-due invoices. ICE needs to be able to decline future bonds from non-performing surety companies, after providing the due process specified in this rule, to give surety companies an incentive to take appropriate action when a bond is breached.

The need for the ability to decline bonds derives from the lack of an effective existing mechanism to address non-performing surety companies at the bond-approving agency level. Specifically, certain surety companies' failure to pay amounts due on breached bonds had been ongoing for years, and the agency considered different approaches to recovering payments. In 1982, Regional Counsel for the former Immigration and Naturalization Service (INS) recommended that the INS amend 8 CFR 103.6 to implement a procedure, similar to that established by the U.S. Customs Service in July 1981, to stop accepting bonds from surety companies with poor payment records until their payment performance improved, but this proposal was never implemented.

In 2005, ICE notified a surety with substantial delinquent debt that it would no longer accept immigration bonds underwritten by that company and separately asked Treasury to revoke the surety's certification to post bonds on behalf of the United States. A district court enjoined ICE's action not to accept additional bonds, ruling that ICE could not decline immigration bonds from this surety without first affording the company procedural due process. *Safety Nat'l Cas. Corp.* v. *DHS,* No. 4:05–cv–2159, slip op. at 8 (S.D. Tex. Dec. 9, 2005).

Treasury, after conducting an informal hearing, issued a determination concluding that the surety company exhibited a course and pattern of doing business that was incompatible with its authority to underwrite bonds on behalf of the United States and directed the surety to make full payment of all amounts due and owing on over 900 breached bonds (over $7 million at the time). *See* ''Notice to Safety National Casualty Corp. from FMS Commissioner'' (Jan. 23, 2007) (withdrawn and vacated, with prejudice, on July 19, 2013). The surety then filed suit in federal district court on February 21, 2007, seeking to enjoin Treasury from enforcing its final decision and to vacate Treasury's ruling that the surety should be decertified. *Safety Nat'l Cas. Corp.* v. *U.S. Dep't of the Treasury,* No. 4:07–cv–00643 (S.D. Tex. Feb. 21, 2007), ECF No. 1. On August 27, 2008, the court stayed the case pending the resolution of 1,421 bond disputes, *id.* (Minute Entry), raised in an earlier case filed by Safety National Casualty Corp. and its agent against DHS, *Safety Nat'l Cas. Corp.* v. *DHS,* No. 4:05–cv–2159 (S.D. Tex. filed June 23, 2005), ECF No. 1. On July 30, 2013, the Treasury case was dismissed based on a settlement agreement reached by the parties in the earlier case involving the 1,421 bond disputes. No. 4:07–cv–00643, ECF. No. 67. This example illustrates the difficulty ICE has encountered in precluding surety companies that have not paid invoices issued on administratively final breach determinations from issuing new immigration bonds.

The repeated failures of certain surety companies to respond appropriately to breached-bond invoices, either by paying the invoice or disputing the validity of the breach determination before the agency, shows the need for this rule allowing ICE to decline bonds from non-performing surety companies.

E. Treasury Regulation Allows Federal Agencies To Decline Bonds From Certified Sureties for Cause

Treasury is responsible for administering the corporate Federal surety bond program pursuant to 31 U.S.C. 9304–9308 and 31 CFR part 223. Treasury evaluates the qualifications of sureties to underwrite Federal bonds and issues certificates of authority to those sureties that meet the specified corporate and financial standards. Under 31 U.S.C. 9305(b)(3), a surety must ''carry out its contracts'' to comply with statutory requirements. To ''carry out its contracts'' and be in compliance with section 9305, a surety must, on a continuing basis, make prompt payment on invoices issued to collect amounts arising from administratively final determinations.

On October 16, 2014, Treasury published a final rule entitled, ''Surety Companies Doing Business with the United States.'' 79 FR 61992. The rule became effective on December 15, 2014. This Treasury regulation clarifies that: (1) Treasury certification does not insulate a surety from the requirement to satisfy administratively final bond obligations; and (2) an agency bond-approving official has the discretion to decline to accept additional bonds on behalf of his or her agency that would be underwritten by a Treasury-certified surety for cause provided that certain due process standards are satisfied.

Through this rule, DHS specifies the circumstances under which ICE will decline to accept new immigration bonds from Treasury-certified sureties. This rule also sets forth the procedures that ICE will follow before it declines bonds from a surety. This rule facilitates the prompt resolution of bond obligation disputes between ICE and sureties and minimizes the number of situations where the surety will routinely fail to pay administratively final bond obligations or fail to promptly seek administrative review of bond breach determinations.

III. Discussion of Final Rule

A. Exhaustion of Administrative Remedies

Exhaustion of administrative remedies serves many purposes. *Bastek* v. *Fed. Crop Ins. Corp.,* 145 F.3d 90, 93 (2d Cir. 1998). First, exhausting administrative remedies ensures that persons do not flout established administrative processes by ignoring agency procedures. *See McKart* v. *United States,* 395 U.S. 185, 195 (1969); *Pub. Citizen Health Research Group* v. *Comm'r, Food & Drug Admin.,* 740 F.2d 21, 29 (D.C. Cir. 1984). Second, it protects the autonomy of agency decision making by allowing the agency the opportunity to apply its expertise in the first instance, exercise discretion it may have been granted, and correct its own errors. *Woodford* v. *Ngo,* 548 U.S. 81, 89 (2006). Third, the doctrine aids judicial review by permitting the full factual development of issues relevant to the dispute. *James* v. *HHS,* 824 F.2d 1132, 1137–38 (D.C. Cir. 1987). Finally, the doctrine of exhaustion promotes judicial and administrative economy by resolving some claims without judicial intervention. *Woodford,* 548 U.S. at 89. For all of these reasons, DHS considers it to be both necessary and appropriate to mandate the exhaustion of administrative remedies for bond breach determinations on bonds issued by Treasury-certified surety companies.

Therefore, under this rule, a Treasury-certified surety or its agent that receives a breach notification from ICE must seek administrative review of that breach determination by filing an appeal with the AAO before the agency's action becomes final and subject to judicial review. The initial breach determination will not be enforced while any timely administrative appeal is pending. ICE will not issue an invoice to collect the amount due from the bond obligors on a breached bond until the agency action becomes final. If the bond obligor fails to file an administrative appeal during the filing period (currently 30 days) or files an appeal that is summarily dismissed or rejected due to failure to comply with the agency's deadlines or other procedural rules, then the bond obligor will have waived all issues and will not be able to seek review of the breach determination in federal court.[3] ICE will then issue an invoice to collect the amount due.[4]

B. Issue Exhaustion

The rule also requires Treasury-certified surety companies and their agents to raise all defenses or other objections to a bond breach determination in their appeal to the AAO; otherwise, these defenses and objections will be deemed waived. The Supreme Court has observed that administrative issue exhaustion requirements may be created by agency regulations:

> [I]t is common for an agency's regulations to require issue exhaustion in administrative appeals. *See, e.g.,* 20 CFR 802.211(a) (1999) (petition for review to Benefits Review Board must ''lis[t] the specific issues to be considered on appeal''). And when regulations do so, courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues.

Sims v. *Apfel,* 530 U.S. 103, 107–08 (2000).

DHS believes that issue exhaustion is appropriate and necessary when a Treasury-certified surety company or its agent appeals a breach determination to the AAO. Some of these companies have engaged in protracted litigation over the validity of bond breach determinations; some of this litigation could have been streamlined if the bond obligors had been required to present all of their issues and disputes to the agency for adjudication on appeal before suit was filed in federal court instead of raising new issues for the first time in federal court. Under this rule, DHS considers issue exhaustion to be mandatory in that a commercial surety or its agent is required to raise all issues before the AAO and waives and forfeits any issues not presented.

C. Standards and Process for Declining Bonds From a Treasury-Certified Surety

As required by the Treasury regulation, DHS, through this rule, establishes the standards ICE will use to decline surety immigration bonds for cause (the ''for cause'' standards) and the procedures that ICE will follow before declining bonds from a Treasury-certified surety. The standards are informed by the important function that surety immigration bonds serve in the orderly administration of the immigration laws. Because insufficient resources exist to hold in custody all of the individuals whose statuses are being determined through removal proceedings, delivery bonds perform the vital function of allowing eligible individuals to be released from custody while the bond obligors accept the responsibility for ensuring their future appearance when required. If the bond obligor fails to satisfy its obligations under the terms of the bond, a claim is created in favor of the United States for the face amount of the bond. 8 CFR 103.6(e); Immigration Bond, ICE Form I–352, G.1 (Rev. 12/17). Enforcing collection of a breached immigration bond is important to motivate bond obligors to comply with the obligations they agreed to when they executed the bond and upon which ICE relied in permitting the alien to remain at liberty while removal proceedings are pending. When an alien does not appear as required, agency resources must be expended to locate the alien and take him or her back into custody.

In short, the ''for cause'' standards arise from the need to maintain the integrity of the bond program. The bond program does not operate as intended when sureties (1) fail to timely pay invoices based on administratively final breach determinations, or (2) have unacceptably high breach rates. The incentive to deliver aliens in response to demand notices is reduced when sureties do not timely forfeit the amount of the bond as a consequence of their failure to perform. Moreover, if sureties do not submit payment for the Government's claim created as a result of the breach, they may receive an undeserved windfall if they retain any premiums or collateral paid by the person who contracted with them to obtain the bond on behalf of the alien (the indemnitor).

1. For Cause Standards

The rule establishes three circumstances, or for cause standards, when ICE may notify a surety of its intention to decline any new bonds underwritten by the surety.[5] ICE's decision about whether to decline new bonds is discretionary; ICE is not required to stop accepting new bonds every time one of the for cause standards has been violated, and ICE retains discretion to work with surety

[3] *See, e.g., Woodford,* 548 U.S. at 90 (''Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules''); *Silverton Snowmobile Club* v. *U.S. Forest Serv.,* 433 F.3d 772, 787 (10th Cir. 2006) (upholding district court's dismissal of complaint due to failure to exhaust administrative remedies); *Galvez Pineda* v. *Gonzales,* 427 F.3d 833, 838 (10th Cir. 2005) (''[U]ntimely filings with administrative agencies do not constitute exhaustion of administrative remedies.''); *Glisson* v. *U.S. Forest Serv.,* 55 F.3d 1325 (7th Cir. 1995) (suit barred for failure to appeal from the decision of the supervisor of a national forest to authorize the sale of timber).

[4] Because a motion to reconsider or reopen a bond breach determination does not stay the final decision, a bond obligor's failure to file such a motion will not constitute failure to exhaust administrative remedies.

[5] Treasury's regulation permitting agencies to promulgate ''for cause'' standards to decline new bonds is ''prospective and is not intended to require a principal to obtain replacement bonds that have already been accepted.'' 79 FR 61,992, 61,995. Accordingly, ICE's notification would not have any effect on a surety's open bonds.

companies on an individual basis to ensure compliance.

First For Cause Standard: Ten or More Past-Due Invoices

Under the first for cause standard, ICE is authorized to issue a notice of its intention to decline new bonds when the surety has 10 or more past-due invoices issued after the final rule's effective date. The terms ''invoice,'' ''administratively final,'' and ''past due'' are each terms of art which require further explanation.

In this context, an ''invoice'' is a demand notice that ICE sends to a surety company and its agent seeking payment on an administratively final breach determination. A breach determination is ''administratively final'' either when the time to file an appeal with the AAO has expired without an appeal having been filed or when the appeal is dismissed. *See* 8 CFR 103.6(e); *see also Gonzales & Gonzales Bonds,* 728 F. Supp. 2d at 1086, 1091; *Safety Nat'l Cas. Corp.,* 711 F. Supp. 2d at 703–04.

Finally, an invoice is ''past due'' when the bond obligor does not pay the invoice within 30 days of ICE's issuance of the invoice. 31 CFR 901.2(b)(3). This 30-day period can be tolled if the obligor disputes the debt during the 30-day period.[6] If the obligor disputes the debt, ICE will review the underlying breach determination and issue a written response to any issues raised by the surety or bonding agent. If ICE, in its written response to the obligor's dispute, concludes that the debt is invalid, ICE will cancel the invoice. If, however, ICE concludes that the debt is valid, the obligor has 30 days from issuance of the written decision to pay the debt. If a disputed invoice is valid, or if the obligor has declined to timely dispute the invoice, such an invoice, when it becomes past due, will be included as one of the 10 past-due invoices that may trigger the issuance of a notice that ICE intends to decline new bonds underwritten by the surety.[7]

Again, the first for cause standard will be triggered when at least 10 invoices issued after this rule's effective date are past due. DHS establishes this standard because, when a surety company has 10 past-due invoices, such a company is not fulfilling its obligation to diligently and promptly act on demands for payment. DHS considered using a smaller number of past-due invoices as the trigger for this standard but concluded that some leeway should be given for missed payments. However, DHS believes that a reasonably attentive surety company should be able to avoid having 10 past-due invoices at the same time.

In fiscal year (FY) 2019, only five surety companies exceeded 10 unpaid past-due invoices. Three of these companies stopped posting new bonds, of their own volition. All five of these companies were either in liquidation or exhibited a practice of repeatedly failing to timely pay invoices, exhibiting that nonpayment of 10 invoices did not occur through mistake or inadvertence. During this same period, multiple surety companies had timely paid all of their invoices or were late in submitting payments on fewer than 10 invoices.

Second For Cause Standard: Cumulative Debt of $50,000 or More on Past-Due Invoices

Under the second for cause standard, ICE is authorized to issue a notice of its intention to decline new bonds when the surety owes a cumulative total of $50,000 or more on past-due invoices issued after the effective date of this final rule, including interest and other fees assessed by law on delinquent debt. This rule includes a for cause standard based on cumulative debt because bond amounts differ based on custody determinations, and a surety could have a fairly large cumulative debt (over $50,000) when fewer than 10 invoices are unpaid. As of October 31, 2019,[8] for bonds in an ''open'' status (those that have not yet been breached or canceled), the lowest surety bond value was $500 and the highest surety bond value was $750,000, the average value of the over 40,000 open surety bonds was about $11,200 and the median value was $10,000.[9]

Data from FY 2019 illustrate the need for this standard. In FY 2019, ICE issued invoices to collect amounts due on breached immigration bonds to 13 different sureties. As of October 31, 2019, three of those thirteen sureties owed cumulative debts above $50,000, and the median amount of cumulative debt owed by these three companies was substantial—$253,500.[10] One other surety, which of its own volition no longer posts bonds, accrued a cumulative debt of $142,500 on 16 past-due invoices in FY 2019 before paying those invoices. Likewise, data from FY 2019 confirm that surety companies that regularly pay invoices on time do not generally exceed a cumulative total of $50,000 in past due debt. Three sureties generally paid their debts in a timely manner with only a few late payments.[11] The highest amount of past-due debt accrued by any of those three companies was $25,000. In addition, six surety companies had no past-due debts during FY 2019.

These numbers suggest that the $50,000 threshold represents a reasonable trigger because, based on an average bond amount of $11,200, a surety could quickly accumulate a substantial debt if it is not committed to fulfilling its obligations by paying invoices timely. Continuing to accept bonds from such an entity places an unacceptable risk on the agency. If a surety company is approaching $50,000 in unpaid obligations and cannot pay such obligations, it should stop attempting to post new bonds.

This standard also gives ICE the flexibility to take action when a surety's non-performance is problematic even though fewer than 10 invoices may be past due. Because more than half of the open surety bonds are in the amount of $10,000 or more, a surety could incur a cumulative debt of $50,000 or more with relatively few unpaid invoices. This second for cause standard recognizes that possibility and gives ICE the option of taking action when the surety has failed to timely pay invoices,

[6] Treasury has issued guidance to federal agencies instructing them to ''develop clear policies and procedures on how to respond to a debtor's request for copies of records related to the debt, consideration for a voluntary repayment agreement, or a review or hearing on the debt.'' Department of the Treasury, Bureau of the Fiscal Service, *Managing Federal Receivables,* at 6–16 (Mar. 2015). When it issues an invoice, ICE includes information about its collection policies, including a statement that: ''If a timely written request disputing the debt is received, the debt will be reviewed and collection will cease on the debt or disputed portion until verification or correction of the debt is made and a written summary of the review is provided.'' ICE Form Invoice, ''Important Information Regarding This Invoice,'' maintained by ICE's Financial Service Center Burlington.

[7] There is no further administrative review of ICE's determination that a disputed invoice is valid. This is because the administratively final breach determination underlying each invoice has already been subject to appellate review. In other words, because ICE does not issue an invoice until after the related breach has become administratively final, ICE's issuance of an invoice, and its review of a disputed invoice, would not occur until *after* the AAO had already resolved the obligor's appeal, if any, of the underlying breach determination.

[8] The data presented has been updated from the data provided in the proposed rule, but it is not meaningfully different. Although the data used here reflects FY 2019 information, the updated data supports the same conclusion as was reached in the proposed rule.

[9] Immigration Bond Statistics maintained by ICE's Financial Service Center Burlington.

[10] An additional surety that has been in liquidation proceedings since 2001 owes a significant amount of past due debt, but no new invoices were issued to that surety in FY 2019.

[11] For purposes of this analysis, ICE considered payments to be timely when the payments were processed within 45 days of issuance of the invoice or were made in accordance with a payment agreement.

while still giving the surety some latitude in making late payments. Having separate standards based either on a designated number of unpaid invoices or the dollar value of past due debt allows ICE to take appropriate action when a surety company is not current on payments of administratively final breach determinations.

Third For Cause Standard: Bond Breach Rate of 35 Percent or Greater

Finally, under the third for cause standard, ICE is authorized to issue a notice of its intention to decline new bonds when the surety's breach rate for bonds is 35 percent or greater during a fiscal year. The breach rate is important because it measures the surety's compliance with its obligations under the terms of the immigration bond. The breach rate is calculated by dividing the number of administratively final breach determinations during a fiscal year for a surety company by the sum of the number of bonds breached and the number of bonds cancelled for that surety company during the same fiscal year. For example, if 50 bonds posted by a surety company were declared breached from October 1 to September 30, and 50 bonds posted by that same surety were cancelled during the same fiscal year (for a total of 100 bond dispositions) that surety would have a breach rate of 50 percent for that fiscal year.

ICE issues notices of breach determinations on Form I–323, Notice—Immigration Bond Breached. As noted above, if the surety does not appeal ICE's breach determination to the AAO, ICE's breach determination becomes administratively final after the appeal period has expired and would be used in the breach rate calculation. If the surety files an appeal with AAO, only those breach determinations upheld by the AAO will be included in the breach rate calculation. In addition, for immigration delivery bonds, ICE will include in the breach rate calculation instances when ICE's mitigation policy applies because these bonds have been breached. As set forth in prior ICE policy statements and as recognized by courts, *see Gonzales & Gonzales Bonds,* 103 F. Supp. 3d at 1150, the mitigation policy applies to delivery bond breaches when the surety company or its agent has delivered the alien within 90 days of the surrender date set forth on the Form I–340, Notice to Obligor to Deliver Alien (demand notice). Currently, the amount forfeited is reduced when the surety or its agent surrenders the alien within 90 days of the surrender date. The mitigation policy does not apply when the alien appears on his or her own at an ICE office or when the alien appears with the indemnitor. *Gonzales & Gonzales Bonds,* 103 F. Supp. 3d at 1150. Because breaches to which the mitigation policy applies are still breached bonds, ICE includes these breach determinations in its calculation of a surety's breach rate.

Under this rule, ICE will calculate breach rates on a federal fiscal year basis (October 1–September 30) to generate a meaningful sample size for each company. ICE will perform the breach rate calculation in the month of January after the end of the relevant fiscal year so that ICE can work with ''closed out'' data. The breach rate calculations used in the standard will be calculated for the first full fiscal year beginning after the effective date of this final rule, and each fiscal year thereafter. If an appeal timely filed with the AAO is still pending while the breach rate calculation is being performed, ICE will not include that breach in its calculations until the AAO has issued a decision dismissing or rejecting the appeal because the breach determination would not be administratively final.

This rule uses 35 percent as the trigger because past performance shows that sureties can meet this standard by exercising reasonable diligence. Higher breach rates signal that obligors are not taking adequate actions to fulfill their responsibility to surrender aliens. During FY 2018, six of the eight surety companies that posted immigration bonds in that year had a breach rate, calculated using this approach, that was less than 35 percent. One of the surety companies with a breach rate that exceeded 35 percent also failed to meet the other standards set forth in this rule, and its failure to meet the breach rate standard reflects under-performance in complying with the terms and conditions of the bonds it has posted. The remaining surety company with a high breach rate had recently begun to post bonds in FY 2018, and as a result, it had only four breaches and three cancellations. Subsequently, this surety company has improved its performance such that it would have cured its deficiency prior to ICE making a final determination to decline bonds from the surety.

Surety companies have demonstrated their ability to comply with a 35 percent breach rate; a higher breach rate would demonstrate a departure from their own and their peers' past performance. Moreover, as set forth in the bond agreement's terms and conditions, bonds are automatically cancelled when certain events occur before the bond has been breached, such as the death of the alien or the alien's departure from the United States. These types of bond cancellations will assist the surety companies in maintaining a relatively low breach rate. Using 35 percent as a threshold for taking action is reasonable because surety companies have some latitude when they are, on occasion, unable to produce the alien, but to remain in compliance, they must surrender aliens for almost two-thirds of the demands issued.

2. Procedures

ICE will use the following procedures to afford the surety company procedural due process protections consistent with 31 CFR 223.17: (1) Provide advance written notice to the surety stating the agency's intention to decline future bonds underwritten by the surety; (2) set forth the reasons for the proposed non-acceptance of such bonds; (3) provide an opportunity for the surety to rebut the stated reasons for non-acceptance of future bonds; and (4) provide an opportunity to cure the stated reasons, *i.e.,* deficiencies, causing ICE's proposed non-acceptance of future bonds. ICE will consider any written submission presented by the surety in response to the agency's notice provided that the response is received by ICE on or before the 30th calendar day following the date ICE issued the notice. ICE may decline bonds underwritten by the surety only after issuing a written determination that the bonds should be declined when at least one of the for cause standards set forth in this rule has been triggered.

D. Technical Changes

The final rule also includes technical changes. It updates the reference to Treasury's authority to certify surety companies to underwrite bonds on behalf of the Federal Government in 8 CFR 103.6(b) from ''6 U.S.C. 6–13'' to ''31 U.S.C. 9304–9308'' to reflect Public Law 97–258 (96 Stat. 877, Sept. 13, 1982), an Act that codified without substantive change certain laws related to money and finance as title 31, United States Code, ''Money and Finance.''

IV. Discussion of Comments

On June 5, 2018, DHS published a notice of proposed rulemaking (NPRM) proposing two changes that would apply to surety companies certified by Treasury to underwrite bonds on behalf of the Federal Government. 83 FR 25951. Specifically, DHS proposed: (1) To require Treasury-certified sureties seeking to overturn a surety immigration bond breach determination to exhaust administrative remedies by filing an administrative appeal with the AAO raising all legal and factual defenses; and (2) to issue for cause standards and

due process protections so that ICE may decline future bonds from non-performing sureties.

DHS received a total of eight comments in response to the NPRM. Five comments were submitted by a variety of entities and individuals associated with sureties. Specifically, two comments were submitted by trade associations, two comments were submitted by law firms representing surety companies currently underwriting immigration bonds, and one comment was submitted by a surety company that has not issued any immigration bonds. The five comments submitted on behalf of surety companies were opposed to the NPRM as written, and some of the commenters suggested that the NPRM be withdrawn because they believe the proposed changes are arbitrary, anticompetitive, and without sufficient authority.

In addition, two comments were submitted by individuals who had no apparent connection to sureties. The two individuals expressed general concerns about immigration policies without raising any concerns about the impact of the NPRM, and did not provide any recommendations for revising elements of the proposed rule. Accordingly, these two comments will not be discussed further.

A. Comments on Exhaustion of Administrative Remedies

The comments submitted by entities and individuals associated with sureties raised multiple issues related to the requirement that sureties exhaust administrative remedies before seeking judicial review. The following is a discussion of the issues that were raised and DHS's responses.

Adequacy of AAO Review Process

One commenter asserted that the exhaustion requirement should not be imposed because the AAO's review process is fatally flawed based upon a 2005 Recommendation from the USCIS Ombudsman to the USCIS Director. The commenter stated that the AAO had not issued a precedential decision addressing immigration bonds since August 7, 1998. The commenter further claimed that insufficient information had been issued about the applicable standard of review used by the AAO. The commenter also characterized the $675 cost to file an appeal as outrageous, claiming that the process lacks any due process safeguards based upon the commenter's estimate that 95 percent of all immigration bond breach appeals are dismissed.

The report referenced by the commenter recommended that the AAO make available to the public four items: (1) The appellate standard of review; (2) the process under which cases are deemed precedent decisions; (3) the criteria under which cases are selected for oral argument; and (4) the statistics on decision-making by the AAO. Recommendation from the CIS Ombudsman to the Director, USCIS (Dec. 6, 2005), *https://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_20_Administrative_Appeals_12-07-05.pdf.* At the time, the USCIS Ombudsman recommended that the legal standards and procedures for the AAO be spelled out in regulation or in detailed policy guidance, and that data on AAO decisions be published on a regular basis.

After issuance of the 2005 report, the AAO changed its practices to address the report's concerns. For example, the AAO now provides detailed information about its decisions and the review process to stakeholders. The AAO has issued seven precedential decisions since the Ombudsman's report, including one issued in 2016. *See Matter of Dhanasar,* 26 I&N Dec. 884 (AAO 2016). In addition, non-precedential decisions are available through the AAO's website, including approximately 2,000 non-precedential decisions issued in response to appeals of breached immigration bonds. *See* Administrative Decisions, *https://www.uscis.gov/laws/admin-decisions?topic_id=1&newdir=G1+-+Breach+of+Delivery+Bond.*

Further, the AAO has published a handbook on its website, setting forth rules, procedures, and recommendations for practice before the AAO. AAO Practice Manual, *https://www.uscis.gov/aao-practice-manual.* The Practice Manual specifically describes the applicable standard of review, explaining that the AAO is independent and exercises *de novo* review of all issues of fact, law, policy, and discretion. *Id.* at sec. 3.4. The Practice Manual also provides information about the issuance of non-precedent and precedent decisions, explaining that AAO decisions may be designated as precedent by the Secretary of Homeland Security, with the approval of the Attorney General. *Id.* at sec. 3.15. In addition, the Practice Manual sets forth the process by which an appellant may request oral argument and the factors considered by the AAO in determining whether to grant a request for oral argument. *Id.* at sec. 6.5.

The AAO also publishes detailed statistics about its decisions, including statistics showing that appeals of bond breaches are adjudicated in a timely manner. Specifically, the AAO's published statistics reflect that in the second quarter of FY 2020, the AAO completed 212 bond breach appeals, and 99.53 percent of those appeals were completed within 180 days. *See* AAO Processing Times, *https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/aao-processing-times.*

The AAO's published statistics also reflect that the AAO independently reviews the validity of bond breaches in issuing its decisions. From FY 2017–2019, the AAO issued 244 decisions on the merits in bond breach appeals. Of those 244 decisions, 30 decisions (12.3 percent) sustained the appeal and determined that the bond breach was invalid. *See* AAO Appeal Adjudications, *https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/AAO/AAO_Data_for_Publishing_Thru_FY19.pdf.*

To the extent that the comment contends that USCIS' fee for processing the appeal is too high, DHS has previously explained the fee was set at $675 because DHS must recover the full costs of the services that USCIS provides or else risk reductions in service quality. USCIS Fee Schedule, 81 FR 73,292, 73,306 (Oct. 24, 2016). This rule does not affect the prior published analysis setting the AAO appeal filing fee. In sum, because the AAO has altered its practices after issuance of the 2005 Ombudsman's report, and those changes are publicly documented, the commenter's reliance on criticisms of the AAO in the report is misplaced.

Sufficiency of 30-Day Time Period for Administrative Appeal

Three commenters objected to the exhaustion requirement because they believe that the 30-day time limit for filing an appeal does not afford sureties enough time to gather evidence to submit a defense to the bond breach determination. One of those commenters noted that surety companies that request documents related to the bond breach through the Freedom of Information Act (FOIA), 5 U.S.C. 552, may not receive responsive documents within the 30-day time period.

Another commenter stated that the rule would result in sureties underwriting an immigration bond as if there were no defenses to the validity of a bond breach, and, as a result, aliens would have more difficulty obtaining a bond because a surety would agree to underwrite an immigration bond only when it could fully collateralize the amount of the bond. The commenter

predicted that sureties would underwrite fewer bonds because the commenter believes that sureties will encounter difficulties in raising defenses to bond breaches based on the 30-day time period for filing an appeal.

This rule does not alter the time period for filing an administrative appeal, which is set forth in 8 CFR 103.3(a)(2)(i). This rule requires that before seeking judicial review, a surety must present any defenses to the AAO through existing procedures.

The AAO's procedures provide ample time for a surety to evaluate the validity of a bond breach, gather relevant evidence, and present any defenses to the validity of the breach. To appeal ICE's bond breach determination to the AAO, a surety must file a Notice of Appeal (Form I–290B) within 33 days after the breach determination was mailed (30 calendar days of the date of service with an additional 3 days because the decision was sent by mail). 8 CFR 103.3(a)(2)(i); Form I–290B Instructions at 2. The surety does not need to submit a brief in support of the appeal, but if a surety does wish to submit a brief or additional evidence, the surety may submit those materials with the Form I–290B or within 30 days of filing the Form I–290B. *Id.* at 5. If a surety needs more than 30 calendar days after filing Form I–290B to submit a brief, the surety must make a written request to the AAO within 30 calendar days of filing the appeal. *Id.* at 6. The AAO may grant more time to submit a brief for good cause. *Id.*

A surety need not have received a response to a FOIA request to file an appeal with the AAO or present any defenses to the bond breach determination. A surety should have access to the necessary information to evaluate the validity of the breach without obtaining additional documents through FOIA. Specifically, the surety receives a copy of the bond when the bond is posted, and the surety, or the surety's agent, receives all bond-related notices, including demand notices and breach notices. In addition, a surety can determine the status of an alien's immigration court proceedings by accessing the information system maintained by EOIR or by obtaining information about the status of proceedings through the alien or his/her attorney. If the surety seeks documents needed for a bond breach appeal through FOIA that it does not have access to otherwise, the surety may request an extension of the briefing period from the AAO.

DHS does not expect this rule to significantly impact the availability of bonds. A large majority of immigration bonds are cash bonds, which are unaffected by this rule. Moreover, a surety will continue to have the same opportunities to challenge the validity of a breach after this rule as it does before the rule. Thus, a surety with valid defenses to a bond breach may raise those defenses by filing an appeal with the AAO and can obtain judicial review thereafter.

Records Needed To Challenge Breach and Applicable Standards

One commenter argued that DHS should not require exhaustion of administrative remedies unless ICE is required to produce non-privileged documents from the alien's registration file (''the A-File'') to sureties after determining that a bond has been breached. The commenter asserted that all non-privileged documents in the A-File are needed to assist the surety in identifying defenses to the bond breach, to locate the alien, and to mitigate the bond breach. The commenter also stated that this rule provides no procedure for review of a dispute or appeal of a breach and argued that the rule should contain requirements to apply specific standards for review and incorporate court decisions addressing the validity of bond breaches.

A surety need not have access to the A-File to perform its obligations under the bond and to evaluate the validity of the breach because a surety should already possess the necessary information. As explained earlier, the surety receives a copy of the bond when it is issued, and the surety, or the surety's agent, receives all bond-related notices, including demand notices and breach notices. In addition, a surety can determine the status of an alien's immigration court proceedings by accessing the information system maintained by EOIR or by obtaining information about the status of proceedings through the alien or his/her attorney. A surety also has a contractual relationship with the indemnitor who requested the bond be posted for the alien, and the surety may obtain information through the indemnitor. Moreover, the A-File contains numerous documents unrelated to bond breaches and requiring ICE to produce the entire A-File for every surety bond breach would be unduly burdensome and unproductive.

Incorporating the standards used by the AAO and courts to review the validity of bond breaches in this rule is unnecessary because both the procedural and substantive standards for assessing the validity of bond breaches are publicly available in existing regulations and judicial decisions. Specifically, as noted above, 8 CFR 103.3 governs the procedure for filing an appeal with the AAO, and the AAO has published a handbook containing applicable rules and procedures for matters submitted to it for review. AAO Practice Manual, *https://www.uscis.gov/aao-practice-manual.* 8 CFR 103.6(c)(3) explains that ''[s]ubstantial performance of all conditions imposed by the terms of a bond shall release the obligor from liability.'' Conversely, ''a bond is breached when there has been a substantial violation of the stipulated conditions'' of the bond. 8 CFR 103.6(e). The terms and conditions of a bond are set forth in the bond form, and those terms and conditions have been interpreted in numerous judicial decisions, *e.g., AAA Bonding Agency, Inc.* v. *DHS,* 447 F. App'x 603 (5th Cir. 2011); *United States* v. *Gonzales & Gonzales Bonds and Ins. Agency, Inc.,* 103 F. Supp. 3d 1121 (N.D. Cal. 2015).

Relationship to Other Processes

Two commenters expressed uncertainty about the relationship between review of a bond breach by the AAO and other avenues for contesting the validity of a bond breach. Specifically, one commenter stated that the proposed regulations are ambiguous as to whether an appeal to the AAO is the exclusive manner to challenge a bond breach. The commenter stated that the proposed rule appeared to suggest that sureties could dispute invoices via a written procedure as an alternative to filing an appeal to the AAO, and that this apparent alternative was in conflict with a requirement that the surety file an AAO appeal. Another commenter perceived a conflict between the rule's requirement of exhaustion through an appeal to the AAO and provisions set forth in settlement agreements known as the Amwest Agreements for using points of contact (POCs) to resolve complaints and questions.

Both the invoice dispute process and the provisions for resolving complaints for signatories of the Amwest Agreements will continue to be available after this rule takes effect, but a surety cannot satisfy the exhaustion requirement through those processes.

This rule requires that, before seeking judicial review, a surety must exhaust administrative remedies by filing an administrative appeal with the AAO raising all legal and factual defenses. The failure by a Treasury-certified surety or its bonding agent to exhaust administrative appellate review before the AAO waives all defenses to the breach before a district court.

Based on the timing of filing an administrative appeal and disputing an invoice, a surety can exhaust administrative remedies and still raise a dispute on an invoice. An invoice for a surety bond breach is issued only after a bond breach becomes administratively final. The breach is inoperative during the administrative appeal period and while a timely-filed administrative appeal to the AAO is pending. If a surety chooses not to file an appeal to the AAO, ICE issues an invoice after appeal period has ended. On the other hand, if a surety submits a timely appeal to the AAO, ICE issues an invoice after the AAO issues a decision upholding the breach determination. In either case, a surety may submit a dispute of an invoice pursuant to 31 CFR 901.2(b)(1) and ICE policy as set forth on the invoice, and ICE will review the dispute. However, the submission of an invoice dispute is neither necessary nor sufficient to satisfy the exhaustion requirement under this rule. To satisfy the exhaustion requirement, a surety must appeal the bond breach to the AAO, an entity that independently reviews the breach using *de novo* review.

Likewise, filing of an administrative appeal does not preclude a signatory to the Amwest Agreements from seeking review available under those agreements. The Amwest Agreements were executed in 1995 and 1997 by Amwest Surety Insurance Co., Far West Surety Insurance Co, Gonzales & Gonzales Bonds and Insurance Agency, and the INS to resolve litigation filed in 1993 by those companies challenging the INS's interpretation of the bond contract. The Amwest Agreements provided that the INS would designate certain officials to serve as POCs for the resolution of the signatories' comments, complaints, and questions regarding bonds or bond practices. Specifically, the 1997 Amwest Agreement states that the signatories are ''entitled to seek resolution through the appropriate POC without paying any filing fee.'' [12]

The commenter claims that ICE will violate the Amwest Agreements if the proposed rule is adopted, contending that a signatory's only option for administrative review would be filing an appeal with the AAO, which necessitates paying the applicable filing fee. The 1997 Amwest Agreement, however, expressly states that the parties to the Agreement did not intend that submission of a complaint to a POC would ''replace the existing procedures for filing either a motion for reconsideration with the Office issuing a breach notice, or an appeal with the AAU [now called the AAO]. It was their intent, however, to create an alternative procedure for resolution of questions relating *solely* to the implementation of the Settlement [the Amwest Agreements].'' [13]

The option of submitting disputes to a POC about issues arising under the Amwest Agreements does not preclude DHS from requiring exhaustion of administrative remedies. An Amwest signatory is still entitled to raise issues arising under the Amwest Agreements to a POC. However, if the signatory ultimately seeks to challenge ICE's breach determination in federal court, it must first exhaust administrative remedies by filing an appeal with the AAO raising all legal and factual defenses to the breach.

B. Comments on For Cause Standards for Declining Bonds

The five comments submitted by Treasury-certified sureties and their representatives also raised numerous issues related to the proposal to adopt for cause standards so that ICE can decline to accept surety immigration bonds from underperforming sureties. Each of the issues is addressed below.

Authority of ICE To Decline Bonds

Two commenters argued that only Treasury has the authority to prevent a surety from conducting business and that ICE lacks delegated authority to decline bonds. The commenters noted that Congress has authorized Treasury to revoke the authority of a surety to do business when Treasury decides the corporation is insolvent, is in violation of 31 U.S.C. 9304–9306, or has failed to pay a final judgment. The commenters contended that Treasury does not have the right to delegate by regulation its authority to administer the federal surety bond program.

Congress has granted Treasury the power to authorize sureties to post bonds in favor of the Federal government and to revoke that authorization. 31 U.S.C. 9305(b), (d); *Concord Casualty & Surety Co.* v. *United States,* 69 F.2d 78, 80 (2d Cir. 1934). However, Congress has also expressly conditioned acceptance of a bond on the approval of the Federal agency issuing the bond. 31 U.S.C. 9304(b); *see American Druggists Ins. Co.* v. *Bogart,* 707 F.2d 1229, 1233 (11th Cir. 1983) (recognizing that even if a surety has been approved by Treasury, an agency may refuse a bond proffered by the surety if it has reason to doubt the surety's willingness to perform according to the conditions of the bond).

In issuing its regulation authorizing agencies to decline bonds from underperforming sureties, Treasury noted that several comments on its rule made the same objection raised in response to this rule: Specifically, the comments stated that 31 U.S.C. 9305(e) provides the only circumstances under which an agency may decline to accept a new bond from a surety. Surety Companies Doing Business with the United States, 79 FR 61992–01, 61993 (Oct. 16, 2014). As Treasury explained, section 9305(e) is the statutory standard under which a surety's certificate of authority to write any additional bonds for any agency is revoked by operation of law for failure to pay a final court judgment or order. However, section 9304(b) reflects that Treasury-certification does not provide a guarantee to a surety that its bonds will be accepted by a particular agency in all situations. That is, Congress expressly conditioned acceptance of a bond on the approval of a Federal agency bond-approving official. 79 FR at 61993. This rule applies only to ICE's ability to decline bonds from non-performing sureties based on authority derived from section 9304(b) as recognized by Treasury in 31 CFR 223.17.

For Cause Standards Appropriately Differ From Treasury's Statutory Standards for Revoking a Surety's Authorization To Issue Bonds on Behalf of the Federal Government

Two commenters asserted that ICE's for cause standards could not differ from Treasury's standards for decertification (revocation of a surety's certification). One of those commenters stated that ICE's for cause standards improperly altered the existing standard of review in revocation proceedings because ICE's for cause standards allow it to refuse to accept bonds based on administratively final breach determinations where payment is past due. The commenter claimed that the standards would result in unprecedented deference to ICE's interpretation of the law, depriving sureties of due process. The second commenter claimed that ICE's for cause standards could not include past-due invoices unless the surety had failed to pay a final judgment issued by a court because Treasury's statutory standard for decertification under 31 U.S.C. 9305(e) refers to final judgments.

[12] Draft Memorandum re; Implementation of Settlement *Amwest* v. *Reno,* at 5, attachment to Settlement Agreement executed by the United States of America and the Gonzales & Gonzales Bonds and Insurance Agency, Inc., the Amwest Surety Insurance Co., and the Far West Surety Insurance Co. (Sept. 10, 1997).

[13] *Id.* (emphasis in original).

The commenters incorrectly characterize ICE's for cause standards as being inconsistent with Treasury's revocation authority. The existing Treasury regulation for revocation proceedings initiated by an agency complaint specifically recognizes that Treasury may revoke a surety's authority based on the failure to satisfy administratively final bond obligations. 31 CFR 223.20(a)(1). Moreover, in its regulation authorizing other agencies to decline bonds based on for cause standards, Treasury provides that an agency can decline to accept new bonds pursuant to section 9304(b) based on for cause standards that can include ''circumstances when a surety has not paid or satisfied an administratively final bond obligation due to the agency.'' 31 CFR 223.17(b)(3).

In its final rulemaking promulgating 31 CFR 223.17, Treasury explained its reasoning for allowing agencies to base for cause standards on administratively final breaches. 79 FR 61,992–01, 61,993. Treasury stated that it did not believe ''it is necessary or appropriate to require an agency to reduce every surety claim to judgment or submit a surety revocation complaint in every instance, in order to facilitate equitable and efficient resolution of surety performance and collection concerns at the agency level.'' *Id.*

In addition, the requirements for decertification under 31 U.S.C. 9305(e) are inapplicable to ICE's decision to decline bonds from a surety because ICE is not revoking a surety's ability to post all government bonds. Unlike a court judgment or order meeting the requirements of section 9305(e), which would preclude a surety from underwriting any Federal bond for any agency, a surety's failure to comply with ICE's for cause standards in this rule may result in ICE declining to accept future bonds, but will not prevent the surety from posting bonds issued by other Federal agencies.

Need for Rule

Four commenters opined that this rule is unnecessary because Treasury has existing authority to revoke a surety's certificate of authority to write additional bonds. The commenters asserted that an agency's appropriate remedy for underperforming sureties is to request that Treasury revoke the surety's certificate of authority.

In issuing 8 CFR 223.17, Treasury indicated that an agency may appropriately decline to accept future bonds based upon agency-specific for cause standards. In its final rulemaking, Treasury stated that, in some cases, sureties appeared ''to have simply ignored agency final decisions for extended periods of time.'' 79 FR 61992–01, 61995. Treasury explained that an agency's ability to decline bonds based upon its own for cause standards could reduce litigation because the agency and the surety would have the proper incentive to resolve disputes at the administrative level. *Id.* In addition, giving agencies discretion to decline bonds based on for cause standards is consistent with, and gives effect to, 31 U.S.C. 9304(b). *Id.*

These for cause standards are necessary to implement an agency-specific process for addressing underperforming sureties. The for cause standards are expected to provide greater incentive to underperforming sureties to timely pay administratively final breaches and to maintain an acceptable breach rate.

Prevention of Erroneous Application of For Cause Standards

One commenter stated that ICE's bond breach determinations are error-prone, arguing that ICE should not implement for cause standards because of possible errors in breach determinations.

Ample procedural protections exist to allow a surety to challenge bond breach determinations to avoid any erroneous breaches from being the basis of a determination that the surety is not in compliance with the for cause standards. Before a bond breach becomes administratively final, a surety may appeal the breach determination to the AAO and obtain administrative review of any defenses that the surety wishes to raise to the breach determination. If a surety timely appeals to the AAO, the breach determination will not become administratively final until the AAO issues a decision either dismissing or rejecting the appeal. Independent of the AAO review process, a surety may also dispute the validity of a bond breach debt invoiced by ICE pursuant to 31 CFR 901.2(b)(1) and ICE policy as set forth on the invoice, and ICE will review the dispute.

In addition, under the final rule, before declining bonds from a surety, ICE will inform the surety of its intent to decline future bonds and provide the surety with an opportunity to submit a written response and cure deficiencies in its performance. ICE will consider the surety's written response and efforts to cure before making a final determination whether to decline future bonds from the surety.

The For Cause Standards Appropriately Measure a Surety's Performance and Are Not Anticompetitive

One commenter asserted that ICE's for cause standards are flawed and anticompetitive. The commenter claimed that the for cause standards are arbitrary, fail to reflect a surety's performance in paying legally valid bond breach determinations, and penalize sureties and their agents in favor of cash bond obligors. The commenter also described specific perceived flaws in each of the for cause standards, each of which will be addressed in the sections that follow, along with other comments about each specific for cause standard.

The for cause standards are designed to measure the performance of sureties in complying with their bond obligations. Two of the for cause standards measure a surety's prompt payment of invoices after administratively final bond breach determinations. As recognized by Treasury's regulation, '' '[f]or cause' includes, but is not limited to, circumstances where a surety has not paid or satisfied an administratively final bond obligation due the agency.'' 8 CFR 223.17(b)(3). When a bond is breached, sureties are expected to pay the amount due as a result of the bond breach, and when a surety fails to pay an invoice within 30 days, it represents nonperformance. Thus, the for cause standards appropriately allow the agency to decline bonds based on the nonpayment of invoices issued on administratively final bond breach determinations.

ICE's for cause standards also appropriately consider a surety's breach rate. The purpose of an immigration bond is to provide a mechanism for obtaining an alien's compliance with his or her obligations during immigration proceedings and after the issuance of a final order in those proceedings. When a surety has a high breach rate, it indicates that bonds posted by that surety are not effectively serving the purpose of the bond to ensure the alien's compliance.

While a commenter expressed the opinion that the rule should apply to cash bonds as well as surety bonds, ICE has three reasons for applying the for cause standards only to surety bonds. First, the majority of cash bond obligors are individuals who post a single bond to secure the release of a friend or relative. Thus, ICE sees no utility in issuing a notice to a cash bond obligor who likely will post only one bond that ICE will decline any future bonds from the obligor.

Second, because a cash bond obligor deposits the bond amount with ICE when posting a bond, no invoice is issued when a cash bond breach becomes administratively final to collect the amount forfeited because ICE already is in possession of the cash deposit securing performance. Thus, a cash bond obligor would never have unpaid invoices and could not violate two of the three for cause standards. In addition, because the majority of cash bond obligors post only one bond, ICE would not have a reasonable sample size to use in calculating the breach rate for cash bonds—the breach rate for a cash bond obligor who posted one bond would either be 0 percent or 100 percent.

Third, although cash bond obligors are not subject to this rule, ICE retains authority to decline to accept a bond if it has specific information indicating that a cash bond obligor will not comply with the terms of a bond. *See American Druggists Ins. Co,* 707 F.2d at 1233 (noting the government's authority to refuse a bond when there is reason to doubt the obligor's willingness to perform the terms of the bond agreement).

For Cause Standard for Unpaid Invoices—Inclusion of Disputed Invoices

Five commenters expressed concern that the use of unpaid invoices as a basis for declining future bonds would have the effect of requiring sureties to pay for bond breaches for which they have legitimate defenses. The commenters contend that a surety will be forced to forego judicial review of a breach determination even if it has strong defenses because ICE could decline to accept future bonds if the surety fails to pay invoices within 30 days. Another commenter argued that the standard fails to provide adequate due process and suggested excluding any breaches undergoing judicial review in determining whether a surety has 10 or more unpaid invoices or a cumulative unpaid amount of $50,000 or more.

All delinquent unpaid invoices are appropriately included in the determination of whether a surety is in compliance with its obligations because a surety has ample opportunity to challenge the validity of a bond breach prior to issuance of an invoice. ICE issues an invoice on a breached immigration bond only after the surety has had an opportunity to seek administrative review by the AAO. If the surety files a timely appeal of a bond breach to the AAO, ICE will issue the invoice only after the AAO issues a decision dismissing the appeal. While this rule will not prevent sureties from seeking judicial review of a bond breach determination, because the applicable statute of limitations for judicial review is six years, 28 U.S.C. 2401(a), it would be impractical to wait for a judicial challenge to be completed or until a surety's ability to bring the case has expired before taking action to decline new bonds posted by a surety that fails to pay for administratively final breach determinations. Consistent with 31 CFR 223.17(b)(5)(i), ICE does not have authority to decline new bonds from a Treasury-certified surety when a court of competent jurisdiction has issued a stay or injunction of enforcement of the breach determinations that would otherwise support the for cause reasons.

For Cause Standard for Unpaid Invoices—Number and Amount of Delinquent Invoices

One commenter suggested that the number of past-due invoices be increased in the for cause standard for declining bonds. The commenter stated that using a standard of 10 past-due invoices could affect even attentive sureties. The commenter also suggested that declining bonds from a surety with past-due invoices in the cumulative amount of $50,000 was problematic because a surety with a few or even one large invoice could exceed the $50,000 threshold. In addition, the commenter stated that the $50,000 threshold may be unnecessary because sureties with a practice of repeatedly not paying invoices would likely have both more than 10 past-due invoices and a cumulative past due amount exceeding $50,000.

The standard appropriately sets thresholds that will not affect attentive sureties, while giving ICE the ability to decline bonds from sureties that are not complying with their obligations to timely pay invoices for breached bonds. Sureties that routinely pay invoices on a timely basis are unlikely to inadvertently fail to comply with these standards. Moreover, when a surety is given notice of ICE's intent to decline bonds based on noncompliance with this standard, the surety has an opportunity to cure the deficiency. Thus, there is no need to raise the threshold amount to accommodate sureties with a practice of complying with obligations because DHS anticipates that those sureties will remain in compliance with these standards or timely cure any deficiencies.

In addition, it is appropriate to decline bonds from a surety that has past-due invoices totaling more than $50,000 even when the surety has fewer than 10 past-due invoices. A surety that posts higher-value bonds can accumulate debt more quickly than sureties that post lower-value bonds if it is not committed to fulfilling its obligations by paying invoices timely. Thus, ICE runs a greater risk by continuing to accept bonds from such an entity.

For Cause Standard for Breach Rate—Purpose

Two commenters stated that ICE should not use a surety's breach rate as a basis for declining to accept new bonds. One of those commenters argued that monitoring a surety's breach rate does not serve the purpose of this rule because the preamble of the NPRM states that the purpose of the rule is to resolve problems with collecting breached bond amounts from sureties and their agents. The second commenter asserted that the breach rate standard would make a surety more risk averse when furnishing bonds.

The purpose of the for cause standards is to create a mechanism that allows ICE to decline bonds from underperforming surety companies. Most ICE immigration bonds posted by sureties are delivery bonds, which require the surety to deliver the alien to ICE's custody upon demand. If a surety has a breach rate that exceeds 35 percent, it means that the surety has routinely failed to perform its obligation to deliver the alien, which necessitates that ICE bring the alien into custody using its own resources. If a surety demonstrates that it is routinely unable to deliver the alien in accordance with the terms of the bond, it is appropriate for ICE to decline to accept future bonds from that surety.

ICE expects that inclusion of the breach rate for cause standard will incentivize surety companies to use appropriate practical measures to comply with the terms of the bond agreement. For example, sureties and their agents will likely choose more effective methods to ensure delivery of the alien in response to demand notices on delivery bonds to avoid a high breach rate that may result in ICE declining to accept future bonds from that surety.

For Cause Standard for Breach Rate—Methodology

One commenter suggested multiple changes to the methodology for calculating the breach rate. The commenter stated that calculating the breach rate on an annual basis could cause the breach rate to be more a function of luck instead of reflecting the surety's performance because a surety

could have several cancellations a few days or weeks shortly before the start or after the end of the fiscal year that would substantially reduce the surety's breach rate. The commenter also argued that the calculation of the breach rate should consider the number of open bonds for a surety because a surety that has a small number of breaches and cancellations may have a large number of open bonds that will subsequently be cancelled.

Because the breach rate calculation will be performed on an annual basis, the calculation will be based on a sample size of the surety's performance over the entire year. Performing the calculation on an annual basis will provide ICE with a meaningful sample while also giving ICE the ability to react in a timely manner if a surety begins to show a pattern of repeatedly breaching bonds. Additionally, before ICE declines bonds from a surety based on the surety's breach rate, it will provide notice to the surety and afford the surety an opportunity to rebut the determination of the breach rate and cure deficient performance. Thus, a surety that improves its performance shortly after the calculation period may be allowed to continue underwriting new immigration bonds.

This rule does not include open bonds in the calculation of the breach rate for two reasons. First, when a bond is open, it is not yet determined whether the surety will successfully perform its obligations under the bond agreement. An open bond has not yet been breached or cancelled. Therefore, including the number of open bonds in the calculation would not provide an accurate or meaningful measure of the surety's performance of its obligations.

Second, including the number of open bonds in the calculation would unfairly favor sureties that have posted large numbers of bonds. For example, if open bonds were counted, a surety company that has 500 breached bonds and 5 cancelled bonds during one fiscal year could still have a breach rate of 10 percent if the company had 5,000 open bonds. In contrast, if the surety instead had 1,000 open bonds, 500 breached bonds, and 5 cancelled bonds, it would have a breach rate of 50 percent if open bonds were included in the calculation. No principled distinction exists for treating sureties with more open bonds more favorably than sureties with fewer open bonds. Because the number of open bonds has no bearing on the surety's performance, the breach rate calculation properly disregards the number of open bonds.

V. Statutory and Regulatory Requirements

DHS developed this rule after considering numerous statutes and executive orders related to rulemaking. The following sections summarize our analyses based on a number of these statutes or executive orders.

A. Executive Orders 12866, 13563, and 13771: Regulatory Review

Executive Orders 12866 (''Regulatory Planning and Review'') and 13563 (''Improving Regulation and Regulatory Review'') 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 (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 (''Reducing Regulation and Controlling Regulatory Costs'') directs agencies to reduce regulation and control regulatory costs and provides that ''for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.''

The Office of Management and Budget (OMB) has not designated this rule a ''significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. As this rule is not a significant regulatory action, this rule is not subject to the requirements of Executive Order 13771. *See* OMB's Memorandum ''Guidance Implementing Executive Order 13771, Titled 'Reducing Regulation and Controlling Regulatory Costs' '' (April 5, 2017).

This rule requires Treasury-certified sureties seeking to overturn an ICE breach determination to file a timely administrative appeal raising all legal and factual defenses in their appeal. DHS anticipates that more appeals will be filed with the AAO as a result of this requirement. The costs to sureties to comply with this requirement include the transactional costs associated with filing an appeal with the AAO. Sureties that do not timely appeal a breach determination could incur the cost of foregoing the opportunity to obtain judicial review of a breach determination. Surety companies will also incur familiarization costs in learning about the rule's requirements.

The rule also establishes ICE standards for declining surety immigration bonds for cause and the procedures that ICE will follow before making a determination that it will no longer accept new bonds from a Treasury-certified surety. If a surety fulfills its obligations and is not subject to these for cause standards, this provision imposes no additional costs on that surety. Surety companies that fail to fulfill their obligations and are subject to the for cause standards may incur minimal costs in responding to ICE's notification. If they fail to cure any deficiencies in their performance, they may also lose business when ICE declines to accept new bonds submitted by the surety.

DHS estimates the most likely total 10-year discounted cost of the rule to be approximately $1.2 million at a seven percent discount rate and approximately $1.5 million at a three percent discount rate.[14] The cost of the rule increased from the estimates presented in the NPRM due to updated assumptions which reflect more current data ranging from FY 2017–2019, particularly because the anticipated number of additional appeals that will be filed as a result of this rule's exhaustion requirements increased from 190 in the NPRM to 225 in the analysis for this final rule.

The benefits of the rule include improved efficiency and lower costs in litigating unresolved breach determinations. In addition, the rule increases incentives for surety companies to timely perform obligations, provides ICE with a mechanism to stop accepting new bonds from non-performing sureties after due process has been provided, and reduces adverse consequences both of sureties' failures to pay invoices timely on administratively final breach determinations and unacceptably high breach rates. When a surety fails to perform its obligation to deliver an alien and the bond is breached, ICE's resources are expended in locating aliens who have not been surrendered in response to ICE's demands. Finally, this rule allows ICE to resolve or avoid certain disputes, thereby decreasing the number of debts referred to Treasury for further collection efforts or the cases

[14] USCIS proposed the Form I–290B fee to be $705 in its NPRM, ''Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,'' on Nov. 14, 2019. 84 FR 62,280, 62,360. If this proposed rule is finalized, this increased fee would add $47,409 to the 10-year discounted cost of the rule at a seven percent discount rate and $57,579 to the 10-year discounted cost of the rule at a three percent discount rate.

referred to the Department of Justice (DOJ) for litigation.

Table 1 shows a summary of the costs of the final rule and list of the updates to the inputs used in the NPRM. The wages and the annual number of breached bonds were updated using the latest available data. Since the publication of the NPRM, the Bureau of Labor Statistics released more recent data on wages and fringe benefits; these updates resulted in higher loaded wage rates. The updated analysis in this rule relies on statistical data about bond breaches from FY 2017–2019. Using the data available for the NPRM, FY 2012–2015, there were 18,892 surety bonds posted, an average of 4,723 per year. 2,486 surety bonds were breached during this time period (average of 622 per year). During FY 2017–2019, there were 28,022 surety bonds posted, an average of 9,341 per year. 3,603 surety bonds were breached during this time period, an average of 1,201 per year. Because the number of bond breaches in FY 2017–2019 was greater than the number of breaches that occurred when the NPRM was published, the estimated total cost of this rule is greater than the estimate in the NPRM. Another change from the proposed rule is a reduction in costs because ICE no longer sends a Record of Proceedings (ROP) to the AAO when a bond breach appeal is filed with the AAO. Instead, the AAO now uses an electronic system to request the A-File from the DHS office that currently has the A-File. That DHS office transfers the file to the AAO with a minimal cost. These input updates are discussed throughout the regulatory impact analysis.

TABLE 1—CHANGES FROM THE INITIAL REGULATORY IMPACT ANALYSIS TO THE FINAL REGULATORY IMPACT ANALYSIS

	NPRM	Final rule	Difference	Description of changes
Total Annual Cost, 10-year 3% discount rate	$1.3 million ...	$1.5 million ...	$0.2 million	• Increase in the number of breached bonds and wages used to estimate annual cost.
Population				
Number of additional breached bonds that might be appealed as a result of this rule.	190	225	35	Updated using most recent three years of data, FY 2017–2019.
Wages Weighted Average Hourly Wage Rate (loaded)				
Insurance Agent	$44.31	$45.59	$1.28	• Average hourly wage updated from BLS release of Occupational Employment Statistics, May 2018. Loaded Wage with fringe benefits from BLS release of the Employer Costs for Employee Compensation, June 2018.
Attorney in-house	$96.06	$100.93	$4.87.	
Attorney Outsourced	$240.14	$252.33	$12.19	• Outsourced attorney rate is estimated to be 2.5 times the wage of an in-house attorney.
Government Bond Control Specialist	$30.40	This cost is no longer applicable.	N/A	• This cost is no longer applicable to this rule.

1. Exhaustion of Administrative Remedies

i. Costs

To comply with the exhaustion of administrative remedies requirement, sureties are required to timely appeal a breach determination to the AAO and raise all issues or defenses during the appeal or waive them in future court proceedings. Previously, if a surety company decided to challenge a breach determination, the surety company could choose to appeal the breach determination to the AAO or seek review in federal district court. The previous and new appeal processes, beginning at the stage of an ICE bond breach determination, are represented in Figure 1.

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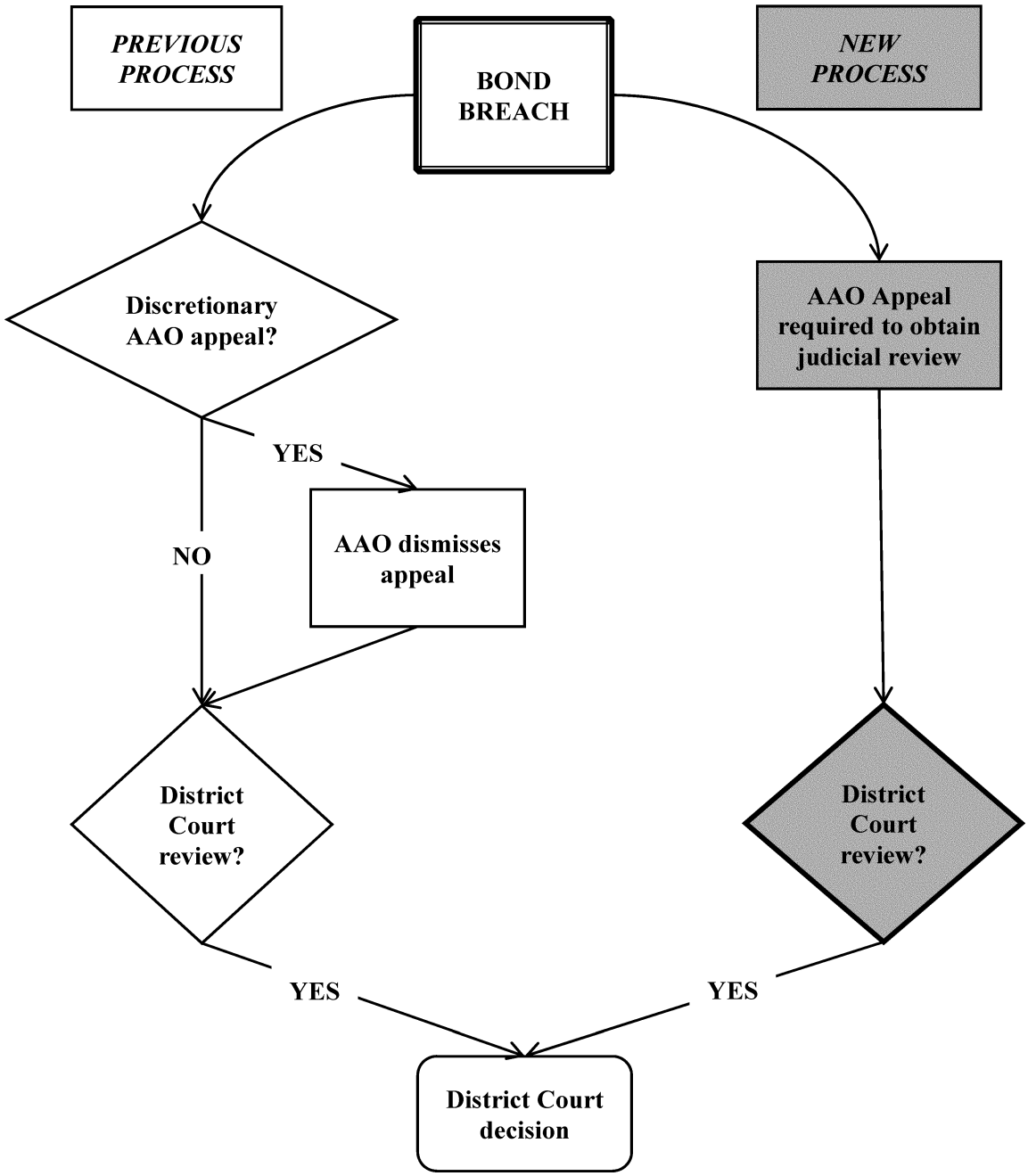
Figure 1: Previous and New Process



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Anticipated costs for sureties to comply with this requirement are costs associated with filing an appeal with the AAO. Sureties filing an appeal must complete Form I–290B, Notice of Appeal or Motion, and submit the form together with the $675 filing fee set by USCIS [15] along with a brief written statement setting forth the reasons and evidence supporting the appeal. If a surety or its agent decides not to timely challenge a breach determination, this requirement imposes no additional costs.

More current information than was available when the NPRM was published shows that a larger number of surety bond breaches are being appealed to the AAO. Data from FY 2017 through FY 2019 show that, on average, 1,201 surety bonds were breached annually [16] and approximately 415 surety bond breaches were appealed annually.[17] Thus, approximately 35 percent of breached surety bonds were appealed annually during FY 2017 through FY 2019.

DHS believes that the requirement to exhaust administrative remedies will likely increase the number of bond breach appeals submitted by sureties because they will waive their right to federal district court review if they do not file an administrative appeal. In its

[15] USCIS I–290B, Notice of Appeal or Motion, Filing Fee $675, *https://www.uscis.gov/i-290b.*

[16] ICE's Financial Service Center Burlington.

[17] USCIS's AAO.

updated economic analysis, DHS used the following assumptions to develop an estimate of the number of additional appeals that will be filed because of this rule. DHS employed a similar methodology in its NPRM, and no comments were submitted about this methodology.

To estimate the likely increase in bond breach appeals, DHS presumes that it is unlikely that surety companies will file appeals with the AAO to contest bond breach determinations that were paid timely.[18] Conversely, DHS assumes that invoices that were not paid promptly can serve as a proxy for breaches that may be subject to dispute and thus might be appealed. In FY 2017, there were 235 invoices not paid promptly. In FY 2018 and FY 2019, there were 763 and 729 invoices not paid promptly, respectively.[19] For bond breaches subject to a settlement agreement with DHS, DHS assumes that those breaches would have been appealed to the AAO if this rule were in effect because the surety did not pay them promptly. In FY 2017, 99 surety bonds appeals were filed. In FY 2018 and FY 2019, there were 239 and 906 surety bond appeals filed. In FY 2019, DHS expected 7 additional disputed bond breaches to be appealed.[20] DHS excluded from its analysis bond breaches that the agency rescinded because no AAO appeal was needed to overturn these breach determinations.

Using this methodology, based on FY 2017–FY 2019 data, DHS estimates that approximately 225 additional surety bond breaches might have been appealed annually if an exhaustion requirement had been in place.[21] In the proposed rule, DHS estimated 190 additional surety bond breaches might have been appealed annually based on the average annual number of invoices that were not timely paid and could be considered ''disputed'' and potential candidates for AAO appeals during FY 2013–FY 2015 (142 + 119 + 313 = 574. 574 ÷ 3 = 191.33).

Sureties that appeal incur an opportunity cost for time spent filing an appeal with the AAO. USCIS estimates the average burden for filing Form I–290B is 90 minutes.[22] The person preparing the appeal could either be an attorney or a non-attorney in the immigration bond business. DHS does not have information on whether all surety companies have an in-house attorney, so we considered a range of scenarios depending on the opportunity cost of the person who would prepare the appeal. DHS assumes the closest approximation to the cost of a non-attorney in the immigration bond business is an insurance agent. The average hourly loaded wage rate of an insurance agent is $45.59.[23] The average hourly loaded wage rate of an attorney is $100.93.[24] To determine the full opportunity costs if a surety company hired outside counsel, we multiplied the fully loaded average wage rate for an in-house attorney ($100.93) by 2.5 for a total of $251.23 to roughly approximate an hourly billing rate for outside counsel.[25] For purposes of this analysis, DHS assumes the minimum opportunity cost scenario is one where a non-attorney, or insurance agent (or equivalent), prepares the appeal. The opportunity cost per appeal in this scenario would be approximately $68 ($45.59 × 1.5 hours, rounded). DHS assumes that an in-house attorney or an insurance agent (or equivalent) is equally likely to prepare a surety's appeal. Thus, the primary estimate for the cost to prepare the appeal is $110—the average of the wage rates for an in-house attorney and an insurance agent multiplied by the estimated time to prepare the appeal ($73.26[26] × 1.5 hours, rounded). DHS estimates a maximum cost scenario in which a surety would hire outside counsel to prepare the appeal, resulting in a cost of $378 ($252.33 × 1.5 hours, rounded). Sureties also incur a $675 filing fee per appeal. When the filing fee is added to the cost of preparing the appeal, the total cost per appeal ranges from $743 ($675 + $68) to $1,053 ($675 + $378), with a primary estimate of $785 ($675 + $110). This results in a total annual cost between $167,175 and $236,925, with a primary estimate of $176,625 ($785 × 225 breached bonds).

DHS expects minimal costs to the Federal government associated with this rule. Although a cost was estimated for ICE to submit an ROP to the AAO in the proposed rule, ICE no longer performs this task. The proposed rule estimated that each ROP took approximately 90 minutes to compile by an ICE Bond Control Specialist. However, now no ROP is prepared; instead, the AAO bases its review of the bond breach determination on the A-File. When the AAO receives a new appeal, it uses a DHS system to request the A-File from the DHS office that currently has the A-File. That DHS office transfers the file to the AAO at a minimal additional burden. The costs to USCIS for conducting an administrative review of the appeals are covered by the $675 fee charged for each appeal, as well as by funds otherwise available to USCIS.

ii. Benefits

This rule assists both DOJ's and ICE's efforts in litigation to collect amounts due on breached surety bonds. For example, the rule eliminates the need for remand decisions required by two federal courts in litigation to collect unpaid breached bond invoices because the AAO will already have had an opportunity to issue a written decision addressing all of the surety company's defenses raised as part of the required administrative appeal. As with any requirement for exhaustion of administrative remedies, this rule promotes judicial and administrative efficiency by resolving many claims

[18] ''Timely'' as used in this context means that the payments were processed within 45 days of issuance of the invoice or were made in accordance with a payment agreement.

[19] ICE's Financial Service Center Burlington.

[20] *Ibid.*

[21] DHS estimates that an additional 136 breaches would have been appealed in FY 2017 (235 − 99 = 136), 524 additional breaches would have been appealed in FY 2018 (763 − 239 = 524), and 7 additional breaches would have been appealed in FY 2019. The estimated number of additional appeals was found to be smaller for FY 2019 because 906 appeals were filed in FY 2019. Thus, the average estimated annual number of additional appeals for FY 2017–2019 is 222. DHS rounds this estimate to 225.

[22] Form I–290B, 2018 Information Collection Request Supporting Statement, Question 12, *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201804-1615-002.*

[23] Bureau of Labor Statistics, Occupational Employment Statistics May 2018, Standard Occupational Code 41–3021 Insurance Sales Agents, Mean hourly wage $32.64, *http://www.bls.gov/oes/2018/may/oes413021.htm.* The fully loaded wage rate is calculated using the percentage of wages to total compensation, found in the Bureau of Labor Statistics, Employer Costs for Employee Compensation June 2018, Table 5. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: private industry workers, by major occupational group, Sales and Office Occupational Group, *http://www.bls.gov/news.release/archives/ecec_09182018.pdf.* Wages are 71.6 percent of total compensation. $45.59 = $32.64/0.716.

[24] Bureau of Labor Statistics, Occupational Employment Statistics May 2018, Standard Occupational Code 23–1011 Lawyers, Mean hourly wage $69.34, *http://www.bls.gov/oes/2018/may/oes231011.htm. http://www.bls.gov/oes/2015/may/oes231011.htm* The fully loaded wage rate is calculated using the percentage of wages to total compensation, found in the Bureau of Labor Statistics, Employer Costs for Employee Compensation June 2018, Table 5. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Private industry workers, by major occupational group, Management, Professional, and related Group, *http://www.bls.gov/news.release/archives/ecec_09182018.pdf.* Wages are 68.7 percent of total compensation. $100.93 = $69.34/0.687.

[25] DHS has previously calculated the hourly cost of outside counsel using this methodology of multiplying the fully loaded average wage rate for an in-house attorney by 2.5. *See* the Final Small Entity Impact Analysis of the Supplemental Proposed Rule ''Safe-Harbor Procedures for Employers Who Receive a No-Match Letter,'' page G–4, at *http://www.regulations.gov/#!documentDetail;D=ICEB-2006-0004-0922.*

[26] $73.26 = ($45.59 + $100.93)/2.

without the need for litigation. Furthermore, review confined to a defined administrative record will eliminate the need for discovery as part of litigation.

2. Process for Declining Bonds

i. Costs

This rule establishes for cause standards that ICE will use to decline new immigration bonds from a surety company. If the surety does not meet these standards, ICE may notify the surety that it has fallen below the required performance levels and, if the surety fails to cure its deficient performance, ICE may stop accepting new bonds from the company. The anticipated costs of a surety's response to ICE's notification derive from the due process requirements set by Treasury for all agencies that issue rules to decline new bonds from Treasury-certified sureties. The rule provides an opportunity for the surety to rebut the stated reasons for non-acceptance of new bonds and provides an opportunity to cure the stated deficiencies. In addition to costs in responding to ICE's notifications, sureties may lose future revenue if ICE makes a final determination to decline new bonds underwritten by the surety.

The rule only applies prospectively. However, for purposes of this economic analysis, DHS uses a snapshot of sureties' past financial performance to estimate the possible impacts of the proposed rule on future performance. As part of its updated economic analysis since publishing the NPRM, DHS examined the impacts to surety companies that actively posted bonds with ICE in FY 2018. In FY 2018, eight sureties posted immigration bonds with ICE and would have been subject to the requirements of this rule had it been in place. Of those eight sureties, three would have been subject to at least one of the proposed for cause standards as of the end of FY 2018. Two of those sureties would have been subject to two of the three for cause standards as of the end of FY 2018. These two sureties together had more than 244 invoices that were past due, with a total outstanding balance of over $2.0 million. The third surety was subject to the for cause standard for breach rate, but as explained earlier, subsequently improved its breach rate substantially.

DHS is establishing the for cause standards to deter deficient performance. DHS believes that less stringent standards would allow historical, deficient business practices to continue. DHS also believes that more stringent standards could result in unnecessarily sanctioning sureties when they are making good-faith efforts to comply with their obligations.

Under this rule, if a surety has 10 or more invoices past due at one time, owes a cumulative total of $50,000 or more on past-due invoices, or has a breach rate of 35 percent or greater in a fiscal year, ICE is authorized to notify the surety that it has fallen below the required performance levels. The surety will have the opportunity to review ICE's written notice identifying the for cause reasons for declining new bonds, rebut the agency's reasons for non-acceptance of new bonds, and cure its performance deficiencies. Before any surety receives a notification from ICE of its intention to decline any new bonds underwritten by the surety, the surety will have had ample opportunities to evaluate and rebut each administratively final breach determination. Furthermore, the for cause standards for declining new bonds will be triggered only when the surety has failed to pay amounts due on administratively final breach determinations or has an unacceptably high breach rate. If a surety fulfills its obligations and is not subject to these for cause standards, this rule will impose no additional costs on that surety.

Surety companies may incur a new opportunity cost when responding to the agency's notification of its intention to decline any new bonds underwritten by the surety. DHS estimates that personnel at a surety company may spend three hours to complete a response to the ICE notification. DHS assumes that an insurance agent (or equivalent) employed by the surety company, an in-house attorney, or outside counsel is equally likely to respond to the notification. The opportunity cost estimate per response is $399 ($133 × 3 hours).[27]

Because a surety will have had ample opportunities to evaluate and challenge administratively final breach determinations, DHS anticipates that it will rarely need to send a notification of its intent to decline new bonds because sureties will use good faith efforts to avoid triggering the for cause standards. However, for the purposes of this cost analysis, DHS assumes that it will send one to three notifications during a 10-year period.[28] To calculate the cost of responding to three notifications over 10 years (the likely maximum number of notifications), the likelihood of issuing a notification during any given year is multiplied by the opportunity cost per response. This equals about $120 (30 percent × $399). The cost of responding to one notification over 10 years (the likely minimum number of notifications) is approximately $40 (10 percent × $399). Thus, the range of response costs per year is $40 to $120, with a primary, or most likely, estimate of $80 (20 percent × $399).

Sureties that receive, after being afforded due process, a written determination that future bonds will be declined pursuant to the for cause standards set forth in this rule will also incur future losses from the inability to submit to ICE future bonds underwritten by the surety. Because DHS does not have access to information about the surety companies' profit margins per bond, DHS is unable to estimate any future loss in revenue to these companies. However, ICE notes that, although it would no longer accept immigration bonds underwritten by these sureties, this rule does not prohibit these sureties from underwriting bonds for other agencies in the Federal government.

ii. Benefits

This rule addresses problems that ICE has had with certain surety companies failing to pay amounts due on administratively final bond breach determinations or having unacceptably high breach rates. For example, certain companies may have realized an undeserved windfall when they have refused to timely pay invoices, yet have foreclosed on collateral securing the bonds because the bonds have been breached. This rule provides greater incentive for surety companies to timely pay their administratively final bond breach determinations and helps ensure that sureties comply with the requirements imposed by the terms of a bond. In turn, this will minimize the number of situations where the surety routinely fails to pay and reduce the number of times agency resources are expended in locating aliens when the alien is not surrendered in response to demands issued pursuant to bonds. In addition, this rule allows ICE to resolve or avoid certain disputes, thereby decreasing the debt referred to Treasury for further collection efforts or the cases referred to DOJ for litigation.

[27] $133 represents the rounded, average loaded wage rate of an insurance agent, an in-house attorney and outside counsel hired by the surety. $133 = ($45.59 + $100.93 + $252.33)/3.

[28] As discussed previously, one or more of the for cause standards would have applied to three companies as of the end of FY 2018. DHS assumes that, at most, the for cause standards will be triggered for three companies over the course of 10 years. DHS assumes that it is possible and somewhat likely that at a minimum, one company's failure to perform will trigger the for cause standards over 10 year timeframe.

3. Regulatory Familiarization Costs

During the first year that this rule is in effect, sureties will need to learn about the new rule and its requirements. DHS assumes that each Treasury-certified surety company currently issuing immigration bonds will conduct a regulatory review. DHS assumes that this task is equally likely to be performed by either an in-house attorney or by a non-attorney at each surety company. DHS estimates that it will take eight hours for the regulatory review by either an in-house attorney or a non-attorney, such as an insurance agent (or equivalent), at each surety. Although DHS requested comments regarding this estimate, no comments addressed the time necessary for regulatory review.

To calculate the familiarization costs, DHS multiplies its estimated review time of eight hours by the average hourly loaded wage rate of an attorney and an insurance agent, $73.26. DHS calculates that the familiarization cost per surety company is $586.08 (8 hours × $73.26). Nine sureties posted immigration bonds with ICE in FY 2019. DHS calculates the total estimated regulatory familiarization cost for all sureties currently issuing immigration bonds as $5,275 ($73.26 × 8 hours × 9 sureties).

4. Alternatives

OMB Circular A–4 directs agencies to consider regulatory alternatives to the provisions of the rule.[29] This section addresses two alternative regulatory approaches and the rationales for rejecting these alternatives in favor of this rule.

The first alternative would be to include different for cause standards for surety companies that fall in different ranges of underwriting limitations.[30] For example, surety companies with higher underwriting limitations could be held to more stringent for cause standards than companies with lower underwriting limitations. The difference of underwriting limitations is great for some Treasury-certified sureties: The lowest underwriting limitation of all of the Treasury-certified sureties is $254,000 per bond and the highest is $11.6 billion per bond.[31] This distinction might be supported by the assumptions that companies with higher underwriting limitations would issue more bonds and possibly bonds of higher values and thus their actions should be monitored more closely, and larger companies have greater resources to ensure compliance with the for cause standards.

This alternative was rejected because the amount of a non-performing surety company's underwriting limitation should have no bearing on whether ICE can stop accepting bonds from that surety company. The underwriting limitation is an indication of the surety company's financial resources. A surety company can comply with its immigration bond responsibilities regardless of its underwriting limitation. In addition, because the average amount of a surety bond is about $11,200,[32] and the lowest underwriting limitation per bond set by Treasury greatly exceeds this average bond amount, it would serve no purpose to make a distinction among surety companies based on their underwriting limitations. Thus, DHS rejected this alternative.

The second regulatory alternative DHS considered would be to apply the requirements of the rule to cash bond obligors as well as to surety companies to further the goal of treating all bond obligors similarly. DHS has rejected this alternative for several reasons. First, by definition, cash bond obligors cannot be delinquent in paying invoices on administratively final breach determinations. Cash bond obligors deposit with ICE the full face amount of the bond before the bond is issued. Thus, when a bond is breached, no invoice is issued because the Federal Government already has the funds on deposit. Second, because cash bond obligors generally will post only one immigration bond, the same concerns about repeated violations of applicable standards do not apply to them. The majority of cash bond obligors are not institutions, but friends or family members of the alien who has been detained. From FY 2015–FY 2019, at least 65 percent of cash bonds were posted by an obligor who only posted one bond.[33] Finally, the volume of disputes regarding surety bonds, as opposed to cash bonds, necessitates administrative and issue exhaustion requirements for claims based on surety bonds. The number of claims in federal court involving breached surety bonds in litigation has far exceeded the number of claims involving breached cash bonds. One surety bond case alone presented more than 1,400 breached bond claims for adjudication.[34] In contrast, the number of cash bond cases challenging bond breaches litigated in federal courts has averaged less than two per year for the past five years.[35]

5. Conclusion

This rule requires Treasury-certified sureties or their bonding agents seeking to overturn a breach determination to file an administrative appeal raising all legal and factual defenses in this appeal, and allows ICE to decline new bonds from surety companies that fail to meet for cause standards. DHS has provided an estimate of the transactional costs, the opportunity costs, and the familiarization costs associated with this rule, as well as the rule's benefits. Table 2 summarizes the costs and benefits of the final rule.

TABLE 2—SUMMARY OF COSTS AND BENEFITS OF THE RULE (2018 US$)

Category	Discount rate	Minimum estimate	Primary estimate	Maximum estimate
Annualized Monetized Costs				
Exhaustion of administrative remedies	7%	$167,175	$176,630	$236,925
	3	167,175	176,630	236,925
For Cause Standards	7	40	80	120
	3	40	80	120
Familiarization *	7	702	702	702
	3	600	600	600

[29] OMB Circular A–4, *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.*

[30] The underwriting limitations set forth in the Treasury's Listing of Certified Companies are on a per bond basis. Department of the Treasury's Listing of Certified Companies Notes, (b) (updated July 1, 2018), *https://www.fiscal.treasury.gov/surety-bonds/circular-570.html#1.*

[31] Department of the Treasury's Listing of Certified Companies, *https://www.fiscal.treasury.gov/surety-bonds/list-certified-companies.html.*

[32] Immigration Bond Statistics maintained by ICE's Financial Service Center Burlington.

[33] ICE's Financial Service Center Burlington.

[34] *AAA Bonding Agency Inc.,* v. *DHS,* 447 F. App'x 603, 606 (5th Cir. 2011).

[35] ICE's Financial Service Center Burlington.

TABLE 2—SUMMARY OF COSTS AND BENEFITS OF THE RULE (2018 US$)—Continued

Category	Discount rate	Minimum estimate	Primary estimate	Maximum estimate
Total Annualized Cost	7	167,917	177,407	237,747
	3	167,815	177,305	237,645
Total 10-Year Undiscounted Cost		1,677,424	1,722,323	2,375,722
Total 10-Year Discounted Cost	7	1,179,377	1,246,030	1,669,832
	3	1,431,498	1,512,449	2,027,161
Unquantified Costs	• Surety companies may lose revenue if ICE declines new immigration bonds.			
Unquantifiable Benefits	• The rule will assist DOJ's efforts in preparing cases for litigation and eliminate the need for remand decisions. • The rule will decrease the debt referred to Treasury for further collection efforts and streamline the litigation of any breached bond claims referred to DOJ. • The rule will increase compliance with a surety company's duty to surrender aliens and reduce the number of times agency resources are expended in locating aliens when the alien is not surrendered.			
Net Benefits	N/A	N/A	N/A	

Familiarization cost is the cost to businesses to familiarize themselves with the rule. It is a one-time cost expected to be incurred within the first year of the rule's effective date. The cost is estimated to be $586 per surety company.

B. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603 requires agencies to consider the economic impact its rules will have on small entities. In accordance with the RFA, DHS has prepared an Final Regulatory Flexibility Analysis that examines the impacts of the final rule on small entities (5 U.S.C. 601 *et seq.*). 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 fewer than 50,000.

1. A statement of the need for, and objectives of, the rule.

DHS establishes procedural and substantive standards under which it may decline new immigration bonds from a Treasury-certified surety and an exhaustion of administrative remedies requirement. This rule will facilitate the resolution of disputes between ICE and sureties that arise after its effective date.

This rule promotes judicial and administrative efficiency by allowing Federal courts to review the AAO's written decision on the validity of a breach determination under the APA without first remanding breach decisions to ICE to prepare written decisions based on defenses raised for the first time in federal court. In addition, the discovery process will be unnecessary in cases solely involving the review of a written AAO decision on a defined administrative record.

By establishing the for cause standards, surety companies will have a greater incentive to surrender aliens in response to demand notices, thereby reducing agency resources expended in locating aliens. They also will have a greater incentive to either pay amounts due on invoices for breached bonds or appeal the breach determination, thereby reducing the number of delinquent debts referred to Treasury for further collection efforts and claims referred to DOJ for litigation.

DHS's objective in requiring exhaustion of administrative remedies and issue exhaustion for disputed surety bond breaches is to allow the agency to correct any mistakes it may have made before claims are filed in federal court, and to allow for more efficient judicial review of breach determinations under the APA. The legal bases for requiring exhaustion of administrative remedies and issue exhaustion are well-established. *See Darby* v. *Cisneros,* 509 U.S. 137, 154 (1993); *Sims* v. *Apfel,* 530 U.S. 103, 107–108 (2000).

DHS's objective in adopting the for cause standards for declining bonds is to provide an incentive for sureties to comply with their obligations to surrender aliens in response to demand notices and to timely pay the amounts due on invoices for breached bonds or appeal the breach determinations.

2. A statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.

DHS did not receive any public comments raising issues in response to the initial regulatory flexibility analysis and did not make any revisions to the standards and procedures for declining bonds underwritten by small entities in this final rule.

3. The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.

DHS did not receive comments from the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule.

4. A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.

As part of its updated economic analysis, ICE determined that for FY 2019 nine of the 266 Treasury-certified sureties [36] would have been subject to the requirements of this rule had it been in place because these nine sureties are the only ones that posted new immigration bonds with ICE during FY 2019. However, any of the Treasury-certified sureties could potentially post new immigration bonds with ICE and would then be subject to the requirements of this rule. Most surety companies are subsidiaries or divisions

[36] The list of Treasury-certified sureties can be found here: *https://fiscal.treasury.gov/surety-bonds/list-certified-companies.html.* There are 266 sureties as of July 1, 2019.

of insurance companies,[37] where bail bonds are a small part of their portfolios. Other lines of surety bonds include contract, commercial, customs, construction, notary, and fidelity bonds.[38]

DHS used multiple data sources such as Dun & Bradstreet, Inc. and ReferenceUSA [39] to determine that four of these sureties are small entities as that term is defined in 5 U.S.C. 601(6). This determination is based on the number of employees or revenue being less than their respective Small Business Administration (SBA) size standard.[40] These four sureties issued approximately 70 percent of the total number of surety bonds to ICE in FY 2019. The following table provides the industry descriptions of the small entities that will be impacted by this rule.

None of the nine entities that posted bonds with ICE in FY 2019 were small governmental organizations or small organizations not dominant in their field.

TABLE 3—SMALL ENTITIES TO WHICH THIS RULE APPLIES

NAICS code	NAICS description	Count of small entities impacted by rule	SBA size standard (in sales receipts or number of employees)
523930	Investment Advice	1	$38,500,000.
524126	Direct Property and Casualty Insurance Carriers	2	1,500 employees.
524210	Insurance Agencies and Brokerages	1	$8,000,000
Total		4	

5. A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the types of professional skills necessary for preparation of the report or record.

This rule requires that a surety or its bonding agent seek administrative review of a breach determination by filing an appeal with the AAO before seeking judicial review. The rule also requires a surety company to respond to any notification that it violated a for cause standard. Other than responding to such a notification, the rule imposes no recordkeeping or reporting requirements.

Estimated Cost and Impact as a Percentage of Revenue

To estimate the impact on small entities, DHS has calculated the cost of this rule as a percentage of the revenue of those entities. During the first year that this rule is in effect, sureties of all sizes will need to learn about the new rule and its requirements. DHS assumes that this task would be equally likely to be performed by either an attorney or by a non-attorney in the immigration bond business. DHS uses the average compensation of an attorney and an insurance agent (the closest approximation to the cost of a non-attorney in the immigration bond business), $73.26,[41] to estimate the familiarization cost. DHS estimates that it will take eight hours for the regulatory review.

To calculate the familiarization costs, DHS multiplies its estimated review time of eight hours by the average of an attorney and an insurance agent's hourly loaded wage rate, $73.26. DHS calculates that the familiarization cost per surety is $586 rounded (8 hours × $73.26).

Another cost that sureties may incur is the fee for filing an appeal with the AAO. One possibility that DHS cannot account for in its analysis is that a surety company's agent may pay the filing fee instead of the surety company. DHS has no information about the contractual arrangements between a surety company and its agent, but either party can file an appeal with the AAO and pay the required fee. In the analysis in its NPRM, DHS assumed that the surety company pays for all the appeals filed. DHS requested comments regarding this assumption, but no comments addressed this assumption. Therefore, DHS uses the same methodology here.

As discussed previously, sureties that choose to appeal complete Form I–290B, Notice of Appeal, and submit the form with a $675 filing fee and a brief written statement setting forth the reasons and evidence supporting the appeal. Based on FY 2017–2019 data, DHS estimates that approximately 225 additional surety bond breaches might be appealed to the AAO annually if an exhaustion requirement had been in place. For the purposes of this analysis, DHS assumes that the additional 225 AAO appeals are divided among the sureties at the same ratio at which the sureties posted bonds in FY 2019. DHS multiplies the percent of bonds posted in FY 2019 that may be appealed, or 2.3 percent, by the number of bonds posted in FY 2019 for each of the four small business sureties to estimate the annual number of breached bonds that the companies might appeal. Applying this methodology to the number of bonds posted by the four small businesses during FY 2019, DHS estimates that each of the four sureties would file between 19 and 61 appeals.

Sureties that appeal will incur an opportunity cost for time spent filing an appeal with the AAO. USCIS has estimated that the average burden for filing Form I–290B is 90 minutes.[42] The person preparing the appeal could either be an attorney or a non-attorney in the immigration bond business. The closest approximation to the cost of a non-attorney in the immigration bond business is an insurance agent. For purposes of this analysis, DHS uses as its primary estimate the average of the hourly loaded wage rate of an in-house attorney and insurance agent, $73.26, to reflect that an in-house attorney or an

[37] National Association of Surety Bond Producers and Surety and Fidelity Association of America, ''Frequently-Asked Questions,'' 2016, *http://suretyinfo.org/?page_id=84#surety.*

[38] International Credit Insurance & Surety Association, ''What kind of surety bonds does a surety insurance company issue?'', 2016, *http://www.icisa.org/surety/1548/mercury.asp?page_id=1899.*

[39] These databases offer information of location, number of employees, and estimated sales revenue for millions of U.S. businesses. The Dun & Bradstreet, Inc's website is *www.hoovers.com.* The Reference USA website is *http://www.referenceusa.com.* ICE collected data from these sources in November 2019.

[40] U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System (NAICS) Codes, August 19, 2019. *https://www.sba.gov/document/support—table-size-standards.*

[41] Bureau of Labor Statistics, *supra* notes 12 and 13. The average of the described wages is $73.26 = ($100.93 + $45.59)/2.

[42] Form I–290B, 2018 Information Collection Request Supporting Statement, Question 12, *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201804-1615-002.*

insurance agent (or equivalent) is equally likely to prepare the appeal. Thus, an approximation of the cost to prepare the appeal would be $110 per appeal ($73.26 × 1.5 hours, rounded). The total cost per appeal is $785 for fees and opportunity costs ($110 opportunity cost + $675 fee).

DHS multiplies the total cost per appeal ($785) by the estimated annual number of breached bonds that a surety company might appeal to determine the annual cost per surety for additional appeals filed because of the exhaustion requirement. DHS adds the familiarization costs per surety to the first year of costs incurred by the surety. For the four small businesses analyzed, the company with the lowest first year costs would incur costs of $15,501 ($785 cost per appeal × 19 appeals + $586 familiarization cost) and the company with the highest first year costs would incur costs of $48,471 ($785 cost per appeal × 61 appeals + $586 familiarization cost).

The four surety companies that are small entities would not have to change any of their current business practices if they do not violate any of the for cause standards set forth in this rule. If one of the entities were to receive notification from ICE that it violated a for cause standard, the entity would then have the opportunity to submit a written response either explaining why the company is not in violation or how the company intends to cure any deficiency. These due process protections benefit the small entity and entail no additional recordkeeping or reporting other than preparing a response to ICE's notification. Surety companies will, however, incur a new opportunity cost when responding to ICE's notification of its intent to decline new bonds underwritten by the surety. DHS estimates that personnel at a surety company may spend three hours to complete a response to ICE's notification. The opportunity cost estimate per response would be $399 ($133 × 3 hours).[43] Because a surety would have had ample opportunities to evaluate and challenge administratively final breach determinations, DHS anticipates that it will rarely need to send a notification of its intent to decline new bonds. However, for the purposes of this opportunity cost estimate, DHS assumes that it may send about two notifications during a 10-year period to the small sureties. To calculate the cost of responding to two notifications over 10 years, the likelihood of issuing a notification during any given year is multiplied by the opportunity cost per response. This equals about $80 (20 percent × $399).

DHS estimates this rule's annual impact to each small surety company by calculating its total costs as a percentage of its annual revenue. The costs are the cost of filing appeals for each small surety company, the opportunity cost to respond to a notification that ICE intends to decline future bonds posted by the company, plus the familiarization costs.

The annual revenue for these four sureties, according to the 2019 sales revenue reported by Dun & Bradstreet, Inc., ranges from approximately $2.6 million to $285.7 million. The annual impact of the rule is estimated to be two percent or less of each company's annual revenue. The following tables summarize the quantified impacts of this rule on the four small surety companies for the first year which includes the one-time familiarization costs and for the subsequent years, not including the familiarization costs.[44]

TABLE 4—QUANTIFIED FIRST YEAR IMPACT TO SMALL ENTITIES FOR EXHAUSTION OF ADMINISTRATIVE REMEDIES AND RESPONDING TO A NOTIFICATION OF ICE'S INTENT TO DECLINE NEW BONDS, INCLUDING REGULATORY FAMILIARIZATION COSTS

Revenue impact range	Number of small entities	Percent of small entities
0% < Impact ≤ 1%	2	50
1% < Impact ≤ 2%	2	50
Total	4	100

TABLE 5—QUANTIFIED ANNUAL IMPACT TO SMALL ENTITIES FOR EXHAUSTION OF ADMINISTRATIVE REMEDIES AND RESPONDING TO A NOTIFICATION OF ICE'S INTENT TO DECLINE NEW BONDS

Revenue impact range	Number of small entities	Percent of small entities
0% < Impact ≤ 1%	2	50
1% < Impact ≤ 2%	2	50
Total	4	100

The above estimated impacts reflect the quantified direct costs to comply with the rule. Surety companies may be impacted in other ways that DHS is unable to quantify. This rule may result in some surety companies changing behavior to pay breached bonds when they otherwise may not have, thereby impacting revenue. For surety companies that fail to fulfill their obligations and cure deficiencies in their performance, this rule may result in business losses when ICE declines to accept new bonds submitted by the surety. DHS is not able to predict which surety companies may choose non-compliance and is not able to factor in the loss of surety companies' revenue.

6. A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual,

[43] $133 represents the rounded, average loaded wage rate of an insurance agent, an in-house attorney and an outside counsel hired by the surety. $133 = ($45.59 + $100.93 + $252.33)/3.

[44] USCIS proposed the I–290B fee to be $705 in its NPRM, ''Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,'' on Nov. 14, 2019. 84 FR at 62360. If this proposed rule is finalized, the increased fee will not change the results of Tables 4 and 5.

policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

DHS examined two regulatory alternatives that could potentially reduce the burden of this rule on small entities. The alternatives to the rule were: (1) Different for cause standards for surety companies with different underwriting limitations; and (2) application of the rule to cash bond obligors as well as surety bond obligors. The first alternative would include different for cause standards for surety companies that fall in different ranges of underwriting limitations. For example, surety companies with higher underwriting limitations could be held to more stringent for cause standards than companies with lower underwriting limitations. The difference of underwriting limitations is great for some Treasury-certified sureties: The lowest underwriting limitation of the Treasury-certified sureties is $254,000 per bond and the highest is $11.6 billion per bond.[45] This distinction might be supported by the assumptions that companies with higher underwriting limitations are larger companies that might issue more bonds and possibly bonds of higher values, and smaller companies might have fewer resources to ensure compliance with the for cause standards. Based on these differences, an argument could be made that larger companies' actions should be monitored more closely than smaller companies' actions.

This alternative was rejected because the amount of a non-performing surety company's underwriting limitation should have no bearing on whether ICE can stop accepting bonds from that surety company. The underwriting limitation is an indication of the surety company's financial resources. A surety company can comply with its immigration bond responsibilities regardless of its underwriting limitation. In addition, because the average amount of a surety bond is about $11,200,[46] and the lowest underwriting limitation per bond set by Treasury greatly exceeds this average bond amount, it would serve no purpose to make a distinction among surety companies based on their underwriting limitations. Thus, the agency rejected this alternative.

DHS rejected the second alternative because many of the for cause standards would not be applicable to cash bond obligors. For cash bond obligors, the Federal Government already has collected the face value of the bond as collateral and thus does not need to issue invoices to collect amounts due on breached bonds. The majority of cash bond obligors are not in the business of issuing bonds for profit and thus do not raise concerns about manipulating the bond management process for institutional gain.

C. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48 (codified at 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 year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

D. Small Business Regulatory Enforcement Fairness Act of 1996

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, 110 Stat. 847, 858–59, we want to assist small entities in understanding this rule so that they can better evaluate its effects on them. This rulemaking is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. *See* 5 U.S.C. 804(2). As indicated in the Executive Orders 12866, 13563, and 13771: Regulatory Review, Section V, the rule is expected to have an effect on compliance costs and regulatory burden for employers. As small businesses may be impacted under this regulation, DHS has prepared a RFA analysis.

E. Collection of Information

Agencies are required to submit to OMB for review and approval any reporting or recordkeeping requirements inherent in a rule under the Paperwork Reduction Act of 1995, as amended, Public Law 104–13, 109 Stat. 163 (1995) (codified at 44 U.S.C. 3501–3520). This rule will not require a collection of information.

As protection provided by the Paperwork Reduction Act, as amended, 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.

F. Federalism

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 does not have implications for federalism.

G. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

H. Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. Environment

DHS Management Directive (MD) 023–01, Rev. 01 and Instruction Manual (IM) 023–01–001–01 establish procedures that DHS and its Components use to implement the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321–4375, and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500–1508. The CEQ regulations allow federal agencies to establish categories of actions that do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment or Environmental Impact Statement. 40 CFR 1508.4. The IM 023–01–001–01, Rev. 01 lists the Categorical Exclusions that DHS has found to have no such effect. IM 023–01–001–01 Rev. 01, Appendix A, Table 1.

For an action to be categorically excluded, IM 023–01–001–01 Rev. 01 requires the action to satisfy each of the following three conditions:

(1) The entire action clearly fits within one or more of the Categorical Exclusions;

[45] Department of the Treasury's Listing of Certified Companies, *https://www.fiscal.treasury.gov/surety-bonds/list-certified-companies.html.*

[46] Immigration Bond Statistics maintained by ICE's Financial Service Center Burlington.

(2) The action is not a piece of a larger action; and

(3) No extraordinary circumstances exist that create the potential for a significant environmental effect. IM 023–01–001–01 Rev. 01 § V(B)(2)(a)–(c). Where it may be unclear whether the action meets these conditions, MD 023–01 requires the administrative record to reflect consideration of these conditions. MD 023–01, app. A, § V.B.

This rule requires Treasury-certified sureties seeking to overturn a breach determination to file an administrative appeal raising all legal and factual defenses in this appeal. The rule also allows ICE to decline additional immigration bonds from Treasury-certified surety companies for cause after certain procedures have been followed. The procedures require ICE to provide written notice before declining additional bonds to allow sureties the opportunity to challenge ICE's proposed action and to cure any deficiencies in their performance.

DHS has analyzed this rule under MD 023–01 and IM 023–01–001–01 Rev. 01. DHS has made a determination that this action is one of a category of actions, which do not individually or cumulatively have a significant effect on the human environment. This rule clearly fits within the Categorical Exclusion found in MD 023–01, Appendix A, Table 1, number A3(d): ''Promulgation of rules . . . that interpret or amend an existing regulation without changing its environmental effect.'' This rule is not part of a larger action. This rule presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this rule is categorically excluded from further NEPA review.

List of Subjects in 8 CFR Part 103

Administrative practice and procedure, Surety bonds.

Accordingly, for the reasons set forth in the preamble, the Department of Homeland Security amends chapter I of title 8 of the Code of Federal Regulations as follows:

Subchapter B—Immigration Regulations

PART 103—IMMIGRATION BENEFITS; BIOMETRIC REQUIREMENTS; AVAILABILITY OF RECORDS

■ 1. The authority citation for part 103 is revised to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1365b; 31 U.S.C. 9701; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); E.O. 12356, 47 FR 14874, 15557; 3 CFR, 1982 Comp., p. 166; 8 CFR part 2; Pub. L. 112–54; 125 Stat. 550; 31 CFR part 223.

■ 2. Section 103.6 is amended by revising the section heading, revising paragraph (b), and adding paragraph (f) as follows:

Subpart A—[Amended]

§ 103.6 Immigration Bonds.

* * * * *

(b) *Acceptable sureties*—(1) *Acceptable sureties generally.* Immigration bonds may be posted by a company holding a certificate from the Secretary of the Treasury under 31 U.S.C. 9304–9308 as an acceptable surety on Federal bonds (a Treasury-certified surety). They may also be posted by an entity or individual who deposits cash or cash equivalents, such as postal money orders, certified checks, or cashier's checks, in the face amount of the bond.

(2) *Authority to decline bonds underwritten by Treasury-certified surety.* In its discretion, ICE may decline to accept an immigration bond underwritten by a Treasury-certified surety when—

(i) Ten or more invoices issued to the surety on administratively final breach determinations are past due at the same time;

(ii) The surety owes a cumulative total of $50,000 or more on past-due invoices issued to the surety on administratively final breach determinations, including interest and other fees assessed by law on delinquent debt; or

(iii) The surety has a breach rate of 35 percent or greater in any Federal fiscal year after August 31, 2020.The surety's breach rate will be calculated in the month of January following each Federal fiscal year after the effective date of this rule by dividing the sum of administratively final breach determinations for that surety during the fiscal year by the total of such sum and bond cancellations for that surety during that same year. For example, if 50 bonds posted by a surety company were declared breached from October 1 to September 30, and 50 bonds posted by that same surety were cancelled during the same fiscal year (for a total of 100 bond dispositions), that surety would have a breach rate of 50 percent for that fiscal year.

(iv) Consistent with 31 CFR 223.17(b)(5)(i), ICE may not decline a future bond from a Treasury-certified surety when a court of competent jurisdiction has stayed or enjoined enforcement of a breach determination that would support ICE's decision to decline future bonds. For example, if collection of a past-due invoice has been stayed by a court, it cannot be counted as one of the ten or more invoices under paragraph (b)(1)(i) of this section.

(3) *Definitions.* For purposes of paragraphs (b)(2)(i) and (ii) of this section—

(i) A breach determination is administratively final when the time to file an appeal with the Administrative Appeals Office (AAO) has expired or when the appeal is dismissed or rejected.

(ii) An invoice is past due if it is delinquent, meaning either that it has not been paid or disputed in writing within 30 days of issuance of the invoice; or, if it is a debt upon which the surety has submitted a written dispute within 30 days of issuance of the invoice, ICE has issued a written explanation to the surety of the agency's determination that the debt is valid, and the debt has not been paid within 30 days of issuance of such written explanation that the debt is valid.

(4) *Notice of intention to decline future bonds.* When one or more of the for cause standards provided in paragraph (b)(2) of this section applies to a Treasury-certified surety, ICE may, in its discretion, initiate the process to notify the surety that it will decline future bonds. To initiate this process, ICE will issue written notice to the surety stating ICE's intention to decline bonds underwritten by the surety and the reasons for the proposed non-acceptance of the bonds. This notification will inform the surety of its opportunity to rebut the stated reasons set forth in the notice, and its opportunity to cure the stated reasons, *i.e.,* deficient performance.

(5) *Surety's response.* The Treasury-certified surety must send any response to ICE's notice in writing to the office that sent the notice. The surety's response must be received by the designated office on or before the 30th calendar day following the date the notice was issued. If the surety or agent fails to submit a timely response, the surety will have waived the right to respond, and ICE will decline any future bonds submitted for approval that are underwritten by the surety.

(6) *Written determination.* After considering any timely response submitted by the Treasury-certified surety to the written notice issued by ICE, ICE will issue a written determination stating whether future bonds issued by the surety will be accepted or declined. This written determination constitutes final agency action. If the written determination concludes that future bonds will be declined from the surety, ICE will decline any future bonds submitted for

approval that are underwritten by the surety.

(7) *Effect of decision to decline future bonds.* Consistent with 31 CFR 223.17(b)(4), ICE will use best efforts to ensure persons conducting business with the agency are aware that future bonds underwritten by the surety will be declined by ICE. For example, ICE will notify any bonding agents who have served as co-obligors with the surety that ICE will decline future bonds underwritten by the surety.

* * * * *

(f) *Appeals of Breached Bonds Issued by Treasury-Certified Sureties.*

(1) *Final agency action.* Consistent with section 10(c) of the Administrative Procedure Act, 5 U.S.C. 704, the AAO's decision on appeal of a breach determination constitutes final agency action. The initial breach determination remains inoperative during the administrative appeal period and while a timely administrative appeal is pending. Dismissal of an appeal is effective upon the date of the AAO decision. Only the granting of a motion to reopen or reconsider by the AAO makes the dismissal decision no longer final.

(2) *Exhaustion of administrative remedies.* The failure by a Treasury-certified surety or its bonding agent to exhaust administrative appellate review before the AAO, or the lapse of time to file an appeal to the AAO without filing an appeal to the AAO, constitutes waiver and forfeiture of all claims, defenses, and arguments involving the bond breach determination. A Treasury-certified surety's or its agent's failure to move to reconsider or to reopen a breach decision does not constitute failure to exhaust administrative remedies.

(3) *Requirement to raise all issues.* A Treasury-certified surety or its bonding agent must raise all issues and present all facts relied upon in the appeal to the AAO. A Treasury-certified surety's or its agent's failure to timely raise any claim, defense, or argument before the AAO in support of reversal or remand of a breach decision waives and forfeits that claim, defense, or argument.

(4) *Failure to file a timely administrative appeal.* If a Treasury-certified surety or its bonding agent does not timely file an appeal with the AAO upon receipt of a breach notice, a claim in favor of ICE is created on the bond breach determination, and ICE may seek to collect the amount due on the breached bond.

Chad R. Mizelle,

Senior Official Performing the Duties of the General Counsel.

[FR Doc. 2020–14824 Filed 7–30–20; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0723; Project Identifier AD–2020–00586–Q; Amendment 39–21192; AD 2020–16–08]

RIN 2120–AA64

Airworthiness Directives; Aspen Avionics, Inc.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Aspen Avionics, Inc., Evolution Flight Display (EFD) EFD1000 Emergency Backup Display, EFD1000 Multi-Function Display, and EFD1000 Primary Flight Display systems installed on various airplanes. This AD imposes operating restrictions on these display systems by revising the Limitations section of the airplane flight manual (AFM). This AD was prompted by an automatic reset occurring when the display internal monitor detects a potential fault, causing intermittent loss of airspeed, attitude, and altitude information during flight. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective August 17, 2020.

The FAA must receive comments on this AD by September 14, 2020.

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

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

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–2020–0723; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

For service information identified in this final rule, contact Aspen Avionics, Inc. at either address: 5001 Indian School Rd. NE, Suite 100, Albuquerque, NM 87110; or 19820 N 7th Street, Suite 150, Phoenix, AZ 85024; telephone: 1 (888) 992–7736; internet: *https://aspenavionics.com/contact/.*

FOR FURTHER INFORMATION CONTACT: Mahmood Shah, Aerospace Engineer, Fort Worth ACO Branch, FAA, 10101 Hillwood Pkwy, Fort Worth, TX 76177; phone: 817–222–5133; fax: 817–222–5960; email: *mahmood.shah@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On February 25, 2020, Aspen Avionics, Inc. (Aspen), notified the FAA of 35 instances of software interacting with a graphics processing chip defect and causing an automatic reset to occur on Aspen EFD1000 Emergency Backup Display, EFD1000 Multi-Function Display, and EFD1000 Primary Flight Display systems. The reset occurs when the display internal monitor detects a potential fault. The display will go black and then it will restart, which lasts about 50 seconds. In installations where multiple Aspen EFDs serve as the primary and backup attitude, altitude, and airspeed displays instead of independent instruments; this repeat resetting may affect both Aspen units, resulting in loss of all attitude, altitude, and airspeed information during the reset period. Loss of all airspeed, attitude, and altitude information during flight may cause a loss of control of the airplane in instrument meteorological conditions (IMC) or at night. The actions required by this AD will restrict operations to flight under visual flight rules (VFR) and prohibit night operations to allow safe operation in the event of a loss of flight display functionality.

Related Service Information

The FAA reviewed Aspen Operator Advisory OA2020–01, dated March 3, 2020. This document advises operators of the automatic reset event and provides recommended operating limitations.

The FAA also reviewed Aspen Service Bulletin Number: SB2020–01, dated April 1, 2020. This document provides instructions for updating the EFD software to correct the automatic reset issue. This AD does not apply to airplanes that are compliant with this service information.

FAA's Determination

The FAA is issuing this AD because it 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.

AD Requirements

This AD requires revising the AFM limitations section to add language restricting operations to Day VFR only, either by making a pen and ink change or by inserting a copy of this AD.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because intermittent loss of attitude, altitude, and airspeed information during flight could result in loss of control of the airplane in IMC or at night. The required corrective actions must be accomplished before further flight, which does not allow the time necessary for the public to comment and for publication of the final rule. Therefore, the FAA finds good cause that notice and opportunity for prior public comment are impracticable. In addition, for the reason stated above, the FAA finds that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, we invite you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under the **ADDRESSES** section. Include the Docket Number FAA–2020–0711 and Product Identifier MCAI–2020–00719–A at the beginning of your 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 we receive, 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 we receive about this final rule.

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 Mahmood Shah, Aerospace Engineer, Fort Worth ACO Branch, FAA, 10101 Hillwood Pkwy, Fort Worth, TX 76177. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Costs of Compliance

The FAA estimates that this AD affects 900 airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Revise Flight Manual	0.25 work-hour × $85.00 per hour = $21.25	$0.00	$21.25	$19,125.00

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 Flexibility Act

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

Regulatory Findings

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

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

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

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator,

the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–16–08 Aspen Avionics, Inc.: Amendment 39–21192; Docket No. FAA–2020–0723; Project Identifier AD–2020–00586–Q.

(a) Effective Date

This AD is effective August 17, 2020.

(b) Affected ADs

None.

(c) Applicability

(1) This AD applies to Aspen Avionics, Inc., Evolution Flight Display (EFD) EFD1000 Primary Flight Display part number (P/N) 910–00001–011, EFD1000 Multi-Function Display P/N 910–00001–012, and EFD1000 Emergency Backup Display P/N 910–00001–017 units that meet both conditions in paragraphs (c)(1)(i) and (ii) of this AD.

(i) Software version 2.10 or 2.10.1 is installed;

(ii) Independent attitude, altitude, and airspeed back-up instruments are not installed.

(2) These flight display units may be installed on, but are not limited to, the following airplanes, certificated in any category:

(i) Aermacchi S.p.A. Model S.205–18/F, S.205–18/R, S.205–20/F, S.205–20/R, S.205–22/R, S.208, and S.208A airplanes;

(ii) Aeronautica Macchi S.p.A. Model AL 60 (previously designated as Model LASA 60), AL 60–B, AL 60–C5, and AL 60–F5 airplanes;

(iii) Aerostar Aircraft Corporation Model PA–60–600 (Aerostar 600), PA–60–601 (Aerostar 601), PA–60–601P (Aerostar 601P), and PA–60–602P (Aerostar 602P) airplanes;

(iv) Alexandria Aircraft, LLC (type certificate previously held by Bellanca, Inc.), Model 14–19, 14–19–2, 14–19–3, 14–19–3A, 17–30, 17–30A, 17–31, 17–31A, 17–31ATC, and 17–31TC airplanes;

(v) American Champion Aircraft Corp. Model 402, 7ECA, 7GCAA, 7GCBC, 7KCAB, 8GCBC, and 8KCAB airplanes;

(vi) CEAPR (type certificate previously held by APEX) Model CAP 10 B airplanes;

(vii) Cirrus Design Corporation Model SR20 and SR22 airplanes;

(viii) Commander Aircraft Corporation (type certificate previously held by CPAC, Inc.) Model 112, 112B, 112TC, 112TCA, 114, 114A, 114B, and 114TC airplanes;

(ix) Consolidated Vultee Aircraft Corporation, Stinson Division Model V–77 (Army AT–19) airplanes;

(x) Cougar Aircraft Corporation (type certificate previously held by SOCATA, S.A.) Model GA–7 airplanes;

(xi) Diamond Aircraft Industries Inc. Model DA20–A1 and DA20–C1 airplanes;

(xii) Diamond Aircraft Industries Inc. (type certificate previously held by Diamond Aircraft Industries GmbH) Model DA 40 and DA 40 F airplanes;

(xiii) Discovery Aviation, Inc. (type certificate previously held by Liberty Aerospace Incorporated), Model XL–2 airplanes;

(xiv) Dynac Aerospace Corporation Model Aero Commander 100, Aero Commander 100A, Aero Commander 100–180, Volaire 10, and Volaire 10A airplanes;

(xv) EADS–PZL ''Warszawa-Okęcie'' S.A. (type certificate previously held by Panstwowe Zaklady Lotnicze) Model PZL–104 WILGA 80, PZL–104M WILGA 2000, PZL–104MA WILGA 2000, PZL–KOLIBER 150A, and PZL–KOLIBER 160A airplanes;

(xvi) Extra Flugzeugproduktions- und Vertriebs- GmbH (type certificate previously held by Extra Flugzeugbau GmbH) Model EA 300, EA 300/L, EA 300/S, EA 300/200, and EA 300/LC airplanes;

(xvii) Frakes Aviation Model G–44 (Army OA–14, Navy J4F–2), G–44A, and SCAN Type 30 airplanes;

(xviii) FS 2003 Corporation (type certificate previously held by The New Piper Aircraft, Inc.) Model PA–12 and PA–12S airplanes;

(xix) GROB Aircraft AG (type certificate previously held by GROB Aerospace GmbH i.l.) Model G115, G115A, G115B, G115C, G115C2, G115D, G115D2, G115EG, and G120A airplanes;

(xx) Helio Aircraft, LLC, Model H–250, H–295 (USAF U–10D), H–391 (USAF YL–24), H–391B, H–395 (USAF L–28A and U–10B), H–395A, H–700, H–800, HST–550, HST–550A (USAF AU–24A), and HT–295 airplanes;

(xxi) Interceptor Aviation Inc. (type certificate previously held by Interceptor Aircraft Corporation) Model 200, 200A, 200B, 200C, 200D, and 400 airplanes;

(xxii) Lockheed Martin Aeronautics Company Model 402–2 airplanes;

(xxiii) Maule Aerospace Technology, Inc. (type certificate previously held by Maule Aircraft Corporation), Model Bee Dee M–4, M–4, M–4C, M–4S, M–4T, M–4–180C, M–4–180S, M–4–180T, M–4–210, M–4–210C, M–4–210S, M–4–210T, M–4–220, M–4–220C, M–4–220S, M–4–220T, M–5–180C, M–5–200, M–5–210C, M–5–210TC, M–5–220C, M–5–235C, M–6–180, M–6–235, M–7–235, M–7–235A, M–7–235B, M–7–235C, M–7–260, M–7–260C, M–7–420A, M–7–420AC, M–8–235, MT–7–235, MT–7–260, MT–7–420, MX–7–160, MX–7–160C, MX–7–180, MX–7–180A, MX–7–180AC, MX–7–180B, MX–7–180C, MX–7–235, MX–7–420, MXT–7–160, MXT–7–180, and MXT–7–180A airplanes;

(xxiv) Mooney Aircraft Corporation Model M22 airplanes;

(xxv) Mooney International Corporation (type certificate previously held by Mooney Aviation Company, Inc.) Model M20, M20A, M20B, M20C, M20D, M20E, M20F, M20G, M20J, M20K, M20L, M20M, M20R, M20S, M20TN, M20U, and M20V airplanes;

(xxvi) Pacific Aerospace Ltd. (type certificate previously held by Found Aircraft Canada, Inc.) Model FBA–2C, FBA–2C1, and FBA–2C2 airplanes;

(xxvii) Pilatus Aircraft Ltd. Model PC–6, PC–6–H1, PC–6–H2, PC–6/350, PC–6/350–H1, PC–6/350–H2, PC6/A, PC–6/A–H1, PC–6/A–H2, PC–6/B–H2, PC–6/B1–H2, PC–6/B2–H2, PC–6/B2–H4, PC–6/C–H2, and PC–6/C1–H2 airplanes;

(xxviii) Piper Aircraft, Inc. (type certificate previously held by The New Piper Aircraft, Inc.), Model PA–18, PA–18 ''105'' (Special), PA–18 ''125'' (Army L–21A), PA–18 ''135'' (Army L–21B), PA–18 ''150,'' PA–18A, PA–18A ''135,'' PA–18A ''150,'' PA–18AS ''125,'' PA–18AS ''135,'' PA–18AS ''150,'' PA–18S, PA–18S ''105'' (Special), PA–18S ''125,'' PA–18S ''135,'' PA–18S ''150,'' PA–19 (Army L–18C), PA–19S, PA–20, PA–20 ''115,'' PA–20 ''135,'' PA–20S, PA–20S ''115,'' PA–20S ''135,'' PA–22, PA–22–108, PA–22–135, PA–22–150, PA–22–160, PA–22S–135, PA–22S–150, PA–22S–160, PA–23, PA–23–160, PA–23–235, PA–23–250, PA–24, PA–24–250, PA–24–260, PA–24–400, PA–28–140, PA–28–150, PA–28–151, PA–28–160, PA–28–161, PA–28–180, PA–28–181, PA–28–201T, PA–28–235, PA–28–236, PA–28R–180, PA–28R–200, PA–28R–201, PA–28R–201T, PA–28RT–201, PA–28RT–201T, PA–28S–160, PA–28S–180, PA–30, PA–32–260, PA–32–300, PA–32–301, PA–32–301FT, PA–32–301T, PA–32–301XTC, PA–32R–300, PA–32R–301 (HP), PA–32R–301 (SP), PA–32R–301T, PA–32RT–300, PA–32RT–300T, PA–32S–300, PA–34–200, PA–34–200T, PA–34–220T, PA–39, PA–40, PA–44–180, PA–44–180T, PA–46–310P, and PA–46–350P airplanes;

(xxix) Polskie Zaklady Lotnicze Spolka zo.o. (type certificate previously held by PZL MIELEC) Model PZL M26 01 airplanes;

(xxx) Revo, Incorporated Model Colonial C–1, Colonial C–2, Lake LA–4, Lake LA–4A, Lake LA–4P, Lake LA–4–200, and Lake Model 250 airplanes;

(xxxi) Robert E. Rust, Jr. (type certificate previously held by Robert E. Rust), Model DHC–1 Chipmunk Mk 21, DHC–1 Chipmunk Mk 22, and DHC–1 Chipmunk Mk 22A airplanes;

(xxxii) Sierra Hotel Aero, Inc. (type certificate previously held by Navion Aircraft LLC), Model Navion (Army L–17A), Navion A (Army L–17B and L–17C), Navion B, Navion D, Navion E, Navion F, Navion G, and Navion H airplanes;

(xxxiii) Slingsby Aviation Ltd. Model T67M260 and T67M260–T3A airplanes;

(xxxiv) SOCATA (type certificate previously held by Socata Groupe Aerospatiale) Model MS 880B, MS 885, MS 892A–150, MS 892E–150, MS 893A, MS 893E, MS 894A, MS 894E, Rallye 100S, Rallye 150ST, Rallye 150T, Rallye 235C, Rallye 235E, TB 9, TB 10, TB 20, TB 21, and TB 200 airplanes;

(xxxv) Spartan Aircraft Company Model 7W (Army UC–71) airplanes;

(xxxvi) SST FLUGTECHNIK GmbH Model EA 400 and EA 400–500 airplanes;

(xxxvii) Swift Museum Foundation, Inc. (type certificate previously held by Univair Aircraft Corporation), Model GC–1A and GC–1B airplanes;

(xxxviii) Symphony Aircraft Industries Inc. (type certificate previously held by Ostmecklenburgische Flugzeugbau GmbH), Model OMF–100–160 and SA 160 airplanes;

(xxxix) Textron Aviation Inc. (type certificate previously held by Cessna Aircraft Company) Model 120, 140, 140A, 150, 150A, 150B, 150C, 150D, 150E, 150F, 150G, 150H, 150J, 150K, 150L, 150M, 152, 170, 170A, 170B, 172, 172A, 172B, 172C, 172D, 172E, 172F (USAF T–41A), 172G, 172H (USAF T–41A), 172I, 172K, 172L, 172M, 172N, 172P, 172Q, 172R, 172RG, 172S, 175, 175A, 175B, 175C, 177, 177A, 177B, 177RG, 180, 180A, 180B, 180C, 180D, 180E, 180F, 180G, 180H, 180J, 180K, 182, 182A, 182B, 182C, 182D, 182E, 182F, 182G, 182H, 182J, 182K, 182L, 182M, 182N, 182P, 182Q, 182R, 182S, 182T, 185, 185A, 185B, 185C, 185D, 185E, 206, 206H, 207, 207A, 210, 210A, 210B, 210C, 210D, 210E, 210F, 210G, 210H, 210J, 210K, 210L, 210M, 210N, 210R, 210–5 (205), 210–5A (205A), 310, 310A (USAF U–3A), 310B, 310C, 310D, 310E (USAF U–3B), 310F, 310G, 310H, 310I, 310J, 310J–1, 310K, 310L, 310N, 310P, 310Q, 310R, 320, 320A, 320B, 320C, 320D, 320E, 320F, 320–1, 335, 336, 337, 337A, 337B, 340, 340A, A150K, A150L, A150M, A152, A185E, A185F, E310H, E310J, LC40–550FG, LC41–550FG, LC42–550FG, P172D, P206, P206A, P206B, P206C, P206D, P206E, P210N, P210R, R172E (USAF T–41B, USAF T–41C and D), R172F (USAF T–41D), R172G (USAF T–41C and D), R172H (USAF T–41D), R172J, R172K, R182, T182, T182T, T206H, T207, T207A, T210F, T210G, T210H, T210J, T210K, T210L, T210M, T210N, T210R, T303, T310P, T310Q, T310R, TP206A, TP206B, TP206C, TP206D, TP206E, TR182, TU206A, TU206B, TU206C, TU206D, TU206E, TU206F, TU206G, U206, U206A, U206B, U206C, U206D, U206E, U206F, and U206G airplanes;

(xl) Textron Aviation Inc. (type certificate previously held by Beechcraft Corporation), Model 19A, 23, 35, 35R, 35–33, 35–A33, 35–B33, 35–C33, 35–C33A, 36, 45 (YT–34), 50 (L–23A), 56TC, 58, 58A, 58P, 58PA, 58TC, 58TCA, 76, 95, 95–55, 95–A55, 95–B55, 95–B55A, 95–B55B (T–42), 95–C55, 95–C55A, A23, A23A, A23–19, A23–24, A24, A24R, A35, A36, A36TC, A45 (T–34A, B–45), A56TC, B19, B23, B24R, B35, B36TC, B50 (L–23B), B95, B95A, C23, C24R, C35, C50, D35, D45 (T–34B), D50 (L–23E), D50A, D50B, D50C, D50E, D50E–5990, D55, D55A, D95A, E33, E33A, E33C, E35, E50 (L–23D, RL–23D), E55, E55A, E95, F33, F33A, F33C, F35, F50, G33, G35, G50, H35, H50, J35, J50, K35, M19A, M35, N35, P35, S35, V35, V35A, and V35B airplanes;

(xli) The Boeing Company (type certificate previously held by Rockwell International) Model AT–6 (SNJ–2), AT–6A (SNJ–3), AT–6B, AT–6C (SNJ–4), AT–6D (SNJ–5), AT–6F (SNJ–6, SNJ–7), BC–1A, and T–6G airplanes;

(xlii) The King's Engineering Fellowship (TKEF) Model 44 airplanes;

(xliii) The Waco Aircraft Company Model YMF airplanes;

(xliv) Topcub Aircraft, Inc., Model CC18–180 and CC18–180A airplanes;

(xlv) True Flight Holdings LLC (type certificate previously held by Tiger Aircraft LLC) Model AA–1, AA–1A, AA–1B, AA–1C, AA–5, AA–5A, AA–5B, and AG–5B airplanes;

(xlvi) Twin Commander Aircraft LLC (type certificate previously held by Twin Commander Aircraft Corporation) Model 500, 520, 560, and 560A airplanes;

(xlvii) Univair Aircraft Corporation Model 108, 108–1, 108–2, 108–3, and 108–5 airplanes;

(xlviii) Viking Air Limited (type certificate previously held by Bombardier Inc. and deHavilland Inc.) Model DHC–2 Mk. I, DHC–2 Mk. II, and DHC–2 Mk. III airplanes;

(xlix) Vulcanair S.p.A. (type certificate previously held by Partenavia Costruzioni Aeronautiche S.p.A.) Model AP68TP–300 ''Spartacus,'' AP68TP–600 ''Viator,'' P.68, P.68 ''Observer,'' P.68 ''Observer 2,'' P.68B, P.68C, P.68C–TC, and P.68TC ''Observer'' airplanes;

(l) WSK PZL Mielec and OBR SK Mielec Model PZL M20 03 airplanes;

(li) W.Z.D. Enterprises Inc. (type certificate previously held by JGS Properties, LLC) Model 11A and 11E airplanes;

(lii) Zenair Ltd. Model CH2000 airplanes; and

(liii) Zlin Aircraft a.s. (type certificate previously held by Moravan a.s.) Model Z–143L and Z–242L airplanes.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 3410, FLIGHT ENVIRONMENT DATA; 3420, ATTITUDE AND DIRECTION DATA SYSTEM.

(e) Unsafe Condition

This AD was prompted by an automatic reset occurring when the display internal monitor detects a potential fault causing intermittent loss of airspeed, attitude, and altitude information during flight. The FAA is issuing this AD to address the software interacting with a graphics processing chip defect. The unsafe condition, if not addressed, could result in intermittent loss of airspeed, attitude, and altitude information during flight with consequent loss of airplane control.

(f) Compliance

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

(g) Required Actions

(1) Before further flight, revise the limitations section of the airplane flight manual (AFM) for your airplane by inserting a copy of this AD or by making a pen and ink change to add: ''Operation under Instrument Flight Rules (IFR) or night Visual Flight Rules (VFR) is prohibited.''

(2) The action required by paragraph (g)(1) of this AD may be performed by the owner/operator (pilot) holding at least a private pilot certificate and must be entered into the aircraft records showing compliance with this AD in accordance with 14 CFR 43.9(a)(1) through (4) and 14 CFR 91.417(a)(2)(v). The record must be maintained as required by 14 CFR 91.417. This authority is not applicable to aircraft being operated under 14 CFR part 119.

(h) Special Flight Permit

Special flight permits are prohibited.

(i) Alternative Methods of Compliance (AMOCs)

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

(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.

(j) Related Information

For more information about this AD, contact Mahmood Shah, Aerospace Engineer, Fort Worth ACO Branch, FAA, 10101 Hillwood Pkwy, Fort Worth, TX 76177; phone: 817–222–5133; fax: 817–222–5960; email: *mahmood.shah@faa.gov*.

Issued on July 24, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–16592 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2019–0932; Airspace Docket No. 19–ASO–24]

RIN 2120–AA66

Removal of Class E Airspace, and Amendment of Class D and Class E Airspace; Jacksonville, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action removes Class E airspace area designated as an extension to a Class D surface area for Cecil Airport, Jacksonville, FL, as the Cecil very high frequency omnidirectional range (VOR) has been decommissioned, and the VOR approach cancelled. This action also amends Class D and E airspace by updating the names and geographic coordinates of several airports located in and around Jacksonville, FL, and corrects the line between Cecil Airport and Whitehouse NOLF. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area. This action also makes an editorial change replacing the term Airport/Facility Directory with the term Chart Supplement in the legal descriptions of associated Class D airspace.

DATES: Effective 0901 UTC, November 5, 2020. The Director of the Federal

Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

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

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Ave., College Park, GA 30337; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rule regarding aviation safety if found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to insure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it removes Class E airspace at Cecil Airport, and amends Class D and E airspace in the Jacksonville, FL area to support IFR operations in the area.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (84 FR 68383, December 16, 2019) for Docket No. FAA–2019–0932 to remove Class E surface airspace designated as an extension to a Class D surface area at Cecil Airport due to the decommissioning of the Cecil VOR. The FAA also proposed to amend Class D airspace and Class E airspace extending upward from 700 feet or more above the surface by recognizing the name changes of Jacksonville NAS (Towers Field), (formerly Jacksonville NAS); and Mayport NS (ADM David L. McDonald Field), (formerly Mayport NAS); and Herlong Recreational Airport, (formerly Herlong Field); and Jacksonville Executive Airport at Craig, (formerly Craig Municipal Airport), Jacksonville, FL.

The NPRM also proposed amendment of the geographic coordinates of these airports, as well as Jacksonville International Airport and Whitehouse NOLF, and to replace the outdated term Airport/Facility Directory with the term Chart Supplement in the associated Class D airspace legal descriptions for these airports.

Also, subsequent to publication of the NPRM, the FAA found the geographic coordinates of Cecil Airport and the line between Cecil Airport and Whitehouse NOLF was incorrect. This action corrects that error.

Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class D airspace designations, Class E airspace areas designated as an extension to a Class D or E surface area, and Class E airspace extending upward from 700 feet or more above the surface are published in Paragraphs 5000, 6004, and 6005, respectively of FAA Order 7400.11D, dated August 8, 2019, and effective September 15, 2019, which is incorporated by reference in 14 CFR 71.1. The Class D and Class E airspace designations listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends 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 routes, and reporting points.

The Rule

This amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 removes Class E surface airspace designated as an extension to a Class D surface area at Cecil Airport due to the decommissioning of the Cecil VOR, and cancellation of the VOR approach. The FAA also amends Class D airspace and Class E airspace extending upward from 700 feet or more above the surface by recognizing the name changes of Jacksonville NAS (Towers Field), and Mayport NS (ADM David L. McDonald Field), and Herlong Recreational Airport, and Jacksonville Executive Airport at Craig, Jacksonville, FL. Also, the geographic coordinates of these airports and Jacksonville International Airport and Whitehouse NOLF are adjusted to coincide with the FAA's aeronautical database. These changes are necessary for continued safety and management of IFR operations at these airports. In addition, the FAA replaces the outdated tem Airport/Facility Directory with the term Chart Supplement in the associated Class D airspace legal descriptions for these airports.

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

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. 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 as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures an air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 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, effective September 15, 2019, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

ASO FL D Jacksonville Cecil Airport, FL [New]

Cecil Airport, FL
(Lat. 30°13′08″ N, long. 81°52′38″ W)
Jacksonville NAS (Towers Field), FL
(Lat. 30°14′01″ N, long. 81°40′34″ W)
Whitehouse NOLF, FL
(Lat. 30°20′58″ N, long. 81°52′01″ W)
Herlong Recreational Airport, FL
(Lat. 30°16′40″ N, long. 81°48′21″ W)

That airspace extending upward from the surface to and including 2,600 feet MSL, within a 4.3-mile radius of Cecil Airport; excluding that airspace within the Jacksonville NAS (Towers Field) Class D airspace area, excluding that airspace north of a line from lat. 30°17′11″ N, long. 81°54′24″ W to lat. 30°16′58″ N, long. 81°50′24″ W, which abuts the Whitehouse NOLF Class D airspace, and excluding that airspace within a 1.8-mile radius of Herlong Recreational Airport. This Class D airspace area is effective during the specific days and times established in advance by a Notice to Airmen. The effective days and times will thereafter be continuously published in the Chart Supplement.

ASO FL D Jacksonville Whitehouse NOLF, FL [Amended]

Whitehouse NOLF, FL
(Lat. 30°20′58″ N, long. 81°52′01″ W)
Cecil Airport, FL
(Lat. 30°13′08″ N, long. 81°52′38″ W)
Herlong Recreational Airport, FL
(Lat. 30°16′40″ N, long. 81°48′21″ W)

That airspace extending upward from the surface to and including 2,600 feet MSL, within a 4.3-mile radius of Whitehouse NOLF, excluding that airspace within a 1.8-mile radius of Herlong Recreational Airport and that airspace south of a line from lat. 30°17′11″ N, long. 81°54′24″ W to lat. 30°16′58″ N, long. 81°50′24″ W, which abuts the Jacksonville Cecil Airport Class D airspace. This Class D airspace area is effective during the specific days and times established in advance by a Notice to Airmen. The effective days and times will thereafter be continuously published in the Chart Supplement.

ASO FL D Jacksonville Executive Airport at Craig, FL [New]

Jacksonville Executive Airport at Craig, FL
(Lat. 30°20′11″ N, long. 81°30′52″ W)
Mayport NS (ADM David L McDonald Field), FL
(Lat. 30°23′29″ N, long. 81°25′28″ W)

That airspace extending upward from the surface to and including 2,500 feet MSL within a 4.2-mile radius of Jacksonville Executive Airport at Craig; excluding the portion northeast of a line connecting the 2 points of intersection with a 4.2-mile radius circle centered on Mayport NS (ADM David L McDonald Field). This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

ASO FL D Jacksonville Cecil Field, FL [Removed]

ASO FL D Jacksonville Craig Municipal Airport, FL [Removed]

Paragraph 6004 Class E Airspace Designated as an Extension to Class D or E Surface Area.

* * * * *

ASO FL E4 Jacksonville Cecil Field, FL [Removed]

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ASO FL E5 Jacksonville, FL [Amended]

Jacksonville International Airport, FL
(Lat. 30°29′39″ N, long. 81°41′16″ W)
Jacksonville NAS (Towers Field), FL
(Lat. 30°14′01″ N, long. 81°40′34″ W)
Cecil Airport, FL
(Lat. 30°13′08″ N, long. 81°52′38″ W)
Jacksonville Executive Airport at Craig, FL
(Lat. 30°20′11″ N, long. 81°30′52″ W)
Mayport NS (ADM David L. McDonald Field), FL
(Lat. 30°23′29″ N, long. 81°25′28″ W)
Whitehouse NOLF, FL
(Lat. 30°20′58″ N, long. 81°52′01″ W)

That airspace extending upward from 700 feet above the surface within a 10-mile radius of Jacksonville International Airport and within the 7-mile radius, respectively, of Jacksonville NAS (Towers Field), Cecil Airport, Jacksonville Executive Airport at Craig, Mayport NS (ADM David L McDonald Field), and Whitehouse NOLF.

Issued in College Park, Georgia, on July 22, 2020.

Andreese C. Davis,

Manager, Airspace & Procedures Team South, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2020–16292 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0192; Airspace Docket No. 20–AEA–3]

RIN 2120–AA66

Amendment of Class E Airspace; Glens Falls, NY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E surface airspace, and Class E airspace extending upward from 700 feet above the surface at Floyd Bennett Memorial Airport, (previously Warren County Airport), Glens Falls, NY due to the decommissioning of the Glens Falls very high frequency omnidirectional range collocated tactical air navigation (VORTAC) system, and cancellation of associated approaches. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area. This action also updates the airport's name.

DATES: Effective 0901 UTC, November 5, 2020. The Director of the Federal Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

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

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Ave, College Park, GA 30337; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION: July 31, 2020

Authority for This Rulemaking

The FAA's authority to issue rule regarding aviation safety if found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to insure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends Class E airspace in Glens Falls, NY to support IFR operations in the area.

History

The FAA published a notice of prosed rulemaking in the **Federal Register** (85 FR 21793, April 20, 2020) for Docket No. FAA–2020–0192 to amend Class E surface airspace and Class E airspace extending upward from 700 feet or more above the surface at Floyd Bennett Memorial Airport, Glens Falls, NY, due to the decommissioning of the Glens Falls VORTAC, and cancellation of the associated approaches.

The NPRM also proposed to update the airport's name. Also, subsequent to publication of the NPRM, the FAA found the Class E surface description contained unnecessary verbiage. On page 21795, column 1, line 24, the number 124 was inadvertently entered in the middle of the word 'from'. This action corrects that error. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received that were associated to this action.

Class E airspace designations are published in Paragraphs 6002, and 6005, respectively of FAA Order 7400.11D, dated August 8, 2019, and effective September 15, 2019, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends 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 routes, and reporting points.

The Rule

This amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 amends Class E surface airspace and Class E airspace extending upward from 700 feet above the surface at Floyd Bennett Memorial Airport, Glens Falls, NY, due to the decommissioning of the Glens Falls VORTAC, and the cancellation of the associated approaches. In addition, the FAA is updating the airport's name.

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

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. 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 as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures an air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air)

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 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, effective September 15, 2019, is amended as follows:

Paragraph 6002 Class E Surface Airspace.

* * * * *

AEA NY E2 Glens Falls, NY [Amended]

Floyd Bennett Memorial Airport, NY
(Lat. 43°20′28″ N, long. 73°36′37″ W)

That airspace extending upward from the surface within a 4-mile radius of the Floyd Bennett Memorial Airport extending clockwise from a 357° bearing to a 275° bearing from the airport and within a 9.6-mile radius of the Floyd Bennett Memorial Airport extending clockwise from a 275° bearing to a 307° bearing from the airport and within a 6.6-mile radius of the Floyd Bennett Memorial Airport extending clockwise from a 307° bearing to a 357° bearing from the airport, and within 2 miles each side of a 121° bearing extending from the airport to 10-miles southeast of the airport.

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AEA NY E5 Glens Falls, NY [Amended]

Floyd Bennett Memorial Airport, NY
(Lat. 43°20′28″ N, long. 73°36′37″ W)

That airspace extending upward from 700 feet above the surface within a 12.3-mile radius of Floyd Bennett Memorial Airport extending clockwise from a 050° bearing to a 220° bearing from the airport and within a 16.1-mile radius of the airport extending clockwise from a 220° bearing to a 050° bearing from the airport.

Issued in College Park, Georgia, on July 22, 2020.

Andreese C. Davis,

Manager, Airspace & Procedures Team South, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2020–16297 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0352; Airspace Docket No. 18–AAL–4]

RIN 2120–AA66

Amendment of Class E Airspace; Sitka, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies Class E airspace, designated as a surface area, at Sitka Rocky Gutierrez Airport, Sitka, AK. This action also establishes a Class E airspace area, designated as an extension to a Class D or Class E surface area. Additionally, this action modifies Class E airspace extending upward from 700 feet above the surface. Further, this action revokes Class E airspace extending upward from 1,200 feet above the surface. Lastly, this action implements several administrative amendments to the airspace legal descriptions.

DATES: Effective 0901 UTC, November 5, 2020. The Director of the Federal Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

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

FOR FURTHER INFORMATION CONTACT: Matthew Van Der Wal, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S. 216th Street, Des Moines, WA 98198; telephone (206) 231–3695.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends Class E airspace at Sitka Rocky Gutierrez Airport, Sitka, AK, to ensure the safety and management of Instrument Flight Rules (IFR) operations at the airport.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (85 FR 27172; May 7, 2020) for Docket No. FAA–2020–0352 to amend Class E airspace at Sitka Rocky Gutierrez Airport, Sitka, AK. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E2, E4, and E5 airspace designations are published in paragraphs 6002, 6004, and 6005, respectively, of FAA Order 7400.11D, dated August 8, 2019, and effective September 15, 2019, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

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

The Rule

This amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 modifies Class E airspace, designated as a surface area, at Sitka Rocky Gutierrez Airport, Sitka, AK. This area is described as follows: That airspace extending upward from the surface within a 4.1-mile radius of Sitka Rocky Gutierrez Airport, and within 1.5 miles each side of the 209° bearing from the airport, extending from the 4.1-mile radius to 4.4 miles southwest of Sitka Rocky Gutierrez Airport.

This action also establishes Class E airspace area, designated as an extension to a Class D or Class E surface area, at the airport. This area is described as follows: That airspace extending upward from the surface within 4 miles north and 8 miles south of the 315° bearing from the airport, extending from 0.9 miles northwest of the airport to 28.3 miles northwest of the Sitka Rocky Gutierrez Airport.

Additionally, this action modifies Class E airspace extending upward from 700 feet above the surface. This area is described as follows: That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of the airport, and within 5 miles each side of the 216° bearing from the airport, extending from the 6.6-mile radius to 26 miles southwest of the Sitka Rocky Gutierrez Airport; excluding that airspace extending beyond 12 miles from the coast.

Further, this action revokes Class E airspace extending upward from 1,200 feet above the surface. This airspace is wholly contained within the Alaska southeast en route area and duplication is not necessary.

Lastly, this action implements several administrative amendments to the airspace legal descriptions. The airport's geographic coordinates are updated to lat. 57°02′49″ N, long. 135°21′40″ W. The following two sentences are removed from the Class E surface area legal description ''This Class E airspace area is effective during specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.''

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

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial, and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air

traffic procedures and air navigation, it is certified that this rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

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

Paragraph 6002 Class E Airspace Areas Designated as a Surface Area.

* * * * *

AAL AK E2 Sitka, AK [Amended]

Sitka Rocky Gutierrez Airport, AK
(Lat. 57°02′49″ N, long. 135°21′40″ W)

That airspace extending upward from the surface within a 4.1 mile radius of Sitka Rocky Gutierrez Airport, and within 1.5 miles each side of the 209° bearing from the airport, extending from the 4.1-mile radius to 4.4 miles southwest of the Sitka Rocky Gutierrez Airport.

Paragraph 6004 Class E Airspace Areas Designated as an Extension to a Class D or Class E Surface Area.

* * * * *

AAL AK E4 Sitka, AK [New]

Sitka Rocky Gutierrez Airport, AK
(Lat. 57°02′49″ N, long. 135°21′40″ W)

That airspace extending upward from the surface within 4 miles north and 8 miles south of the 315° bearing from the airport, extending from 0.9 miles northwest of the airport to 28.3 miles northwest of the Sitka Rocky Gutierrez Airport.

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AAL AK E5 Sitka, AK [Amended]

Sitka Rocky Gutierrez Airport, AK
(Lat. 57°02′49″ N, long. 135°21′40″ W)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of the airport, and within 5 miles each side of the 216° bearing from the airport, extending from the 6.6-mile radius to 26 miles southwest of the Sitka Rocky Gutierrez Airport; excluding that airspace extending beyond 12 miles from the coast.

Issued in Seattle, Washington, on July 22, 2020.

B.G. Chew,

Acting Group Manager, Western Service Center, Operations Support Group.

[FR Doc. 2020–16314 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 740

[Docket No. 200718–0196]

RIN 0694–AI14

Revision to the Export Administration Regulations: Suspension of License Exceptions for Hong Kong

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: The Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) to suspend the availability of all License Exceptions for Hong Kong that provide differential treatment as compared to those available to the People's Republic of China (PRC). As announced on BIS's website on June 30, 2020, these License Exceptions are no longer available for exports and reexports to Hong Kong, and transfers within Hong Kong, of all items subject to the EAR. BIS is taking this action as part of revised U.S. policy toward Hong Kong in response to the newly imposed security measures on Hong Kong by the Chinese Communist Party. These new security measures undermine Hong Kong's autonomy and thereby increase the risk that sensitive U.S. technology and items will be illegally diverted to unauthorized end uses and end users in the PRC or to unauthorized destinations such as Iran or North Korea. This rule includes saving clauses for items, including for deemed exports.

DATES: This rule is effective July 31, 2020.

FOR FURTHER INFORMATION CONTACT: Patricia Muldonian, Office of National Security and Technology Transfer Controls, *patricia.muldonian@bis.doc.gov.*

SUPPLEMENTARY INFORMATION: The Chinese Communist Party of the People's Republic of China (PRC) has imposed new measures that undermine Hong Kong's autonomy. As a result, the United States Government (USG) has revised its policy toward Hong Kong, including treatment of Hong Kong under the EAR. Undermining Hong Kong's autonomy increases the risk that sensitive U.S. technology and items will be illegally diverted to unauthorized end uses and end users in the PRC or to unauthorized destinations such as Iran or North Korea.

As the USG finds that it can no longer distinguish between the export of controlled items to Hong Kong and the PRC, the United States is removing eligibility for License Exceptions for exports or reexports to, or transfers within, Hong Kong that are not available for exports and reexports to the PRC or transfers within the PRC. This action targets the PRC regime, not residents of Hong Kong. The Bureau of Industry and Security (BIS), in consultation with other executive branch agencies, continues to review the EAR to assess whether additional amendments are warranted.

Amendments to the EAR

In this final rule, BIS amends the Export Administration Regulations, 15 CFR parts 730–774 (EAR), to suspend the availability of the License Exceptions for exports and reexports to Hong Kong, and transfers within Hong Kong of all items subject to the EAR that provide differential treatment from the license exceptions available to the PRC.

BIS is taking this action pursuant to § 740.2(b) of the EAR (15 CFR 740.2(b)), which provides that all License Exceptions are subject to revision, suspension, or revocation, in whole or in part, without notice. The following License Exceptions are suspended to the extent they allow exports or reexports to or from Hong Kong, or transfers within Hong Kong, when they may not be used for exports or reexports to the PRC, or transfers within the PRC:

(1) Shipments of Limited Value (LVS) (§ 740.3);
(2) Shipments to Group B Countries (GBS) (§ 740.4);
(3) Technology and Software under Restriction (TSR) (§ 740.6);
(4) Computers, Tier 1 only (APP) (§ 740.7(c));
(5) Temporary Imports, Exports, Reexports, and Transfers (in-country) (TMP) (§ 740.9(a)(11), (b)(2)(ii)(C, and (b)(5));
(6) Servicing and Replacement Parts and Equipment (RPL) (§ 740.10(a)(3)(viii), (a)(4), (b)(1) except as permitted to Country Group D:5, and (b)(3)(i)(F) and (ii)(C));
(7) Governments (GOV) (§ 740.11(c)(1)—Cooperating Governments only));
(8) Gift Parcels and Humanitarian Donations (GFT) (§ 740.12);
(9) Technology and Software Unrestricted (TSU) (§ 740.13);
(10) Baggage (BAG) (§ 740.14) (except as permitted by § 740.14(d));
(11) Aircraft, Vessels, and Spacecraft (AVS) (§ 740.15(b)(1), (b)(2), (c));
(12) Additional Permissive Reexports (APR) (§ 740.16(a) and (j)); and
(13) Strategic Trade Authorization (STA) (§ 740.20(c)(2)).

Reexports of items subject to the EAR from Hong Kong under License Exception APR § 740.16(a) are also restricted.

In this final rule, BIS also amends paragraph (a) of § 740.2—Restrictions on all License Exceptions—by adding a new paragraph (a)(23) to identify the suspension of the availability of these License Exceptions for exports to Hong Kong, reexports to and from Hong Kong, and transfers within Hong Kong of all items subject to the EAR.

A License Exception is an authorization contained in Part 740 of the EAR that allows exports, reexports, or transfers (in-country) under stated conditions of items subject to the EAR that would otherwise require a license. This includes License Exception APR which was previously also available for reexports from Hong Kong.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA), 50 U.S.C. Sections 4801–4852. ECRA provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule.

Rulemaking Requirements

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been designated significant under Executive Order 12866. This final rule will protect the national security and foreign policy objectives of the United States by addressing the increased risk of illegal diversion of sensitive U.S. technology and other items to unauthorized end uses and end users in China or to unauthorized destinations such as Iran or North Korea.

This final rule is not subject to the requirements of Executive Order 13771 (82 FR 9339; February 3, 2017) because it is issued with respect to a national security function of the United States. The cost-benefit analysis required pursuant to Executive Orders 12866 and 13563 indicates that this rule is intended to improve national security as its primary direct benefit. Specifically, suspending license exceptions for Hong Kong serves U.S. national security interests and foreign policy objectives. Accordingly, this rule meets the requirements set forth in the April 5, 2017 OMB guidance implementing Executive Order 13771, regarding what constitutes a regulation issued ''with respect to a national security function of the United States,'' and is, therefore, exempt from the requirements of Executive Order 13771.

This rule does not contain policies with federalism implications as that term is defined under Executive Order 13132.

Paperwork Reduction Act Requirements

Notwithstanding any other provision of law, no person may be required to respond to or be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves collections currently approved by OMB under control numbers 0694–0088, Simplified Network Application Processing System, and 0694–0137, License Exceptions and Exclusions. These collections include, among other things, license applications, which carries a burden estimate of 42.5 minutes for a manual or electronic submission for a total burden estimate of 31,878 hours. This rule is expected to increase the number of licenses required as license exception availability is suspended, including for deemed exports and reexports, but this increase is not expected to exceed the existing estimates currently associated with OMB control number 0694–0088. A minimal decrease in burden is expected for 0694–0137.

Administrative Procedure Act and Regulatory Flexibility Act Requirements

Pursuant to section 1762 of the Export Control Reform Act of 2018 (50 U.S.C. 4801–4852), which was included in the John S. McCain National Defense Authorization Act for Fiscal Year 2019, this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

Savings Clauses

Shipments of items that are removed from eligibility for a License Exception as a result of this action and were on dock for loading, on lighter, laden aboard an exporting or transferring carrier, or en route aboard a carrier to a port of export or reexport on June 30, 2020, pursuant to actual orders for export to Hong Kong, reexport to or from Hong Kong, or transfer within Hong Kong, may proceed to their destination under the previous License Exception eligibility.

Similarly, the deemed export/reexport transactions involving Hong Kong persons authorized under License Exception eligibility prior to June 30, 2020, may continue to be authorized under such provision until August 28, 2020, after which such transactions will require a license. Exporters, re-exporters, or transferors (in-country) availing themselves of this 60-day savings clause must maintain documentation demonstrating that the Hong Kong national was hired and provided access to technology eligible for Hong Kong under part 740 prior to June 30, 2020.

List of Subjects

15 CFR Part 740

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

Accordingly, part 740 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

PART 740—LICENSE EXCEPTIONS

■ 1. The authority citation for part 740 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 7201 *et seq.;* E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 2. Section 740.2 is amended by revising paragraphs (a)(12) and (13) introductory text and by adding new paragraph (a)(23) to read as follows:

§ 740.2 Restrictions on all License Exceptions.

(a) * * *

(12) The item is described in a 9x515 or ''600 series'' ECCN and is destined to, shipped from, or was manufactured in a destination listed in Country Group D:5 or Hong Kong (see Supplement No. 1 to part 740 of the EAR), except that:

* * * * *

(13) ''600 series'' items that are controlled for missile technology (MT) reasons may not be exported, reexported, or transferred (in-country) under License Exception STA (§ 740.20 of the EAR). Items controlled under ECCNs 9D610.b, 9D619.b, 9E610.b, or 9E619.b or .c are not eligible for license exceptions except for License Exception GOV (§ 740.11(b)(2) of the EAR). Only the following license exceptions may be used to export ''600 series'' items to destinations other than those identified in Country Group D:5 or Hong Kong (see Supplement No. 1 to part 740 of the EAR):

* * * * *

(23) The item is subject to the EAR and is for export to Hong Kong, reexport to Hong Kong or transfer (in-country) within Hong Kong under License Exceptions LVS—Shipments of Limited Value (§ 740.3); GBS—Shipments to Group B Countries (§ 740.4); TSR—Technology and Software under Restriction (§ 740.6); APP—Computers, Tier 1 only (§ 740.7(c)); TMP Temporary Imports, Exports, Reexports, and Transfers (in-country)—(§ 740.9(a)(11) and (b)(2)(ii)(C) and (b)(5) only); RPL—Servicing and Replacement Parts and Equipment (§ 740.10(a)(3)(viii), (a)(4), (b)(1) except as permitted to Country Group D:5, and (b)(3)(i)(F) and (ii)(C) only); GOV—Cooperating Governments only (§ 740.11(c)(1)); GFT—Gift Parcels (except as permitted by § 740.12(a)(3)); TSU Technology and Software Unrestricted—only § 740.13(f); BAG—Baggage (except as permitted by § 740.14(d)); AVS Aircraft, Vessels, and Spacecraft—(§ 740.15(b)(1), (b)(2), (c), and (f) only); APR—Additional Permissive Reexports (§ 740.16(a) and (j)); and STA—Strategic Trade Authorization (§ 740.20). Reexports of items subject to the EAR from Hong Kong under License Exception APR § 740.16(a) are also restricted.

* * * * *

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2020–16278 Filed 7–30–20; 8:45 am]

BILLING CODE 3510–33–P

CONSUMER PRODUCT SAFETY COMMISSION

[Docket No. CPSC–2012–0068]

16 CFR Part 1225

Safety Standard for Hand-Held Infant Carriers

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule; delay of effective date.

SUMMARY: On May 20, 2020, the Consumer Product Safety Commission (Commission, or CPSC) issued a direct final rule revising the CPSC's mandatory standard for hand-held infant carriers to incorporate by reference the most recent version of the applicable ASTM standard. We are publishing this final rule to delay the effective date of the CPSC's mandatory standard for hand-held infant carriers, due to the COVID–19 pandemic.

DATES: The effective date for the direct final rule published on May 20, 2020, at 85 FR 30605, is delayed from August 3, 2020, until January 1, 2021.

FOR FURTHER INFORMATION CONTACT: Keysha L. Walker, Compliance Officer, Office of Compliance and Field Operations, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814–4408; telephone: 301–504–6820; email: *kwalker@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

On May 20, 2020, the Commission published a direct final rule (DFR), revising 16 CFR part 1225, the CPSC's mandatory standard for hand-held infant carriers, to incorporate by reference the most recent version of the applicable ASTM standard, ASTM F2050–19, *Standard Consumer Safety Specification for Hand-Held Infant Carriers. See* 85 FR 30605. The DFR was originally set to become effective by operation of law on August 3, 2020, unless the Commission received a significant adverse comment by June 19, 2020.

Since Commission approval of the DFR in April 2020, Executive Order (E.O.) 13924, ''Regulatory Relief to Support Economic Recovery,'' was issued on May 19, 2020. 85 FR 31385. E.O. 13924 encourages federal agencies to address the economic consequences of COVID–19 ''by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery, consistent with applicable law and with protection of the public health and safety.''

B. Delaying the Effective Date of the Rule

CPSC received two comments in response to the DFR notice. Neither comment is considered to be a ''significant adverse comment.'' [1] However, one commenter, who was anonymous, noted that in the last few months, the pandemic has ''caused drastic changes in consumer behavior and manufacturing capabilities, including reduced sales and otherwise unforeseen production stoppages.'' The commenter stated: ''As a consequence, inventory levels of some previously ordered components have been extended further into the year than typical. Lead times for new material have also increased as manufacturers struggle to return to pre-pandemic production output capabilities.'' The commenter recommends the effective date should be pushed back, ''perhaps as far as to the end of the calendar year, to allow manufacturers more time to use up existing inventory before implementing the required changes.''

[1] The Commission considers a significant adverse comment to be ''one where the commenter explains why the rule would be inappropriate,'' including an assertion challenging ''the rule's underlying premise or approach,'' or a claim that the rule would be ''ineffective or unacceptable without change.'' 60 FR 43108, 43111. One commenter asserted that the incorporation by reference process does not allow the public free access to the law without paying for the incorporated voluntary standard. CPSC did not consider that comment to be a significant adverse comment because a copy of the standard can be inspected at the National Archives and Records Administration, or at the CPSC, and a read-only copy of the standard will be available for viewing on the ASTM website at *www.astm.org/READINGLIBRARY.*

This comment is not a considered a significant adverse comment because it does not challenge the premise or purpose of the underlying rule. Nevertheless, the Commission recognizes that as a result of the COVID–19 pandemic, disruptions in the U.S. economy may limit manufacturers' ability to comply with the new labeling requirements of ASTM F2050–19.

CPSC staff conducted a review of the safety impact of delaying the effective date for the revised hand-held infant carriers' standard. As detailed in the staff briefing package for the DFR,[2] staff determined that the changes made by ASTM F2050–19 were either neutral or improved the safety for hand-held infant carriers. Based on staff's findings, the Commission allowed the revised voluntary standard to become the consumer product safety standard for hand-held infant carriers. The substantive changes adopted by the Commission include:

- Exempting hand-held bassinets/cradles from the requirement to display a ''NEVER leave child unattended'' warning message;
- Changing the definition of ''hand-held'' infant carriers to include ''semi-rigid'' infant carriers within the scope of the standard; and
- Including a new warning icon and warning statement regarding the fall hazard with shopping cart use to be included in instructional literature.

Staff's review of the impact on safety of delaying the effective date indicates that the above changes to the standard could be delayed until the end of the calendar year, consistent with the protection of public health and safety. Continuing to display a ''NEVER leave child unattended'' warning message would not adversely impact safety. Delaying the expansion of the definition of ''hand-held'' infant carrier in the voluntary standard does not reduce safety because ''semi-rigid'' infant carriers are already included in CPSC's mandatory standard, 16 CFR 1225(b)(1); the effect of the change to the voluntary standard is to match the current mandatory standard's definition. Finally, although the requirement for including the new shopping cart fall hazard warning in instructional literature would be delayed, shopping carts that meet ASTM F2372–15, *Standard Consumer Safety Performance Specification for Shopping Carts,* will still be required to display the on-product warning, often on the seat flap, providing an important safety message addressing the same hazard as the new hazard warning in the voluntary standard.

Based on staff's safety assessment that indicates delaying the effective date will not adversely impact safety, and the direction in E.O. 13294 to address the economic consequences of COVID–19, the Commission is delaying the effective date of the hand-held carriers' standard until January 1, 2021. The delayed effective date should provide manufacturers that are not already compliant with the new standard the necessary time to comply with the new labeling requirement of the revised hand-held carriers' standard without negatively impacting the safety of hand-held infant carriers.

C. The APA and Good Cause Finding

The Commission is issuing this final rule without an additional opportunity for public comment. Pursuant to section 553(b)(3)(B) of the Administrative Procedure Act (APA), general notice and the opportunity for public comment are not required with respect to a rulemaking when an ''agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' [3]

As a result of this rule, the DFR published by the Commission on May 20, 2020, which revised the Commission's standard for hand-held infant carriers, will not be reflected in the Code of Federal Regulations until January 1, 2021. The COVID–19 pandemic has disrupted economic activity in the United States. E.O. 13294 urges federal agencies to take actions to reduce regulatory burdens that arise as a result of the pandemic ''consistent with applicable law and with protection of the public health and safety.'' As previously discussed in section B of the preamble, manufacturers may be handicapped in their ability to comply with the new labeling requirements of the revised hand-held carriers' standard by the August 3, 2020 effective date set in the DFR. Therefore, the Commission has determined that delaying the effective date until January 1, 2021 is warranted, because delaying the effective date will not have an adverse impact on public health and safety, and as encouraged by E.O. 13924, it will help reduce regulatory burdens exacerbated by the pandemic. Delaying the effective date until January 1, 2021 will allow manufacturers to come into compliance with the new labeling requirements in the hand-held carriers' standard while providing regulatory relief to manufacturers impacted by the COVID–19 pandemic. Because of the short time frame until the original August 3, 2020 effective date is scheduled to go into effect, and for the reasons discussed above, the Commission finds that there is good cause consistent with the public interest to issue the rule without advance notice and comment.[4]

The APA generally requires a 30-day delayed effective date for final rules, except for: (1) Substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.[5] The Commission believes that the public interest is best served by having this final rule become effective immediately upon publication in the **Federal Register**, instead of the usual 30-day delayed effective date normally required by the APA. Therefore, the Commission finds that there is good cause to delay the effective date of the previously approved change to 16 CFR part 1225 of the Commission's standard, for the reasons noted above.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that agencies review proposed and final rules for their potential economic impact on small entities, including small businesses, and prepare regulatory flexibility analyses. 5 U.S.C. 603 and 604. The RFA applies to any rule that is subject to notice and comment procedures under section 553 of the APA. *Id.* As discussed previously, consistent with section 553(b)(B) of the APA, the Commission has determined for good cause that general notice and opportunity for public comment is unnecessary. Thus, the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply.

However, the Commission is extending the effective date because economic disruptions affecting inventory levels could potentially affect a subset of manufacturers, although the exact number is not known. Although the cost to firms of having to dispose of an inventory of out-of-date printed instructions is probably low as a percent of their total costs or their total revenue, extending the effective date of the rule may provide some relief to manufacturers who may face delays in having new materials printed due to backlogs in print shops or because of

[2] *https://cpsc.gov/s3fs-public/ASTM%27s%20Revisions%20to%20Safety%20Standard%20for%20Hand-Held%20Infant%20Carriers.pdf.*

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

[4] 5 U.S.C. 553(b)(3)(B); 553(d)(3).

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

local stay-at-home restrictions or other delays related to the COVID–19 pandemic. The additional time will allow manufacturers to come into compliance with the new requirements as they deplete their inventory of non-compliant materials.

E. Paperwork Reduction Act

The standard for hand-held infant carriers contains information-collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The revisions made no changes to that section of the standard. Thus, the revisions will have no effect on the information-collection requirements related to the standard.

F. Environmental Considerations

The Commission's regulations provide a categorical exclusion for the Commission's rules from any requirement to prepare an environmental assessment or an environmental impact statement where they ''have little or no potential for affecting the human environment.'' 16 CFR 1021.5(c)(2). This rule falls within the categorical exclusion, so no environmental assessment or environmental impact statement is required.

G. Preemption

Section 26(a) of the CPSA, 15 U.S.C. 2075(a), provides that where a consumer product safety standard is in effect and applies to a product, no state or political subdivision of a state may either establish or continue in effect a requirement dealing with the same risk of injury unless the state requirement is identical to the federal standard. Section 26(c) of the CPSA also provides that states or political subdivisions of states may apply to the CPSC for an exemption from this preemption under certain circumstances. Section 104(b) of the CPSIA deems rules issued under that provision ''consumer product safety rules.'' Therefore, once a rule issued under section 104 of the CPSIA takes effect, it will preempt in accordance with section 26(a) of the CPSA.

H. The Congressional Review Act

The Congressional Review Act (CRA; 5 U.S.C. 801–808) states that, before a rule may take effect, the agency issuing the rule must submit the rule, and certain related information, to each House of Congress and the Comptroller General. 5 U.S.C. 801(a)(1). The submission must indicate whether the rule is a ''major rule.'' The CRA states that the Office of Information and Regulatory Affairs (OIRA) determines whether a rule qualifies as a ''major rule.'' Pursuant to the CRA, this rule does not qualify as a ''major rule,'' as defined in 5 U.S.C. 804(2). To comply with the CRA, the Office of the General Counsel will submit the required information to each House of Congress and the Comptroller General.

Alberta E. Mills,

Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 2020–16137 Filed 7–30–20; 8:45 am]

BILLING CODE 6355–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2019–0183; FRL–10008–04]

Trichoderma atroviride Strain SC1; Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of *Trichoderma atroviride* strain SC1 in or on all food commodities when used in accordance with label directions and good agricultural practices. Bi-PA nv submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of *Trichoderma atroviride* strain SC1 in or on all food commodities under FFDCA.

DATES: This regulation is effective July 31, 2020. Objections and requests for hearings must be received on or before September 29, 2020 and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2019–0183, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805.

Please note that due to the public health emergency the EPA Docket Center (EPA/DC) and Reading Room was closed to public visitors on March 31, 2020. Our EPA/DC staff will continue to provide customer service via email, phone, and webform. For further information on EPA/DC services, docket contact information and the current status of the EPA/DC and Reading Room, please visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Robert McNally, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *BPPDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–

OPP–2019–0183 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before September 29, 2020. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2019–0183, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Background

In the **Federal Register** of June 7, 2019 (84 FR 26630) (FRL–9993–93), EPA issued a proposed rule pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance exemption petition (PP 8F8726) by Bi-PA nv, Technologielaan 7, B–1840, Londerzeel, Belgium (c/o SciReg, Inc., 12733 Director's Loop, Woodbridge, VA 22192). The petition requested that 40 CFR part 180 be amended by establishing an exemption from the requirement of a tolerance for residues of the fungicide *Trichoderma atroviride* strain SC1 in or on all food commodities. That proposed rule referenced a summary of the petition prepared by the petitioner Bi-PA nv, and available in the docket via *http://www.regulations.gov.* No comments were received on the notice of filing.

III. Final Rule

A. EPA's Safety Determination

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement of a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. Pursuant to FFDCA section 408(c)(2)(B), in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in FFDCA section 408(b)(2)(C), which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance or tolerance exemption and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .'' Additionally, FFDCA section 408(b)(2)(D) requires that EPA consider ''available information concerning the cumulative effects of a particular pesticide's residues and other substances that have a common mechanism of toxicity.'' EPA evaluated the available toxicological and exposure data on *Trichoderma atroviride* strain SC1 and considered their validity, completeness, and reliability, as well as the relationship of this information to human risk. A summary of the data upon which EPA relied and its risk assessment based on those data can be found within the document entitled ''Federal Food, Drug, and Cosmetic Act (FFDCA) Safety Determination for *Trichoderma atroviride* strain SC1'' (''Safety Determination Document''). This document, as well as other relevant information, is available in the docket for this action as described under **ADDRESSES**.

The available data demonstrated that, with regard to humans, *Trichoderma atroviride* strain SC1 is not toxic, pathogenic, or infective via any reasonably foreseeable route of exposure and when used in accordance with label directions and good agricultural practices. Although there may be dietary and non-occupational exposure to residues when *Trichoderma atroviride* strain SC1 is used on food commodities, there is not a concern due to the lack of potential for adverse effects when used in accordance with label directions and good agricultural practices. EPA also determined that retention of the Food Quality Protection Act safety factor was not necessary as part of the qualitative assessment conducted for *Trichoderma atroviride* strain SC1.

Based upon its evaluation in the Safety Determination Document, EPA concludes that there is a reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to residues of *Trichoderma atroviride* strain SC1 when used in accordance with label directions and good agricultural practices. Therefore, an exemption from the requirement of a tolerance is established for residues of *Trichoderma atroviride* strain SC1 in or on all food commodities when used in accordance with label directions and good agricultural practices.

B. Analytical Enforcement Methodology

An analytical method for enforcement purposes is not required because EPA has determined that reasonably foreseeable exposure to residues of *Trichoderma atroviride* strain SC1 from use of the pesticide will be safe, due to lack of toxicity, pathogenicity, and infectivity. Under those circumstances, it is unnecessary to have an analytical method to monitor for residues.

C. Response to Comments

EPA did not receive any comments on the notice of filing.

IV. Statutory and Executive Order Reviews

This action establishes a tolerance exemption under FFDCA section 408(d) in response to a petition submitted to EPA. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), nor is it considered a regulatory action under Executive Order 13771, entitled ''Reducing Regulations and Controlling Regulatory Costs'' (82 FR 9339, February 3, 2017). This action does not contain any information

collections subject to OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance exemption in this action, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes. As a result, this action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, EPA has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, EPA has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require EPA's consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (15 U.S.C. 272 note).

V. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule 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**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 10, 2020.

Edward Messina,

Acting Director, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, the EPA amends 40 CFR chapter I as follows:

PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Add § 180.1378 to subpart D to read as follows:

§ 180.1378 *Trichoderma atroviride* strain SC1; exemption from the requirement of a tolerance.

Residues of *Trichoderma atroviride* strain SC1 are exempt from the requirement of a tolerance in or on all food commodities when used in accordance with label directions and good agricultural practices.

[FR Doc. 2020–15695 Filed 7–30–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2019–0591; FRL–10011–33]

Long Chain Alcohols; Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of long chain alcohols when used as inert ingredients (carrier/adjuvant and coating agent/binder) in pesticide products applied to/on all growing crops and raw agricultural commodities after harvest, and to/on animals, and in certain antimicrobial formulations. Spring Trading Company on behalf of Sasol Chemicals (USA) LLC., submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an establishment of an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of certain long chain alcohols when used in accordance with these exemptions.

DATES: This regulation is effective July 31, 2020. Objections and requests for hearings must be received on or before September 29, 2020, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2019–0591, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

Please note that due to the public health emergency the EPA Docket Center (EPA/DC) and Reading Room was closed to public visitors on March 31, 2020. Our EPA/DC staff will continue to provide customer service via email, phone, and webform. For further information on EPA/DC services, docket contact information and the current status of the EPA/DC and Reading Room, please visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Michael L. Goodis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).

- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Publishing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2019–0591 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before September 29, 2020. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2019–0591, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Petition for Exemption

In the **Federal Register** of February 11, 2020 (85 FR 7708) (FRL–10005–02), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the filing of a pesticide petition (IN–11284) by Spring Trading Company (203 Dogwood Trail, Magnolia, TX 77354) on behalf of Sasol Chemicals (USA) LLC (12120 Wickchester Lane, Houston, TX 77224). The petition requested that 40 CFR be amended by establishing an exemption from the requirement of a tolerance for residues of certain long chain alcohols (CAS Reg. Nos.: 112–42–5, 112–72–1, 112–92–5, 629–96–9, 661–19–8, 68603–17–8, 1190630–03–5, 1430895–61–6, and 1430895–62–7) when used as inert ingredients (carrier/adjuvant and coating agent/binder) in pesticide formulations applied to/on all growing crops and raw agricultural commodities after harvest under 40 CFR 180.910, to/on animals under 180.930, and in certain antimicrobial formulations under 180.940(a). That document referenced a summary of the petition prepared by Spring Trading Company on behalf of Sasol Chemicals (USA) LLC, the petitioner, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

III. Inert Ingredient Definition

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): Solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term ''inert'' is not intended to imply nontoxicity; the ingredient may or may not be chemically active. Generally, EPA has exempted inert ingredients from the requirement of a tolerance based on the low toxicity of the individual inert ingredients.

IV. Aggregate Risk Assessment and Determination of Safety

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. Under FFDCA section 408(c)(2)(B), EPA must take into account, among other considerations, the factors in subparagraphs (C) and (D) of subsection (b)(2). Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue . . . .''

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be clearly demonstrated that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(c)(2)(A), and the factors specified in FFDCA section 408(c)(2)(B), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for certain long chain alcohols including exposure resulting from the exemption established by this action. EPA's assessment of exposures and risks associated with certain long chain alcohols follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered their validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Specific information on the studies received and the nature of the adverse effects caused by the relevant long chain alcohols as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document Long Chain Alcohols; Human Health Risk Assessment and Ecological Effects Assessment to Support Proposed Exemption from the Requirement of a Tolerance When Used as an Inert Ingredient in Pesticide Formulations in docket ID number EPA–HQ–OPP–2019–0591.

Toxicological data for several long chain alcohols (C_{12}–C_{34}) are used as surrogate data for the proposed long chain alcohols since long chain alcohols are structurally similar, differing only in carbon chain length so toxicity is expected to be similar.

The acute oral, dermal, and inhalation toxicities are low in rats treated with long chain alcohols. They are mildly to non-irritating to the rabbit eye and moderately to non-irritating to rabbit skin. Long chain alcohols are not skin sensitizers.

No toxicity is observed in repeated dose studies conducted with long chain alcohols administered via diet and gavage to rats, mice, dogs and rabbits.

Mutagenicity is not expected with long chain alcohols since negative results are observed in mutagenicity studies.

Neurotoxicity and immunotoxicity studies are not available for review. However, no evidence of neurotoxicity or immunotoxicity is observed in any of the available studies on long chain alcohols.

B. Toxicological Points of Departure/Levels of Concern

The available toxicity studies indicate that long chain alcohols have very low overall toxicity. Acute oral toxicity studies show LD_{50}s above 2,000 mg/kg in rats. Repeated dose studies show no toxicity at doses as high as 2,000 mg/kg/day, twice the limit dose of 1,000 mg/kg/day. Since no toxicity is observed, an endpoint of concern for risk assessment purposes was not identified. EPA assessed dietary and other non-occupational exposures qualitatively.

C. Exposure Assessment

1. *Dietary exposure from drinking water, food and feed uses.* In evaluating dietary exposure to long chain alcohols, EPA considered exposure under the proposed exemption from the requirement of a tolerance. EPA assessed dietary exposures from long chain alcohols in food as follows:

Dietary exposure (food and drinking water) to long chain alcohols may occur following ingestion of foods with residues from their use in accordance with this exemption. Dietary exposure may also occur from direct and indirect food contact uses under the Food and Drug Administration Code of Federal Regulations Title 21. However, a quantitative dietary exposure assessment was not conducted since a toxicological endpoint for risk assessment was not identified.

2. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* textiles (clothing and diapers), carpets, swimming pools, and hard surface disinfection on walls, floors, tables).

Long chain alcohols may be used in pesticide products and non-pesticide products that may be used in and around the home. Based on the discussion above regarding the toxicity of the long chain alcohols, a quantitative residential exposure assessment for long chain alcohols was not conducted.

3. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

Based on the available data, long chain alcohols do not have a toxic mechanism; therefore, section 408(b)(2)(D)(v) does not apply.

D. Safety Factor for Infants and Children

Based on the lack of threshold effects, EPA has not identified any toxicological endpoints of concern and is conducting a qualitative assessment of long chain alcohols. The qualitative assessment does not use safety factors for assessing risk, and no additional safety factor is needed for assessing risk to infants and children. Based on an assessment of long chain alcohols, EPA has concluded that there are no toxicological endpoints of concern for the U.S. population, including infants and children.

E. Aggregate Risks and Determination of Safety

Because no toxicological endpoints of concern were identified, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to long chain alcohols residues.

V. Other Considerations

Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

VI. Conclusions

Therefore, an exemption from the requirement of a tolerance is established for residues of long chain alcohols: 1-undecanol (CAS Reg. No. 112–42–5), 1-tetradecanol (CAS Reg. No. 112–72–1), 1-octadecanol (CAS Reg. No. 112–92–5), 1-eicosanol (CAS Reg. No. 629–96–9), 1-docosanol (CAS Reg. No. 661–19–8), alcohols, $C_{16–18}$, distn. residues (CAS Reg. No. 68603–17–8 & CAS Reg. No. 1190630–03–5), alkenes, $C_{18–22}$, mixed with polyethylene, oxidized, hydrolyzed, distn. residues from $C_{16–18}$ alcs. manuf. (CAS Reg. No. 1430895–61–6), alkenes, $C_{18–22}$, mixed with polyethylene, oxidized, hydrolyzed, distn. residues from $C_{20–22}$ alcs. manuf. (CAS Reg. No. 1430895–62–7) when used as inert ingredients (carrier/adjuvant and coating agent/binder) in pesticide formulations applied to/on all growing crops and raw agricultural commodities after harvest under 40 CFR 180.910, to/on animals under 180.930, and in certain antimicrobial formulations under 180.940(a).

VII. Statutory and Executive Order Reviews

This action establishes a tolerance exemption under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045,

entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), nor is it considered a regulatory action under Executive Order 13771, entitled ''Reducing Regulations and Controlling Regulatory Costs'' (82 FR 9339, February 3, 2017). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance exemption in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or Tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal Governments, on the relationship between the National Government and the States or Tribal Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VIII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule 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**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: June 26, 2020.

Michael Goodis,

Director, Registration Division, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, the EPA amends 40 CFR chapter I as follows:

PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.910, amend Table 1 by adding ''1-undecanol (CAS Reg. No. 112–42–5), 1-tetradecanol (CAS Reg. No. 112–72–1), 1-octadecanol (CAS Reg. No. 112–92–5), 1-eicosanol (CAS Reg. No. 629–96–9), 1-docosanol (CAS Reg. No. 661–19–8), alcohols, C16–18, distn. residues (CAS Reg. No. 68603–17–8 & CAS Reg. No. 1190630–03–5), alkenes, C18–22, mixed with polyethylene, oxidized, hydrolyzed, distn. residues from C16–18 alcs. manuf. (CAS Reg. No. 1430895–61–6), alkenes, C18–22, mixed with polyethylene, oxidized, hydrolyzed, distn. residues from C20–22 alcs. manuf. (CAS Reg. No. 1430895–62–7)'' in alphabetical order to read as follows:

§ 180.910 Inert ingredients used pre- and post-harvest; exemptions from the requirement of a tolerance.

* * * * *

TABLE 1 TO 180.910

Inert ingredients	Limits	Uses
* * * *	*	* *
1-undecanol (CAS Reg. No. 112–42–5), 1-tetradecanol (CAS Reg. No. 112–72–1), 1-octadecanol (CAS Reg. No. 112–92–5), 1-eicosanol (CAS Reg. No. 629–96–9), 1-docosanol (CAS Reg. No. 661–19–8), alcohols, $C_{16–18}$, distn. residues (CAS Reg. No. 68603–17–8 & CAS Reg. No. 1190630–03–5), alkenes, $C_{18–22}$, mixed with polyethylene, oxidized, hydrolyzed, distn. residues from $C_{16–18}$ alcs. manuf. (CAS Reg. No. 1430895–61–6), alkenes, $C_{18–22}$, mixed with polyethylene, oxidized, hydrolyzed, distn. residues from $C_{20–22}$ alcs. manuf. (CAS Reg. No. 1430895–62–7).	.....	Carrier/Adjuvant and Coating Agent/Binder.
* * * *	*	* *

■ 3. In § 180.930;

a. Designate the table as Table 1 to 180.930; and

■ b. Amend newly designated Table 1 by adding, in alphabetical order, an entry for ''1-undecanol (CAS Reg. No. 112–42–5), 1-tetradecanol (CAS Reg. No. 112–72–1), 1-octadecanol (CAS Reg. No. 112–92–5), 1-eicosanol (CAS Reg. No. 629–96–9), 1-docosanol (CAS Reg. No. 661–19–8), alcohols, C16–18, distn. residues (CAS Reg. No. 68603–17–8 & CAS Reg. No. 1190630–03–5), alkenes, C18–22, mixed with polyethylene, oxidized, hydrolyzed, distn. residues from C16–18 alcs. manuf. (CAS Reg. No. 1430895–61–6), alkenes, C18–22, mixed with polyethylene, oxidized, hydrolyzed, distn. residues from C20–22 alcs. manuf. (CAS Reg. No. 1430895–62–7)''.

The additions read as follows:

§ 180.930 Inert ingredients applied to animals; exemptions from the requirement of a tolerance.

* * * * *

TABLE 1 TO 180.930

Inert ingredients	Limits	Uses
* * * * * * *		
1-undecanol (CAS Reg. No. 112–42–5), 1-tetradecanol (CAS Reg. No. 112–72–1), 1-octadecanol (CAS Reg. No. 112–92–5), 1-eicosanol (CAS Reg. No. 629–96–9), 1-docosanol (CAS Reg. No. 661–19–8), alcohols, $C_{16–18}$, distn. residues (CAS Reg. No. 68603–17–8 & CAS Reg. No. 1190630–03–5), alkenes, $C_{18–22}$, mixed with polyethylene, oxidized, hydrolyzed, distn. residues from $C_{16–18}$ alcs. manuf. (CAS Reg. No. 1430895–61–6), alkenes, $C_{18–22}$, mixed with polyethylene, oxidized, hydrolyzed, distn. residues from $C_{20–22}$ alcs. manuf. (CAS Reg. No. 1430895–62–7).	.....	Carrier/Adjuvant and Coating Agent/Binder.
* * * * * * *		

■ 4. In § 180.940 amend paragraph (a) by;

■ a. Designating the table as Table 1 to 180.940(a); and

■ b. Amending newly designated Table 1 by adding, in alphabetical order, entries for ''1-undecanol (CAS Reg. No. 112–42–5)'', ''1-tetradecanol (CAS Reg. No. 112–72–1)'', ''1-octadecanol (CAS Reg. No. 112–92–5)'', ''1-eicosanol (CAS Reg. No. 629–96–9)'', ''1-docosanol (CAS Reg. No. 661–19–8)'', ''alcohols, C16–18, distn. residues (CAS Reg. No. 68603–17–8 & CAS Reg. No. 1190630–03–5)'', ''alkenes, C18–22, mixed with polyethylene, oxidized, hydrolyzed, distn. residues from C16–18 alcs. manuf. (CAS Reg. No. 1430895–61–6)'', ''alkenes, C18–22, mixed with polyethylene, oxidized, hydrolyzed, distn. residues from C20–22 alcs. manuf. (CAS Reg. No. 1430895–62–7)''.

The addition reads as follows:

§ 180.940 Tolerance exemptions for active and inert ingredients for use in antimicrobial formulations (Food-contact surface sanitizing solutions)

(a) * * *

TABLE 1 TO 180.940(A)

Inert ingredients	CAS Reg. No.	Limits
* * * * * * *		
1-undecanol	112–42–5	Carrier/Adjuvant and Coating Agent/Binder.
1-tetradecanol	112–72–1	
1-octadecanol	112–92–5	
1-eicosanol	629–96–9	
1-docosanol	661–19–8	
alcohols, $C_{16–18}$, distn. residues	68603–17–8 1190630–03–5	
alkenes, $C_{18–22}$, mixed with polyethylene, oxidized, hydrolyzed, distn. residues from $C_{16–18}$ alcs. manuf.	1430895–61–6	
alkenes, $C_{18–22}$, mixed with polyethylene, oxidized, hydrolyzed, distn. residues from $C_{20–22}$ alcs. manuf.	1430895–62–7	
* * * * * * *		

* * * * *

[FR Doc. 2020–15743 Filed 7–30–20; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 200227–0066; RTID 0648–XA334]

Fisheries of the Exclusive Economic Zone Off Alaska; Greenland Turbot in the Aleutian Islands Subarea of the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting retention of Greenland turbot in the Aleutian Islands subarea of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary because the 2020 Greenland turbot total allowable catch (TAC) in the Aleutian Islands subarea of the BSAI has been reached.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), July 28, 2020, through 2400 hours, A.l.t., December 31, 2020.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by

the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2020 Greenland turbot TAC in the Aleutian Islands subarea of the BSAI is 175 metric tons (mt) as established by the final 2020 and 2021 harvest specifications for groundfish in the BSAI (85 FR 13553, March 9, 2020). In accordance with § 679.20(d)(2), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2020 Greenland turbot TAC in the Aleutian Islands subarea of the BSAI has been reached. Therefore, NMFS is requiring that Greenland turbot in the Aleutian Islands subarea of the BSAI be treated as prohibited species in accordance with § 679.21(a).

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 679, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the prohibited retention of Greenland turbot in the Aleutian Islands subarea of the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 28, 2020.

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

Dated: July 28, 2020.

Jennifer M. Wallace,

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

[FR Doc. 2020–16667 Filed 7–28–20; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 85, No. 148
Friday, July 31, 2020

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0676; Product Identifier 2020–NM–085–AD]

RIN 2120–AA64

Airworthiness Directives; ATR—GIE Avions de Transport Régional Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all ATR—GIE Avions de Transport Régional Model ATR72 airplanes. This proposed AD was prompted by reports of main landing gear (MLG) hinge pins found cracked or thermally abused. This proposed AD would require replacing certain MLG hinge pins with serviceable parts, or replacing an MLG equipped with any affected MLG hinge pin with an MLG equipped with serviceable MLG hinge pins, as specified in a European Union Aviation Safety Agency (EASA) AD, which will be incorporated by reference. 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 September 14, 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 material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0676.

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–2020–0676; 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: Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3220; email *Shahram.Daneshmandi@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to participate in this rulemaking by submitting written comments, data, or views about this proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2020–0676; Product Identifier 2020–NM–085–AD'' at the beginning of your 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, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments received by the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this NPRM because of those comments.

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 the person identified in the **FOR FURTHER INFORMATION CONTACT** section. 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 EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0101, dated May 5, 2020 (''EASA AD 2020–0101'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all ATR—GIE Avions de Transport Régional Model ATR72 airplanes.

This proposed AD was prompted by reports of MLG hinge pins found cracked or thermally abused. The FAA is proposing this AD to address MLG hinge pins subjected to a non-detected thermal abuse during production, which could lead to structural failure and consequent collapse of the MLG, resulting in damage to the airplane and injury to the occupants. See the MCAI for additional background information.

Related IBR Material Under 1 CFR Part 51

EASA AD 2020–0101 describes procedures for replacing certain MLG hinge pins with serviceable parts or replacing an MLG equipped with any affected MLG hinge pin with an MLG equipped with serviceable MLG hinge pins. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in EASA AD 2020–0101 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2020–0101 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2020–0101 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2020–0101 that is required for compliance with EASA AD 2020–0101 will be available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0676 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this proposed AD affects 23 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
4 work-hours × $85 per hour = $340	$*	$340	$7,820

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

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

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):

ATR—GIE Avions de Transport Régional: Docket No. FAA–2020–0676; Product Identifier 2020–NM–085–AD.

(a) Comments Due Date

The FAA must receive comments by September 14, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to ATR—GIE Avions de Transport Régional Model ATR72–101, –102, –201, –202, –211, –212, and –212A airplanes, certificated in any category, all manufacturer serial numbers.

(d) Subject

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

(e) Reason

This AD was prompted by reports of main landing gear (MLG) hinge pins found cracked or thermally abused. The FAA is issuing this AD to address MLG hinge pins subjected to a non-detected thermal abuse during production, which could lead to structural failure and consequent collapse of the MLG, resulting in damage to the airplane and injury to the occupants.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2020–0101, dated May 5, 2020 (''EASA AD 2020–0101'').

(h) Exceptions to EASA AD 2020–0101

(1) Where EASA AD 2020–0101 refers to its effective date, this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2020–0101 does not apply to this AD.

(i) No Reporting or Returning Parts Requirement

Although the service information referenced in EASA AD 2020–0101 specifies to submit certain information and to return affected parts to the manufacturer, this AD does not include those requirements.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation 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 Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (k)(2) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

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

(k) Related Information

(1) For information about EASA AD 2020–0101, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0676.

(2) For more information about this AD, contact Shahram Daneshmandi, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3220; email *Shahram.Daneshmandi@faa.gov.*

Issued on July 22, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–16282 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0674; Product Identifier 2020–NM–070–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Airbus SAS Model A330–200 and A330–300 series airplanes, and all Model A340–200 and A340–300 series airplanes. This proposed AD was prompted by reports of hydraulic system failure due to fatigue failure of the screws attaching the manual valve to the ground service manifold (GSM). This proposed AD would require, for certain GSMs, repetitive replacement of the hydraulic system GSM manual valve attachment screws having certain part numbers; and, for certain other GSMs with certain screws installed, replacement of those screws, as specified in a European Union Aviation Safety Agency (EASA) AD, which will be incorporated by reference. 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 September 14, 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 material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0674.

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–2020–0674; 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: Vladimir Ulyanov, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3229; email *vladimir.ulyanov@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–2020–0674; Product Identifier 2020–NM–070–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 based on those comments.

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

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0093, dated April 24, 2020 (''EASA AD 2020–0093'') (also referred to as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Airbus SAS Model A330–200 and A330–300 series airplanes, and all Model A340–200 and A340–300 series airplanes.

This proposed AD was prompted by reports of hydraulic system failure due to the fatigue failure of the screws attaching the manual valve to the GSM. The FAA is proposing this AD to address the failure of hydraulic system manual valve attachment screws. This condition, if not addressed, could lead to the loss of one or more hydraulic systems and damage to surrounding structure and components, possibly resulting in reduced control of the airplane, or injury to maintenance staff working in the main landing gear bay. See the MCAI for additional background information.

Related IBR Material Under 1 CFR Part 51

EASA AD 2020–0093 describes procedures for replacement of the hydraulic system GSM manual valve attachment screws. For GSMs with part number (P/N) 70902–3 or P/N 70902–4 installed with screws having P/N NAS1101–3H8, EASA AD 2020–0093 describes procedures for repetitive replacement of those screws with new screws having P/N NAS1101–3H8. For GSMs with P/N 70902–5 installed with screws having P/N NAS1101–3H8, EASA AD 2020–0093 describes procedures for replacement of those screws with new bolts having P/N EWB0420D–3H–3 or four new screws having P/N NAS1101–3H8; if new screws are installed, EASA AD 2020–0093 describes procedures for replacing them with new bolts having P/N EWB0420D–3H–3 before the screws exceed 10,000 flight cycles since installation on an airplane. EASA AD 2020–0093 also describes an optional terminating modification (replacement of all affected GSMs), which would terminate the repetitive replacements of the attachment screws.

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

FAA's Determination and Requirements of This Proposed AD

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in EASA AD 2020–0093 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2020–0093 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2020–0093 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2020–0093 that is required for compliance with EASA AD 2020–0093 will be available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0674 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this proposed AD affects 107 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
7 work-hours × $85 per hour = $595 per cycle	$0*	$595 per cycle	$63,665 per cycle.

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

ESTIMATED COSTS FOR OPTIONAL ACTIONS

Labor cost	Parts cost	Cost per product
10 work-hours × $85 per hour = $850	$0*	$850

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

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

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):

Airbus SAS: Docket No. FAA–2020–0674; Product Identifier 2020–NM–070–AD.

(a) Comments Due Date

The FAA must receive comments by September 14, 2020.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus SAS airplanes specified in paragraphs (c)(1) through (4) of this AD, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2020–0093, dated April 24, 2020 (''EASA AD 2020–0093'').

(1) Model A330–201, –202, –203, –223, and –243 airplanes.

(2) Model A330–301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes.

(3) Model A340–211, –212, and –213 airplanes.

(4) Model A340–311, –312, and –313 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 29, Hydraulic power.

(e) Reason

This AD was prompted by reports of hydraulic system failure due to fatigue failure of the screws attaching the manual valve to the ground service manifold (GSM). The FAA is issuing this AD to address the failure of hydraulic system manual valve attachment screws. This condition, if not addressed, could lead to the loss of one or more hydraulic systems and damage to surrounding structure and components, possibly resulting in reduced control of the airplane, or injury to maintenance staff working in the main landing gear bay.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2020–0093.

(h) Exceptions to EASA AD 2020–0093

(1) Where EASA AD 2020–0093 refers to its effective date or to ''the effective date of EASA AD 2019–0314,'' this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2020–0093 does not apply to this AD.

(3) Where EASA AD 2020–0093 specifies to comply with ''the instructions of the AOT,'' and ''the AOT'' specifies that ''the accomplishment instructions marked as Required for Compliance (RC) must be done'' this AD requires compliance with ''paragraph 4.4.2., Accomplishment Instructions, of the AOT'' only.

(i) No Reporting Requirement

Although the service information referenced in EASA AD 2020–0093 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation 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 Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (k)(2) of this AD. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, Large Aircraft Section,

International Validation Branch, FAA; or EASA; or Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC)*: For any service information referenced in EASA AD 2020–0093 that contains RC procedures and tests: Except as required by paragraphs (h)(3) and (j)(2) of this AD, RC procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(k) Related Information

(1) For information about EASA AD 2020–0093, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0674.

(2) For more information about this AD, contact Vladimir Ulyanov, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3229; email *vladimir.ulyanov@faa.gov.*

Issued on July 22, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–16281 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0645; Airspace Docket No. 20–ASO–18]

RIN 2120–AA66

Proposed Amendment of Class E Airspace; Toccoa, GA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E airspace extending upward from 700 feet above the surface in Toccoa, GA, due to the decommissioning of the Foothills VHF Omnidirectional Range/Distance Measuring Equipment (VOR/DME) and cancellation of the associated approaches at Toccoa RG Letourneau Field Airport. This action would also update the geographic coordinates of the airport, as well as Habersham County Airport. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

DATES: Comments must be received on or before September 14, 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 20590–0001; Telephone: (800) 647–5527, or (202) 366–9826. You must identify the Docket No. FAA–2020–0645; Airspace Docket No. 20–ASO–18, 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 on line at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11D at NARA, email *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; telephone (770) 883–5664.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend Class E airspace in the Toccoa, GA area, to support IFR operations in the area.

Comments Invited

Interested persons are invited to comment on 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 (Docket No. FAA–2020–0645 and Airspace Docket No. 20–ASO–18) and be submitted in triplicate to DOT Docket Operations (see **ADDRESSES** section for the address and phone number.) You may also submit comments through the internet at *https://www.regulations.gov.*

Persons 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–2020–0645; Airspace Docket No. 20–ASO–18.'' The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this document may be changed in light of the 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 *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for 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 between 8:00 a.m. and 4:30 p.m., Monday through Friday, except federal holidays at the office of the Eastern Service Center, Federal Aviation Administration, Room 350, 1701 Columbia Avenue, College Park, GA 30337.

Availability and Summary of Documents for Incorporation by Reference

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

The Proposal

The FAA proposes an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to amend Class E airspace extending upward from 700 feet above the surface at Toccoa RG Letourneau Field Airport, Toccoa, GA, by eliminating the Foothills VOR/DME and the associated extension. In addition, the FAA proposes to update the geographic coordinates of the airport and Habersham County Airport, to coincide with the FAA's aeronautical database.

Class E airspace designations are published in Paragraph 6005, of FAA Order 7400.11D, dated August 8, 2019, and effective September 15, 2019, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

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

Regulatory Notices and Analyses

The FAA has determined that this 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 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.

Lists 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 Federal Aviation Administration Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth.

* * * * *

ASO GA E5 Toccoa, GA [Amended]

Toccoa RG Letourneau Field Airport, GA
(Lat. 34°35′34″ N, long. 83°17′47″ W)
Habersham County Airport
(Lat. 34°29′59″ N, long. 83°33′24″ W)

That airspace extending upward from 700 feet or more above the surface of the earth within a 10-mile radius of Toccoa RG Letourneau Field, and an 8.2-mile radius of Habersham County Airport.

Issued in College Park, Georgia, on July 22, 2020.

Andreese C. Davis,

Manager, Airspace & Procedures Team South, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2020–16296 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34–89290; File No. S7–08–20]

RIN 3235–AM65

Reporting Threshold for Institutional Investment Managers

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (the ''Commission'') is proposing to update the reporting threshold for Form 13F reports by institutional investment managers for the first time in 45 years, raising the reporting threshold from $100 million to $3.5 billion to reflect the change in size and structure of the U.S. equities market since 1975, when Congress adopted the requirement for these managers to file holdings reports with the Commission. The proposal also would amend Form 13F to increase the information provided by institutional investment managers by eliminating the omission threshold for individual securities, and requiring managers to provide additional identifying information. The Commission is also proposing to make certain technical amendments, including to modernize the structure of data reporting and amend the instructions on Form 13F for confidential treatment requests in light of a recent decision of the U.S. Supreme Court.

DATES: Comments should be received on or before September 29, 2020.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/submitcomments.htm*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number S7–08–20 on the subject line;

Paper Comments

- Send paper comments to Vanessa A. Countryman, Secretary, Securities

and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–08–20. 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/proposed.shtml*). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. 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.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Zeena Abdul-Rahman, Senior Counsel, Mark T. Uyeda, Senior Special Counsel, at (202) 551–6792, or Brian McLaughlin Johnson, Assistant Director, at (202) 551–6792, Investment Company Regulation Office, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Commission is proposing for public comment amendments to 17 CFR 240.13f–1 (''rule 13f–1'') and Form 13F (referenced in 17 CFR 249.325) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act'').

Table of Contents

I. Background

The Commission is proposing to:

- Amend rule 13f–1 and Form 13F to raise the reporting threshold from $100 million to $3.5 billion to account for the changes in the size and structure of the U.S. equities market since 1975; and
- Eliminate the omission threshold for individual securities on Form 13F.

The Commission further proposes to amend Form 13F to require an institutional investment manager (''manager'') that files Form 13F to provide certain identifying information:

- If the manager has a number assigned to the manager by the Central Registration Depository (''CRD'') system of the Financial Industry Regulatory Authority, Inc. (''FINRA'') or by the Investment Adviser Registration Depository (''IARD'') system (''CRD number''), the manager would be required to provide the CRD number; and
- If a manager has a filing number assigned to the manager by the Commission (''SEC filing number''), the manager would be required to provide the SEC filing number.[1]

Finally, the Commission proposes to make certain technical amendments to modernize the information reported on Form 13F, consistent with its existing structured eXtensible Markup Language (''XML'') format, and to modify the standard applied to certain types of requests to the Commission for confidential treatment of Form 13F information (''Form 13F CTRs'') to make such standard consistent with a recent U.S. Supreme Court decision.[2]

A. Overview of Section 13(f) and Rule 13f–1

Adopted in 1975 as part of the Securities Acts Amendments of 1975 (''1975 Amendments''),[3] section 13(f) of the Exchange Act[4] requires a manager to file a report with the Commission if the manager exercises investment discretion with respect to accounts holding certain equity securities (''13(f) securities'')[5] having an aggregate fair market value on the last trading day of any month of any calendar year of at least $100 million.[6] Rule 13f–1 requires that managers file quarterly reports on Form 13F if the accounts over which they exercise investment discretion hold an aggregate of more than $100 million in 13(f) securities.[7] The information reported on Form 13F becomes publicly available upon filing, unless the manager has filed a Form 13F CTR.[8] A Form 13F CTR is confidential pending review pursuant to 17 CFR 240.24b–2(c) (''rule 24b–2(c)''). The staff of the Division of Investment Management has delegated authority from the Commission to grant and deny Form 13F CTRs, and to revoke a grant of confidential treatment for any Form 13F CTR.[9]

Section 13(f) of the Exchange Act gives the Commission broad rulemaking authority to determine the size of the institutions required to file reports, the format and frequency of the reporting requirements, and the information to be

[1] The term ''institutional investment manager'' includes any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person. *See* section 13(f)(6)(A) of the Exchange Act [15 U.S.C. 78m(f)(6)]. The term ''person'' includes any natural person, company, government, or political subdivision, agency, or instrumentality of a government. *See* section 3(a)(9) of the Exchange Act [15 U.S.C. 78c(a)(9)].

[2] *Food Marketing Institute* v. *Argus Leader Media,* 139 S. Ct. 2356 (2019).

[3] Public Law 94–29, 89 Stat. 97 (1975).

[4] 15 U.S.C. 78m(f).

[5] Rule 13f–1(c) under the Exchange Act defines ''section 13(f) securities'' to mean equity securities of a class described in section 13(d)(1) of the Exchange Act that are admitted to trading on a national securities exchange or quoted on the automated quotation system of a registered securities association. The Commission is required under section 13(f)(4) to publish a list of section 13(f) securities, which can be found at *www.sec.gov/divisions/investment/13flists.htm.*

[6] Section 13(f)(1) of the Exchange Act [15 U.S.C. 78m(f)(1)].

[7] *See* General Instruction 3 of Form 13F. Form 13F requires managers to disclose, for example, the name, Form 13F file number, and address of the manager, and, for each security being reported, the name of the issuer, title of class, CUSIP, market value, amount and type of security, and whether the manager has investment discretion and voting authority for that security.

[8] *See* Sections 13(f)(4) and (5) of the Exchange Act and 17 CFR 240.24b–2 (''rule 24b–2'') under the Exchange Act. A Form 13F CTR consists of two parts: A written request letter (the ''application,'' per 17 CFR 240.24b–2(b)(2)) and a paper, confidential Form 13F *for the same calendar quarter as the public Form 13F* that includes only the equity holding(s) for which confidential treatment is being requested (the ''confidential portion,'' per 17 CFR 240.24b–2(b)(1)). A Form 13F CTR must be filed in paper with the Secretary of the Commission. *See* 17 CFR 240.24b–2(b)(3). While section 13(f)(4) of the Exchange Act gives the Commission discretion to determine whether to grant Form13F CTRs, section 13(f)(4) also prohibits the Commission from publicly disclosing information that identifies the securities held by the account of a natural person, estate, or trust (other than a business trust or investment company).

[9] 17 CFR 200.30–5(c–1) and (c–2).

disclosed in each report.[10] Section 13(f)(1) authorizes the Commission to set the reporting threshold in an amount ''of at least $100,000,000 or such lesser amount'' by rule.[11] In addition, section 13(f)(3) authorizes the Commission to exempt any manager or class of managers from the reporting requirements of section 13(f).[12] The 1975 Amendments Senate Report stated that the Commission would ''have authority to raise or lower'' the threshold.[13] The 1975 Amendments Senate Report also indicated that, in setting the reporting threshold for Form 13F, the Commission should consider, among other factors, the compliance burdens of reporting and the marginal informational value provided by the disclosure.[14] Additionally, in exercising its authority under section 13(f), the Commission is required to consult with other agencies, including federal, state, and self-regulatory organizations.[15]

In 1978, the Commission implemented the reporting requirement of section 13(f) by adopting rule 13f–1 and Form 13F.[16] In designing Form 13F, the Commission stated that it attempted to structure the form in a manner that would provide useful data regarding holdings that would impact the markets, while minimizing the form's reporting burdens.[17] In 1999, the Commission required electronic filing of public Form 13F reports through the Commission's Electronic Data Gathering, Analysis, and Retrieval (''EDGAR'') system.[18]

B. Legislative History and Subsequent Developments

Section 13(f) was added to the Exchange Act following a study the Commission conducted at Congress's direction, which concluded that there were certain ''gaps in information about the purchase, sale and holdings of securities by major classes of institutional investors.'' [19]

The section 13(f) disclosure program had three primary goals. First, to create a central repository of historical and current data about the investment activities of institutional investment managers. Second, to improve the body of factual data available regarding the holdings of institutional investment managers and thus facilitate consideration of the influence and impact of institutional investment managers on the securities markets and the public policy implications of that influence. Third, to increase investor confidence in the integrity of the U.S. securities markets.[20]

Legislative history indicates that the reporting threshold of section 13(f) was designed so that reporting would cover a large proportion of managed assets, while minimizing the number of reporting persons. The $100 million threshold that was adopted thereby limited the burdens of reporting, particularly on smaller managers. The 1975 Amendments Senate Report noted that, at the time of the section's adoption, approximately 300 persons—holding about 75 percent of the dollar value of all institutional equity security holdings—would be subject to the reporting requirements.[21] The 1975 Amendments Senate Report reasoned that, by setting the threshold at $100 million, the burdens associated with filing Form 13F would be limited to ''the largest institutional investment managers'' and, therefore, the new filing requirements could be ''implemented rapidly with the least amount of unnecessary costs and burdens on the potential respondents.'' [22]

Since 1975, the relative significance of managing $100 million in securities as compared with the overall size of the U.S. equities market has declined considerably. More managers have become subject to the Form 13F reporting obligation, even though $100 million represents a much smaller fraction of the U.S. equities market, which has grown substantially in aggregate size. Figure 1 shows the rise in the number of managers that file Form 13F over time.[23]

[10] 15 U.S.C. 78m(f)(1); *see also* Filing and Reporting Requirements Relating to Institutional Investment Managers, Exchange Act Release No. 14852 (June 15, 1978) [43 FR 26700, 26701 (June 22, 1978)] (''13F Adopting Release'') at text accompanying n.5.

[11] However, the Commission does not have the authority to lower the reporting threshold under section 13(f)(1) to less than $10 million. *See* 15 U.S.C. 78m(f)(1).

[12] 15 U.S.C. 78m(f)(3).

[13] *See* Securities Acts Amendments of 1975: Hearings on S. 249 before a Subcomm. of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. (S. Report No. 94–75) (1975), at 107 (''1975 Amendments Senate Report'').

[14] *Id.* at 86 (stating that, in establishing a reporting threshold, the Commission should ''balance such costs and burdens to the public interest that would be served by the expected informational value of the marginal equity securities holdings which would then be subject to the reporting provisions'').

[15] 15 U.S.C. 78m(f)(5). Specifically, the statute requires the Commission to consult with the Comptroller General of the United States, the Director of the Office of Management and Budget, national securities exchanges, registered securities associations, and the appropriate regulatory agencies, federal and state authorities which, directly or indirectly, require reports from managers of information substantially similar to that called for by section 13(f). Section 3(a)(34)(F) defines ''appropriate regulatory agency'' for these purposes as the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation. 15 U.S.C. 78c(a)(34)(F) (defining ''appropriate regulatory agency'' when used with respect to a person exercising investment discretion over an account). We will complete our consultation with these agencies during the comment period of this proposal in accordance with section 13(f)(5).

[16] *See* 13F Adopting Release, *supra* footnote 10.

[17] *See* Reporting by Institutional Investment Managers of Information with Respect to Accounts over which Investment Discretion is Exercised, Exchange Act Release No. 13396 (Mar. 22, 1977) [42 FR 16831, 16832 at n.7 (Mar. 30, 1977)]. *See also* 13F Adopting Release, *supra* footnote 10.

[18] *See* Rulemaking for EDGAR System, Investment Company Act Release No. 23640 (Jan. 12, 1999) [64 FR 2843 (Jan. 19, 1999)]. In 2013, the Commission modernized the filing format of Form 13F by replacing the plain-text ASCII format with a structured XML format and accompanying online form, but did not make any substantive changes to the Form. *See* Adoption of Updated EDGAR Filer Manual, Investment Company Act Release No. 30515 (May 14, 2013) [78 FR 29616 (May 21, 2013)].

[19] *See* 13F Adopting Release, *supra* footnote 10 at n.3 and accompanying text.

[20] *See* 13F Adopting Release, *supra* footnote 10 at n.4 and accompanying text; *see also* Thomas P. Lemke and Gerald T. Lins, *Equity Holdings by Institutional Investment Manager: An Analysis of Section 13(f) of the Securities Exchange Act of 1934,* 43 Bus. Law 93, 94 n.7 (Nov. 1987); Office of the Inspector General, *Review of the SEC's 13(f) Reporting Requirements* (Sept. 27, 2010), *available at https://www.sec.gov/about/offices/oig/reports/audits/2010/480.pdf* (''OIG Report'').

[21] The 1975 Amendments Senate Report indicated that section 13(f) would increase public availability of information regarding the securities holdings of institutional investment managers. *See supra* footnote 13, at 85.

[22] 1975 Amendments Senate Report, *supra* footnote 13, at 87.

[23] Data presented after 1999 only includes managers that file Form 13F holdings and combination reports (together, ''Form 13F–HR'') under rule 13f–1. In some instances, two or more managers may exercise investment discretion with respect to the same securities. In these cases, subject to certain conditions, Form 13F permits one such institutional manager to report those securities on behalf of the other(s). A manager on whose behalf securities are reported, generally, must file an abbreviated ''notice'' report on Form 13F to identify the manager(s) reporting on its behalf (''Form 13F–NT''). *See* General Instruction 2 to Form 13F (requiring that, where two managers exercise investment discretion with respect to the same securities, only one such manager include information regarding those securities in its Form 13F report).

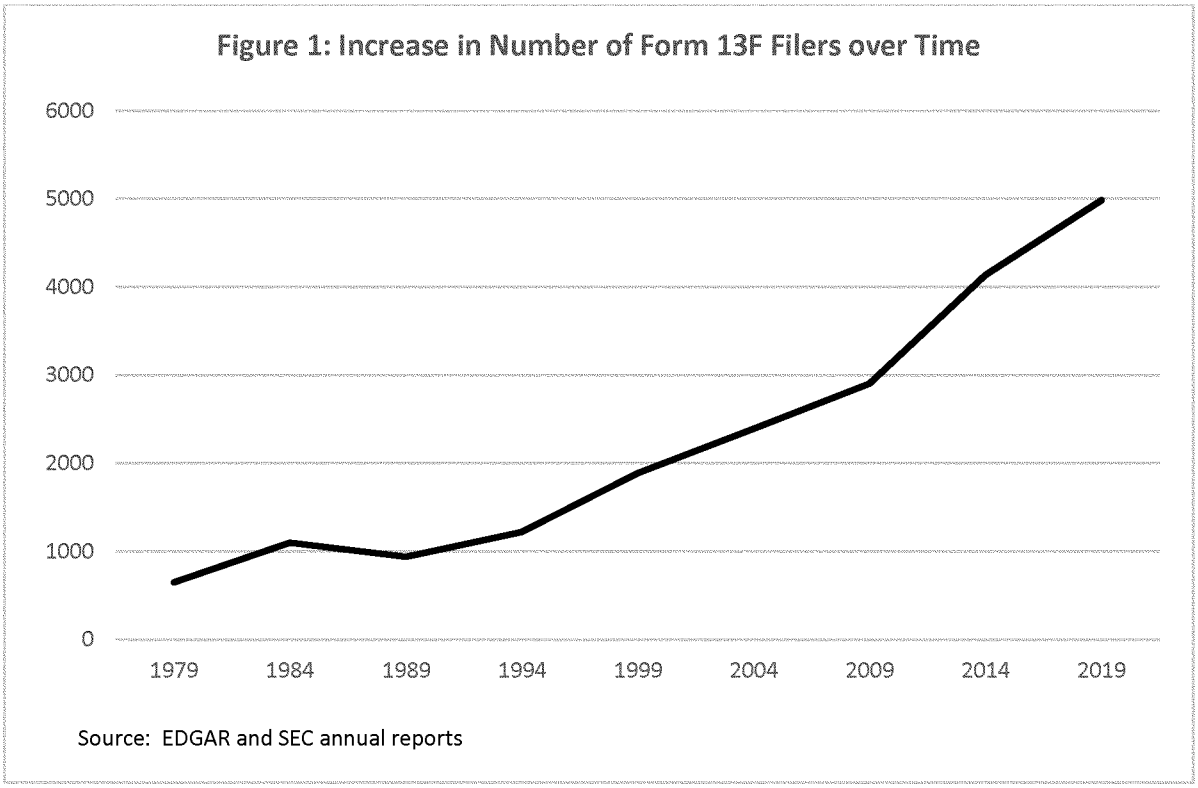
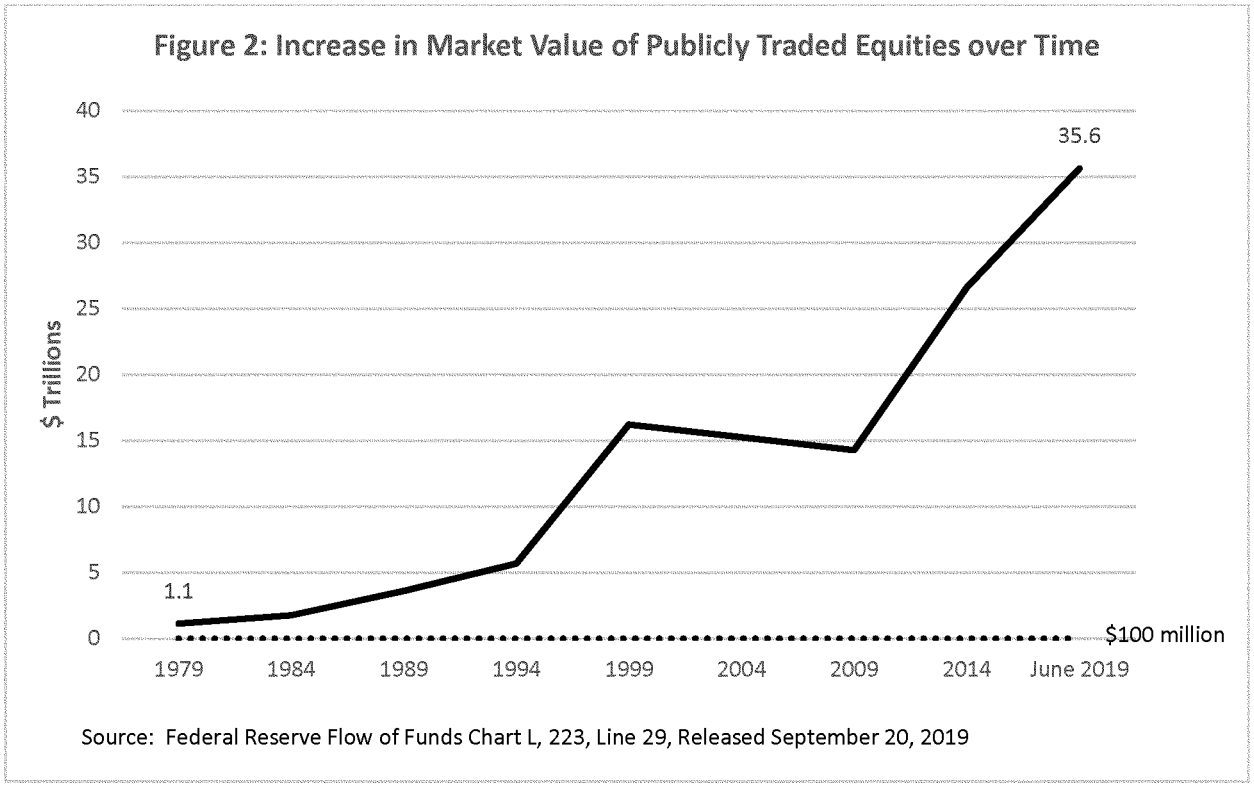


Figure 2 shows the significant increase in the overall size of the U.S. equities market over time and the resulting decrease in the market significance of managing $100 million in securities as compared with the overall size of the market.



Today, 5,089 managers that exceed the $100 million threshold file Form 13F holding reports.[24] This is approximately 17 times the number of filers that the threshold covered in 1975. The 1975 Amendments Senate Report anticipated that the Commission would consider the costs and burdens on smaller institutional investment managers in preparing Form 13F reports.[25] Given the significant increase in the number of managers required to file 13F reports over the last two decades, and the substantial reduction in the significance of holdings of $100 million, we believe it is an appropriate time to adjust the reporting threshold.

II. Discussion and Economic Analysis

A. Increase of Form 13F Reporting Threshold

We are proposing to amend rule 13f–1 and Form 13F to raise the reporting threshold for Form 13F to $3.5 billion.[26] This adjustment is based on the growth of the U.S. equities market that occurred between the adoption of section 13(f) in 1975 and December 2018, and it is designed to reflect proportionally the same market value of U.S. equities that $100 million represented in 1975.[27]

We have received recommendations from persons representing a variety of different perspectives to increase the reporting threshold for Form 13F.[28] For example, in response to our rulemaking on shareholder reports and quarterly portfolio disclosure of mutual funds, two commenters in a joint letter suggested that the 13(f) reporting threshold should be raised to reflect the ''effects of market inflation.'' [29] The Commission's Office of Inspector General recommended that the staff update its analysis of the impact of increasing the reporting threshold of $100 million for section 13(f) in order to determine whether an increase in the threshold amount should be pursued.[30] Another commenter called for legislation that would increase the reporting threshold to $450 million to reflect a consumer price index (''CPI'') adjustment from 1976 to 2019, with an adjustment every five years thereafter to reflect changes in the CPI, to ease the reporting burden on smaller investors.[31]

We believe that increasing the reporting threshold would provide meaningful regulatory relief for smaller managers that manage less than $3.5 billion in 13(f) assets and would no longer have to file the form in terms of a reduction in direct compliance costs and indirect costs. We believe that some of the direct compliance costs associated with preparing filings on Form 13F have decreased since 1975, principally due to lower-cost information processing systems. However, we believe that direct compliance costs are likely to be proportionately higher for smaller managers than they are for larger managers.[32] For example, in connection with staff outreach to advisers to smaller fund complexes, these advisers stated that reporting on Form 13F involves significant compliance burdens. Other indirect costs also may have increased since 1975, especially for smaller managers. For example, public reports of smaller managers, as compared with larger managers, may be more likely to reflect a limited number of separately managed portfolios that follow the same style or reflect the investment behavior of a single portfolio manager.[33] Consequently, Form 13F data of smaller managers may be more likely to be used by other market participants to engage in behavior that is damaging to the manager and the beneficial owners of the managed portfolio, such as front running (which primarily harms the beneficial owners) or copycatting (which potentially harms the portfolio manager), which may increase the costs of investing for smaller managers and hinder their investment performance.[34]

Smaller managers also account for a significant proportion of the Form 13F CTRs filed with the Commission. Managers with less than $3.5 billion of 13(f) securities manage 9.2 percent of the dollar value of all reported securities, yet our staff estimates that those smaller managers submit approximately three-fourths of all the Form 13F CTRs filed (see Table 1). Additionally, smaller managers may have limited resources, which might

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[24] *See infra* footnote 40 (noting that an additional 1,570 managers filed a notice report on Form 13F–NT for December 31, 2018).

[25] *See* 1975 Amendments Senate Report, *supra* footnote 13 (noting that the Commission represented to the Senate that, before it reduced the 13(f) reporting threshold, it would consider the cost and burden to such smaller managers of preparing such reports).

[26] For purposes of determining whether a manager is required to file Form 13F, the new reporting threshold would be evaluated for all months of the calendar year in which the adoption of the new reporting threshold occurs. Thus, if the Commission were to adopt an increased reporting threshold in 2020, the increased threshold would be used to determine Form 13F filing obligations for the cycle starting with the year ending December 31, 2020. The first Form 13F report that would apply the new reporting threshold would be due within 45 days after the end of such calendar year.

[27] Proposed rule 13f–1(a)(1); *see also* proposed General Instruction 1 of Form 13F. We calculated the growth of the U.S. equities market from 1975 until 2018 using statistical data provided by the Federal Reserve System. *See* Federal Reserve Board, Flow of Funds Chart L.223 for domestic corporate equities, *available at https://www.federalreserve.gov/releases/z1/current/default.htm* (''Federal Reserve Data''). The ratio of U.S. equities market value in 2018 to U.S. equities market value in 1975 is 3,571.41 percent. We multiplied that ratio by $100 million and rounded to the nearest $500 million, which resulted in a dollar value of $3.5 billion. Because the proposed reporting threshold is a figure in the billions, we believe that rounding to the nearest $500 million is appropriate.

[28] The Commission has also received petitions for rulemakings regarding other aspects of Form 13F. We believe that it is appropriate to propose changes to the scope of managers required to file reports on Form 13F before considering other potential amendments to the Form. *See* Petition for Rulemaking Under Section 13(f) of the Securities Exchange Act of 1934 (Feb. 1, 2013), *available at https://www.sec.gov/rules/petitions/2013/petn4-659.pdf* (requesting that the Commission amend rule 13f–1(a)(1) to shorten the 45-day delay in Form 13F's reporting deadline); *see also* Petition for Rulemaking Pursuant to Sections 10 and 13(f) of the Securities Exchange Act of 1934 (October 7, 2015), *available at https://www.sec.gov/rules/petitions/2015/petn4-689.pdf* (requesting that the Commission consider requiring periodic public disclosure of short-sale activities of managers on Form 13F).

[29] *See* letter from Fund Democracy and Consumer Federation of America, File No. S7–51–02 (Feb. 14, 2003). The commenters noted that ''[t]he $100 million threshold was based on the impact that such a portfolio could have on the market at the time that Section 13(f) was adopted. If the same standard were applied today, the threshold would exceed $1 billion dollars. The $100 million threshold no longer accomplishes the stated purpose of Form 13F disclosure.''

[30] *See* OIG Report, *supra* footnote 20, at 27. The OIG Report noted that, in 2006, the staff performed an analysis of increasing the Form 13F reporting threshold to $300 million, which reflected inflation using the consumer price index, and staff concluded that such an adjustment to the threshold would result in a significant decrease in the number of institutional investment managers that would be required to file Form 13F, with only a relatively modest decrease in the total dollar amount of assets covered.

[31] *See* National Investor Relations Institute, *The Case for 13F Reform* (Sept. 25, 2019), *available at https://www.niri.org/NIRI/media/NIRI/Advocacy/NIRI-Case-for-13F-Reform-2019-final.pdf.*

[32] *See infra* discussion accompanying and following footnote 43 (discussing the direct compliance costs and indirect costs associated with Form 13F); *see also* Section III below for a discussion of estimated information collection burdens associated with Form 13F under the Paperwork Reduction Act.

[33] *See* Marshall E. Blume and Donald B. Keim, *The Changing Nature of Institutional Stock Investing,* 6 Critical Fin. Rev. 1 (2017) (''Blume and Keim'') at 3–4.

[34] *See e.g.,* Susan E.K. Christoffersen, Erfan Danesh, and David Musto, *Why Do Institutions Delay Their Shareholdings? Evidence from Form 13F,* (Working Paper, June 11, 2018) (''Chistoffersen, Danesh and Musto''), *available at https://www.bwl.uni-mannheim.de/media/Lehrstuehle/bwl/Area_Finance/Finance_Area_Seminar/HWS2018/Christoffersen_Paper.pdf* (explaining that a frontrunner is one who trades ''in front of an expected trade by another investor, thereby making the same trade on the terms the other investor would otherwise have got.''); *see also* Mary Margaret Frank, et al., *Copycat Funds: Information Disclosure Regulation and the Returns to Active Management in the Mutual Fund Industry,* 47 J.L. & Econ. 515 (2004) (''Frank et al. 2004'') (explaining that copycat funds ''purchase the same assets as actively-managed funds as soon as those asset holdings are disclosed.'').

make it difficult for them to file Form 13F CTRs in order to protect their holdings information from harmful behaviors and the costs of those behaviors.

Our staff regularly receives inquiries and requests for assistance from managers regarding compliance with the Form 13F reporting obligations. Smaller managers make many of the requests. In addition to relieving smaller managers from the compliance burdens associated with filing Form 13F (and Form 13F CTRs), our proposal would also reduce the costs to the Commission associated with administering the regulatory program for Form 13F by reducing the number of inquiries and requests for assistance the staff receives and the associated time needed for staff review.

We considered various approaches to adjusting the reporting threshold, including the use of:

- *Stock Market Growth:* Using the growth in value of U.S. public corporate equities from 1975 until 2018 as the basis for calculating the threshold increase, the threshold would be $3.57 billion.[35]
- *Consumer Price Inflation:* We evaluated two potential consumer price inflation calculations:
  - Using the Personal Consumption Expenditures Price Index (''PCE'') inflation standard through 2018, the threshold would be $358 million.[36]
  - Using the CPI inflation standard through 2018, the threshold would be $453 million.[37]
- *Stock Market Returns:* Using the total return of the stock market from the end of December 1975 to the end of December 2018 as the basis for calculating the threshold increase, the threshold would be $9.33 billion.[38]

Table 1 demonstrates how changing the reporting threshold for section 13(f) would affect the number of filers at different threshold amounts and the aggregate holdings reported by such filers.[39]

TABLE 1—FORM 13F REPORTING THRESHOLD CHANGES

[*13F Holdings Filings as of December 31, 2018*[40]]

Total Number of Holdings Filers: 5,089

Total Reported Assets (billions): $25,198

Threshold	Number of filers above threshold	Number of filers below threshold	Percent of filers below threshold	Aggregate assets of filers above threshold (billions)	Percent of the dollar value of all reported assets
≥$100 billion	37	5,052	99.3	14,286	56.7
≥$30 billion	114	4,975	97.8	18,605	73.8
≥$25 billion	122	4,967	97.6	18,824	74.7
≥$10 billion	278	4,811	94.5	21,261	84.4
≥$5 billion	441	4,648	91.3	22,427	89.0
≥$4.5 billion	467	4,622	90.8	22,550	89.5
≥$4 billion	500	4,589	90.2	22,688	90.0
≥$3.5 billion	550	4,539	89.2	22,876	90.8
≥$3 billion	597	4,492	88.3	23,027	91.4
≥$2.5 billion	672	4,417	86.8	23,233	92.2
≥$2 billion	790	4,299	84.5	23,494	93.2
≥$1.5 billion	955	4,134	81.2	23,780	94.4
≥$1 billion	1,227	3,862	75.9	24,113	95.7
≥$900 million	1,301	3,788	74.4	24,183	96.0
≥$800 million	1,407	3,682	72.4	24,273	96.3
≥$700 million	1,532	3,557	69.9	24,366	96.7
≥$600 million	1,710	3,379	66.4	24,481	97.2
≥$500 million	1,904	3,185	62.6	24,588	97.6
≥$400 million	2,188	2,901	57.0	24,716	98.1
≥$300 million	2,543	2,546	50.0	24,838	98.6
≥$200 million	3,148	1,941	38.1	24,985	99.2
≥$100 million	5,089	0	0.0	25,198	100.0

We considered raising the threshold to account for consumer price inflation, rather than market growth. However, we preliminarily determined that the group of managers covered by using a market growth standard better reflects the group of managers intended to be subject to reporting under section 13(f) because this approach focuses on managers whose holdings of section 13(f) securities are large relative to the overall

[35] Based on the Federal Reserve Data, *supra* footnote 27.

[36] Based on the Personal Consumption Expenditures Chain-Type Price Index, published by the U.S. Department of Commerce.

[37] Based on the Consumer Price Index for All Urban Consumers, published by the Bureau of Labor Statistics of the U.S. Department of Labor.

[38] We assembled monthly value-weighted market returns with dividends reinvested from the Center for Research in Security Prices. We compounded these returns from January 1976 to December 2018, and we multiplied that product by $0.100 billion, which resulted in $9.33 billion.

[39] The staff compiled this data by reviewing filings made on Form 13F during the relevant period. The data excludes securities reported as options on Form 13F. The staff has adjusted the reported data to account for what appeared to be erroneously reported information, such as data that is reported in the wrong units.

[40] This data covers Form 13F–HR, but excludes Form 13F–NT. An additional 1,570 managers filed a Form 13F–NT for December 31, 2018. Using this data, we cannot determine precisely how many of these additional 1,570 managers would no longer need to file Form 13F–NT if the reporting threshold is increased. Therefore, if a Form 13F–NT filer is linked to a Form 13–HR filing of a manager that exceeds the 3.5 billion threshold, we assumed that such a manager would be required to file Form 13F–NT if the reporting threshold is increased as proposed. Therefore, we estimate that 738 notice reports would be filed on Form 13F–NT if the proposed threshold increase is adopted.

Certain aspects of the Form 13F reporting structure make it difficult to pinpoint the exact value of reported holdings for an individual manager. The staff analysis excludes holdings reported as options. In addition, not all holdings may be reported due to Form 13F CTRs and managers may omit a holding if they hold fewer than 10,000 shares and less than $200,000 in aggregate fair market value. Therefore, the actual number of Form 13F filers above the threshold, the aggregate assets of filers above the threshold, and the percentage of all assets may be higher.

size of the U.S. equities market.[41] Raising the reporting threshold for rule 13f–1 to $3.5 billion, which would account for the growth in the U.S. equities market since 1975, would retain disclosure of 90.8 percent of the dollar value of the Form 13F holdings data currently reported while relieving the reporting burdens from approximately 4,500 Form 13F filers, or approximately 89.2 percent of all current filers.[42]

Managers incur direct compliance costs, including information collection costs,[43] associated with Form 13F. These costs include the following: (1) Developing and maintaining internal hardware and software systems to collect and analyze the information for submission; [44] (2) utilizing internal and external legal and compliance resources for advice and review in connection with Form 13F filings and to analyze whether any holdings qualify for confidential treatment and, if so, to prepare and submit a request for confidential treatment; (3) preparing the information for submission to the EDGAR system; and (4) undertaking other reviews or compliance activities as part of the manager's overall compliance program, such as comparisons of the data reported on Form 13F against other regulatory filings that may have similar data reporting obligations to confirm that information is reported consistently across multiple regulatory filings, as applicable.

Based on staff analysis and outreach to managers, we estimate that, for the smaller managers that would no longer file reports on Form 13F under the proposal, these direct compliance costs could range from $15,000 to $30,000 annually per manager, depending on the complexity and volume of holdings, the type of third-party legal and compliance review undertaken prior to the filing, and a filer's experience with filing Form 13F, among other factors. Therefore, we estimate that the direct compliance cost savings for these managers per year would range from $68.1 million to $136 million.[45] We believe that larger managers that would continue to be required to file reports on Form 13F under the proposal incur higher direct compliance costs, on a per manager basis, than the smaller managers.

In addition to these direct compliance costs, managers face indirect costs such as the potential for front-running and copycatting. The key determinant of these indirect costs is whether the disclosure of holdings information enables other market participants to take actions that harm either the beneficial owners of the fund or its manager.

The academic literature provides partial evidence about the harm caused by the actions of third parties that is applicable in the context of the proposed amendments. For example, several studies show that managers use confidential treatment requests to delay reporting stocks on Form 13F that have higher future returns than their other stocks, but these studies do not directly verify that the delayed stocks do not continue to have high future returns after the end of the confidential treatment period.[46] Other researchers show that managers who are more likely to face front-running costs choose to file at the end of the 45-day filing window, but they do not show whether or to what extent the delay to the end of the filing window eliminates the potential front-running costs.[47] Many studies test for copycatting profits by simulating funds that copy reported 13F portfolios, and the studies generally find that some copycat funds can match the performance of the copied funds, although they do not directly test whether this behavior harms managers or beneficial owners of the copied funds.[48] In addition, one study examines hedge funds around the time they begin filing Form 13F. The study suggests that hedge funds experience decreased performance after Form 13F disclosure, and it reports that this drop in performance may be ''due to the revelation of trade secrets and free-riding activities.'' [49]

Under the proposed amendments, the aggregate value of section 13(f) securities reported by managers would represent approximately 75 percent of the U.S. equities market as a whole, as compared with 83 percent without the proposed amendments and 40 percent in 1981, the earliest year for which Form 13F data is available.[50] The proposed amendments to the Form 13F reporting threshold thus also reflect the changes in the structure of the market that have occurred over time.

Using CPI or PCE would result in a reporting threshold of $500 million and $400 million, respectively (applying a rounding convention to the nearest $100 million). The decrease in the dollar value of the reported holdings would be either about 2.4 percent or 1.9 percent, and the decrease in the number of current filers would be about 3,200 or 2,900, respectively. In the years since 1975, the overall size of the U.S. equities market has grown at a rate significantly higher than the CPI or PCE. The legislative history indicates that the reporting threshold of section 13(f) was designed to focus on larger managers. We therefore believe that relying on a consumer price inflation measure such as CPI or PCE to account for 45 years of market growth would not adequately or appropriately capture the holdings and universe of managers contemplated by section 13(f).

Using stock market returns from December 1975 to December 2018, rather than market growth, would result in a reporting threshold of $9.5 billion, rounded to the nearest $500 million. The decrease in the dollar value of the reported holdings would be about 15.2 percent and the decrease in the number of current filers would be about 4,800. We believe that section 13(f) was

[41] *See supra* footnote 22 and accompanying text (noting that the 1975 Amendments Senate Report stated that the Form 13F reporting threshold was designed to limit the form's filing obligations to ''the largest institutional investment managers'').

[42] Since December 31, 2018, there have been significant fluctuations in the market that may impact our analysis.

[43] *See* Section III below for a discussion of estimated information collection costs associated with Form 13F under the Paperwork Reduction Act.

[44] We believe that funds generally do not maintain dedicated hardware systems for the sole purpose of filing Form 13F. Our cost estimates therefore are intended to take into account only the partial cost of those systems attributable to filing Form 13F.

[45] These estimates are based on the following calculations: 4,539 filers × $15,000 = $68,085,000; 4,539 filers × $30,000 = $136,170,000. This is based on our estimate that 4,539 managers would no longer be required to file reports on Form 13F–HR under the proposal. These estimates do not include direct compliance costs for managers filing notice reports on Form 13F–NT. The information collection burdens associated with these filings are included in the estimates discussed below in Section III.

[46] *See* George O. Aragon, Michael Herzel, and Zhen Shi, *Why Do Hedge Funds Avoid Disclosure? Evidence from Confidential 13F Filings,* 48 J. Fin. & Quantitative Analysis, 1499 (Oct. 2013); *see also* Agarwal Vikas, Wei Jiang, Yuehua Tang, and Baozhong Yang, *Uncovering Hedge Fund Skill from the Portfolio Holdings They Hide,* 68 J. Fin. 739 (2013).

[47] *See* Chistoffersen, Danesh and Musto, *supra* footnote 34 at 23.

[48] *See* Frank et al. 2004, supra note 34; *see also* Marno Verbeek and Yu Wangb, *Better than the Original? The Relative Success of Copycat Funds,* 37 J. Banking & Fin. 3454 (2013); *see also* Chistoffersen, Danesh and Musto, *supra* footnote 34.

[49] *See* Shi, Zhen, *The Impact of Portfolio Disclosure on Hedge Fund Performance* (2017) the Journal of Financial Economics, Vol. 126, at 38 (''Shi (2017)'') (finding (a) an annual reduction of certain hedge funds' performance after they begin filing Form 13F, (b) that ''the return correlations between disclosing funds and other hedge funds that are in the same investment style increase after the disclosure,'' and (c) that ''the negative effect of disclosure is concentrated among funds that hold more illiquid stocks, have lower turnover rates, have greater portfolio concentration, are in more competitive investment styles, have performed well in the past, employ less conventional trading strategies, or belong to an asset management company with a smaller number of funds'').

[50] This data is based on the staff's review of data reporting on Form 13F and Federal Reserve Data.

intended to provide transparency into a certain segment of the securities markets—the equity holdings by larger institutional investment managers. Therefore, we believe that it is more appropriate to increase the reporting threshold based on the growth of the U.S. equities market rather than the returns generated by the stock market. Our preliminary decision to use market growth to adjust the reporting threshold is designed to require managers to file on Form 13F when their holdings of section 13(f) securities approximate the same percentage of the U.S. equities market that was represented by the $100 million threshold in 1975. If we were to use stock market returns instead, however, the holdings of individual managers required to report under this threshold would not approximate the same percentage of the U.S. equities market that was represented by the $100 million threshold in 1975.

We have considered the potential effects of the reduction in Form 13F data received from smaller managers, and we understand that the information reported on Form 13F currently is used for a wide variety of purposes. Since Form 13F data became publicly available, different uses for the data have developed. These uses developed, in part, due to the increased volume of Form 13F data as more and more managers became subject to the filing requirement. While Form 13F was originally designed to assist regulators and the public in understanding the effects of institutional equity ownership on the markets, the pool of users of the data has expanded to include academics, market researchers, the media, attorneys pursuing private securities class-action matters, and market participants (including institutional investors themselves) who use the data to enhance their ability to compete.[51] The data can also assist individuals in making investment decisions, investment managers in managing assets, and corporate issuers of 13(f) securities interested in determining the beneficial holders of their publicly traded stock.[52] Commission staff also uses Form 13F information for a variety of purposes, some of which were specifically identified in the legislative history of section 13(f), while others were not. Since section 13(f) was adopted in 1975, data available to the Commission about the investment activities of institutional investment managers has been greatly expanded and includes data from sources other than Form 13F, such as Form N–PORT. Commission staff currently uses Form 13F and other data regarding the investment activities of institutional investment managers in rulemakings, to support the Commission's examination and enforcement programs, and to conduct research. For example, Commission staff may use investor information from Form 13F on a relatively infrequent basis in estimating shareholder harm as well as shareholder turnover, which may be considered in the context of potential corporate penalties, including in determining whether proposed penalties would cause further harm to shareholders who suffered losses as a result of the violation. Commission staff typically will have access to additional data sources for these estimates, including Form N–PORT, and the Commission generally does not expect the proposed amendments to the Form 13F reporting thresholds to impact the staff's recommendations regarding the imposition or amounts of corporate penalties.

We recognize that raising the Form 13F reporting threshold would decrease holdings data available to the Commission and other regulators as well as corporate issuers, market participants, and other analysts and researchers pursuant to section 13(f).[53] Although we believe the proposal would retain disclosure of 90.8 percent of the dollar value of the Form 13F holdings data, some of the holdings data that would no longer be reported by managers with less than $3.5 billion in section 13(f) securities relates to smaller portfolio companies in which some commenters assert larger managers may be less likely to invest.[54] We estimate that, under the proposal, holdings data for approximately 95.7 percent of portfolio companies that are currently reported by more than one manager on Form 13F would continue to be reported on the form.[55] Whether any of these Form 13F data users find the data from smaller managers to be valuable would depend on their particular use of this data.[56] We believe that the investing public specifically would be less concerned about the availability of portfolio holdings of these smaller managers because the activities of these smaller managers are not likely to cause market effects of the type contemplated by section 13(f).[57]

When examining the effects on data availability of the proposed amounts, we are mindful of alternative sources of holdings data that either exist or are being developed and may provide overlapping or similar data to that included on Form 13F. For example, since the adoption of section 13(f), the Commission has adopted additional rules and forms that require investment companies to provide additional holdings data to the Commission, which would provide the Commission and the public with certain information about these funds' holdings of section 13(f) securities and other investments.[58] As

[51] Commission staff has noted that ''meritorious private actions have long been recognized as an important supplement to civil and criminal law-enforcement actions.'' See *Study on the Cross-Border Scope of the Private Right of Action under Section 10(b) of the Securities Exchange Act of 1934,* available at *https://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf.* Some of those private actions use Form 13F data in their calculations to produce a more reliable, 'lower bound' estimate of damages. *See* Marcia Mayer, *Best-Fit Estimation Of Damaged Volume in Shareholder Class Actions: The Multi-Sector, Multi-Trader Model of Investor Behavior,* Nat'l Economic Research Assoc. (Oct. 2006); Daniel Fishel et al., *The Use of Trading Models to Estimate Aggregate Damages in Securities Fraud Litigation: An Update,* 10(3) Briefly (Washington, D.C.) 1 (2006). As a result, a reduction in publicly available Form 13F data may result in increased use of other methods to estimate shareholder harm.

[52] *See generally* Edward Pekarek, *Hogging the Hedge? ''Bulldog's'' 13F Theory May Not be So Lucky,* 12 Fordham J. Corp. & Fin. Law 1079 (2007) (''Pekarek'').

[53] *See infra* footnote 58 and accompanying text.

[54] *See e.g.,* Blume and Keim *supra* footnote 33 at 16 (providing evidence that portfolios of smaller institutional investors are weighted more heavily towards smaller stocks compared to portfolios of larger institutional investors, but noting that both large and small institutional investors overweight investments in smaller stocks relative to market weights).

[55] We believe that data regarding portfolio companies held by just a single manager would generally be of limited value to many users of Form 13F data. This is because a smaller sample size provides less information about the population and, in particular, a sample size of one provides no basis for an estimate of variance. However, if we also counted portfolio companies that are currently held by just a single manager on Form 13F, together with portfolio companies that are currently held by more than one manager, we estimate that, under the proposal, holdings data for approximately 87.2 percent of portfolio companies would continue to be reported.

[56] See *e.g.,* Blume and Keim, *supra* footnote 33 (observing that, because the $100 million reporting threshold has not changed over several decades, whereas stock market capitalization has increased significantly, the holdings of smaller managers make up only 6.1 percent of the aggregate institutional portfolio in 2010 and do not affect the main results of their analysis about the trends of institutional ownership).

[57] In addition, to the extent that a manager (individually or collectively with other members of a group) acquires more than 5 percent of any voting class of a company's equity securities registered under section 12 of the Exchange Act, the manager would be required to report such an acquisition, along with other information, on Schedule 13D within 10 days of the purchase. Depending on the circumstances, the manager may be eligible to file the more abbreviated Schedule 13G in lieu of filing Schedule 13D.

[58] *See e.g.,* Form N–PORT [referenced in 17 CFR 274.150] (This form requires each registered management investment company to report on a quarterly basis its monthly holdings information to the Commission. On a quarterly basis, and with a

Continued

another example, the Commission adopted a rule to require the self-regulatory organizations to submit to the Commission a national market system plan to create, implement and maintain a comprehensive consolidated audit trail that would allow regulators to track all activity throughout the U.S. markets in National Market System securities efficiently and accurately.[59]

The 1975 Amendments Senate Report noted that Congress was concerned with the material increase in the concentration of institutional ownership of securities with managers and the effect of such an increase on the trade prices of those securities, the issuers of the securities, as well as on the interests of individual investors.[60] Congress adopted section 13(f), in part, because it was concerned that this increase in concentration, coupled with the lack of trading data of larger managers available to regulators and the market, hampered the Commission's ability to maintain fair and orderly securities markets and impaired the stability of stock prices.[61] We believe that it is necessary to continue to provide regulators and the public information regarding the equities holdings of larger managers that have the potential to significantly affect the securities markets. The need for public disclosure of holdings of smaller managers is less compelling. Raising the reporting threshold to $3.5 billion is designed to recalibrate the reporting threshold to reflect the multiple objectives of section 13(f). These include providing the Commission, other regulators and the public with holdings information of larger managers that may impact the markets without requiring smaller managers to incur the costs associated with filing reports on Form 13F and subjecting them to the risks of potentially harmful investment behaviors resulting from those filing obligations. We believe that the proposed $3.5 billion reporting threshold recalibrates the reporting threshold appropriately so that it does not impose undue burdens, including because the dollar value of the aggregate holdings of the smaller managers that would no longer be required to file reports on Form 13F under the proposal represent a small percentage of 13(f) securities overall.

We request comment on the proposed amendments to rule 13f–1 and Form 13F to adjust the reporting threshold.

1. Should we, as proposed, adopt an amendment to rule 13f–1 that would initially adjust the reporting threshold under rule 13f–1? Is the proposed threshold of $3.5 billion appropriate? If another threshold would be more appropriate, what should the threshold be and why?

2. Would raising the reporting threshold for Form 13F to $3.5 billion negatively affect the utility of Form 13(f) data or investor confidence in the integrity of the U.S. markets? If so, how? And if so, is there a different threshold that would be more appropriate? Are there any additional effects of raising the Form 13F reporting threshold that we have not considered?

3. Should we, as proposed, adopt an amendment to rule 13f–1 that would initially adjust the Form 13F reporting threshold based on the growth in the U.S. equities market? Should we, as described above, use the Federal Reserve Board's flow of funds data on corporate equities as a basis for this calculation?

4. Rather than adjusting the Form 13F reporting threshold based on the growth in the U.S. equities market that occurred between 1975 and December 2018 (a date certain), should we instead use an average rate of growth, which might effectively reflect market growth while minimizing the effects of market fluctuations around the time the Commission is adjusting the threshold? For example, under this approach, we could take the market size as of the end of 2015, 2016, 2017, 2018, and 2019, average those values, and compare that average to the size of the U.S. equities market in 1975. If so, why? Is such a five-year period (or other period) more appropriate for calculating an average growth rate to apply over the 45 years since the threshold was initially set?

5. Should we instead adjust the reporting threshold for Form 13F using stock market returns as a basis for this calculation? If so, how should we measure stock market returns? For example, would dividends be included or excluded? Is there another measure that we should use as a basis for initially adjusting the reporting threshold?

6. Should we instead adjust the reporting threshold for Form 13F to account for consumer price inflation? If so, what measure of consumer price inflation—PCE or CPI—should we use? Is there another measure of consumer price inflation (or other inflation measure) that we should use? If so, what?

7. Should we adopt a different rounding convention, rather than the nearest $500 million, such as the nearest $1 billion, $250 million, or $100 million? For example, if we rounded to the nearest $100 million, the reporting threshold would be $3.6 billion based on stock market growth. If we should use a different rounding convention, why?

8. Are the Form 13F filing obligations burdensome to smaller managers? If so, how? Are they burdensome in absolute terms, relative terms, or both? Are the burdens on smaller managers different in character from the burdens on larger managers?

9. What, if any, are the benefits to investors and markets for the markets to have access to Form 13F data from smaller managers? Do these benefits justify the filing burdens? If so, why?

10. Are the Form 13F filing obligations burdensome to larger managers? If so, how? Is it beneficial to the markets to continue to have access to Form 13F data from larger managers? If so, why? Do these benefits justify the filing burdens? If so, why?

11. Who uses Form 13F data? Are these uses beneficial to investors, market integrity, or capital formation? Why or why not? How will these users of the data be affected if the reporting threshold is increased and fewer filers report? Do those users prefer a different threshold? Why or why not? Can those users reasonably find alternative sources of data that meet their needs? Why or why not?

12. We estimate above direct compliance costs that smaller managers incur in connection with Form 13F. Are these estimates accurate? What kinds of costs, and in what amounts, do smaller managers incur in connection with Form 13F? How do the costs differ for larger and smaller managers? How much internal time do managers devote to compliance with Form 13F? What are the external costs, such as the cost of a third-party vendor or external legal counsel, associated with complying with Form 13F? We request comment on the direct compliance costs managers experience in connection with Form 13F, including the estimates in Section III below, and how these costs vary among managers.

13. We also request comment on indirect costs that may be incurred in connection with Form 13F. We discuss above some of these indirect costs, such as the potential for front-running and copycatting. Do commenters agree that these indirect costs are incurred? How

60-day delay, holdings information for the last month of the quarter is made publicly available). Additionally, developments in the market such as the increased use of technology to capture current data with respect to market activity, including more sophisticated systems for following daily transactions, have reduced the need for the Commission to rely on Form 13F for purposes of market analysis or surveillance.

[59] *See* Securities Exchange Act Release No. 67457 (July 18, 2012), [77 FR 45722 (August 1, 2012)].

[60] *See* 1975 Amendments Senate Report, *supra* footnote 13 at 82.

[61] *Id.*

do these indirect costs differ for larger and smaller managers? Are there other or different indirect costs that are incurred in connection with Form 13F? What are those and how would they be affected by the proposed amendments?

B. Future Analysis

We are proposing an increase in the reporting threshold of Form 13F to account for the change in size and structure of the U.S. equities market since 1975. However, we recognize that, as the U.S. equities market continues to change in the future, Form 13F's reporting threshold, once again, may become significantly misaligned with the size and structure of the market and, as a result, place unnecessary reporting burdens on certain managers. Therefore, the staff will conduct reviews of the Form 13F reporting threshold every five years to determine whether the reporting threshold continues to be appropriate. If, as a result of such a review, the staff believes that additional adjustments should be made to the Form 13F reporting threshold, the staff will recommend an appropriate adjustment to the Commission.

As an alternative, we considered proposing to amend rule 13f–1 to provide that the Commission would make automatic future adjustments to the Form 13F reporting threshold on an ongoing basis every five years to keep the reporting threshold aligned with the size and structure of the market.[62] For example, we considered proposing that these automatic adjustments take into account the growth in the U.S. equities market. However, we are concerned that adjusting the Form 13F reporting threshold to account for the growth in U.S. equities market for regularly recurring, automatic, and ongoing adjustments could cause volatile changes in the reporting threshold. Alternatively, we considered using inflation indexes, such as the PCE or CPI, to make automatic adjustments to the Form 13F reporting threshold. While these measures would result in less volatile changes to the 13F reporting threshold, we are concerned that the growth in the size of the market may outpace inflation over time. This would cause the 13F reporting threshold to burden smaller managers unnecessarily.

Based on these considerations, we determined not to propose automatic future adjustments to the reporting threshold. The staff's periodic review of the Form 13F reporting threshold and any resulting staff recommendation would inform the Commission's consideration of whether to propose additional changes to the threshold in the future. Addressing any future change to the reporting threshold in notice and comment rulemaking, as opposed to an automatic adjustment required by an order, would allow the Commission to actively consider and receive public comment on the effects of any future adjustments to the reporting threshold, including the effects on the mix of information available to the market and the reporting burdens associated with filing Form 13F reports. We request comment on the following:

14. Rather than the staff conducting periodic reviews of the Form 13F reporting threshold, should we instead adopt a periodic automatic adjustment to the Form 13F reporting threshold? If so, how often should the reporting threshold be automatically adjusted? If we adopt an automatic adjustment, what measure should we use to make the adjustment? Should we use consumer price inflation measures such as the CPI or PCE? Should we use stock market growth or stock market returns instead? Is there a different measure that would be more appropriate? If so, please explain why. If we use any of these measures, how should they be measured and as of what date? If we use an adjustment based on stock market growth or returns, the adjustment could be positive or negative compared with the present level. Would such an automatic adjustment raise any additional issues that the Commission should take into account in considering such an automatic adjustment?

C. Omission Threshold for Form 13F

Form 13F allows, but does not require, a manager to omit holdings of fewer than 10,000 shares (or less than $200,000 principal amount of convertible debt securities) (''share limit'') and less than $200,000 aggregate fair market value (''value limit'') (together, with the share limit, ''omission threshold'').[63] The omission threshold was intended to further the Commission's goals of structuring Form 13F in a manner that would provide meaningful holdings data while minimizing the form's reporting burdens.[64] The Commission included the omission threshold when it first adopted Form 13F because it viewed aggregate holdings in these amounts as *de minimis* and, therefore, unlikely to have the potential to materially impact the market.[65]

In conjunction with the proposal to increase the reporting threshold, we are proposing to eliminate the omission threshold for Form 13F. We believe that, if the reporting threshold is substantially increased, the omission threshold would no longer be necessary or appropriate. We have proposed a significant increase in the reporting threshold for Form 13F to $3.5 billion and, as a result, reporting all of a manager's holdings would be less burdensome to managers of that size. For these larger managers, we believe that the incremental increase in cost, if any, of including securities holdings information below the omission threshold on Form 13F would be immaterial, including because larger managers are more likely to have trading and other systems that can export all of the manager's positions (regardless of size) for purposes of reporting on Form 13F. Eliminating the omission threshold therefore may not materially increase burdens for these filers. Although we do not have data on the extent to which managers currently utilize the omission threshold, our staff has examined current filings on Form 13F by managers reporting more than $3.5 billion in holdings and found that a number of these managers currently report holdings that fall below the omission threshold.[66] These managers choose not to omit certain holdings even where Form 13F would permit them to do so. Should a manager determine that disclosure of a smaller holding may cause harm and qualify for confidential treatment, we believe that managers with at least $3.5 billion under management would be able to seek appropriate protection by filing Form 13F CTR.

Rather than eliminate the omission threshold entirely, as proposed, we considered adjusting it, including adjusting it upwards to account for market growth, akin to the adjustment we are proposing to the reporting threshold (*e.g.,* increasing the share limit to 50,000 and the value limit to $1,000,000[67]). We are not taking this or

[62] Such a requirement would be similar to other automatic periodic adjustments that the Commission makes. For example, 17 CFR 275.205–3 [rule 205–3 under the Investment Advisers Act of 1940 (''Advisers Act'')] provides that the Commission will issue an order every five years to adjust the dollar amounts in that rule for the effects of inflation.

[63] *See* Special Instruction 10 of Form 13F.

[64] *See supra* footnote 17 and accompanying text.

[65] *See* 13F Adopting Release, *supra* footnote 10 at n.12 and accompanying text.

[66] In December 2018, we estimate that 1,162 managers, or 23.1 percent, voluntarily reported at least some positions that fell within the omission threshold. Additionally, approximately 212 managers (or 38.27 percent) who had at least $3.5 billion in assets under management voluntarily reported positions that fell below the omission threshold.

[67] Based on the staff's review of data reported on Form 13F, increasing the share and value limits in

Continued

a similar approach because, as discussed, we believe that the incremental increase in cost, if any, of including securities holdings information below the current omission threshold—or any revised threshold—is likely immaterial.

We seek comment on our proposal to eliminate the omission threshold, including the following issues:

15. Should we, as proposed, eliminate the omission threshold? Why or why not?

16. If the Form 13F reporting threshold is raised to $3.5 billion as proposed, to the extent it is not already reported on a voluntary basis, would investors and the markets find the disclosure of smaller holdings information for larger managers valuable? Why or why not?

17. Among Form 13F filers with at least $3.5 billion of 13(f) securities under management, is it costly to report small positions? Why or why not? How many of these filers' positions have fewer than 10,000 shares? How many of their positions are valued under $200,000? What is the incremental cost of reporting these small positions on Form 13F? Is the incremental cost significant? Are there other costs associated with identifying these specific positions for purposes of excluding them? Are there other reasons that it would be beneficial to keep the omission threshold?

18. Rather than eliminating the omission threshold, should we increase it? If so, what part should we increase? Should we adjust only the share limit of the omission threshold? If so, to what? Should we adjust only the value limit of the omission threshold? If so, to what? Should we adjust both components of the omission threshold? If so, to what? Should we, for example, increase the share limit to 50,000 and the value limit to $1,000,000?

19. Should we mirror the adjustment to the omission threshold proportionately to the adjustment we are proposing for the Form 13F reporting threshold using stock market growth? Would such an adjustment result in a significant decrease in securities reported on Form 13F? Would such an adjustment impede the ability of the public to observe the impact managers have on the markets?

20. If we maintain an omission threshold, should we adopt a mechanism for automatic future adjustments of the omission threshold? Should future adjustments be for the share limit, for the value limit, or for both? What is an appropriate mechanism for adjusting the share limit?

this way would result in 25.83 percent of the number of holdings qualifying for omission on Form 13F and a decrease in the value of the reported securities of 0.22 percent.

D. Additional Identifying Information

We are proposing to amend Form 13F to require filers to provide additional identifying information. The proposed amendments would require each Form 13F filer to provide its CRD number and SEC filing number, if any.[68] If a manager is making a Form 13F–NT filing, the manager must include the CRD number and SEC filing number, if any, of any other manager included in the ''List of Other Managers Reporting for this Manager'' table on the cover page.[69]

We believe that this information would allow the Commission and other consumers of Form 13F data to identify a Form 13F filer's other regulatory filings and the interrelationships between managers who share investment discretion over 13(f) securities more easily. This could identify for the public additional sources of market information.[70] We estimate that each manager will initially spend six hours per year implementing these changes.[71] Therefore, we estimate that these amendments will initially impose $1,164,798 of costs on all managers who would be required to file Form 13F under the proposed reporting threshold.[72] We believe that the estimated additional costs of requiring this disclosure would be justified by informational efficiencies and benefits.[73]

We seek comment on the following issues:

21. Should we require managers to provide their CRD number and SEC filing number, if any, on Form 13F?

22. Should we require managers to provide the CRD number and SEC filing number, if any, of other managers identified in their 13F report?

23. Would this additional identifying on Form 13F be useful information? If so, how?

24. Would disclosing this information be unduly burdensome for 13F filers?

25. Are there any other amendments we should make to the information provided on Form 13F? For example, is there any information currently required that is not useful or does not have a beneficial effect for investors, reporting managers, or users of the data? Should we consider omitting Form 13F's requirement to provide a CUSIP number for each security? Why or why not? Should we permit managers to provide, in lieu of a CUSIP number, other identifiers such as a Financial Instrument Global Identifier (FIGI) for each security? Why or why not? Would permitting voluntary use of an alternate identifier have a beneficial effect for investors, reporting managers, or users of the data?

E. Technical Amendments

We are proposing to make certain nonsubstantive technical amendments to Form 13F designed to account for the previous change in the format of Form 13F from the plain-text ASCII format to the structured XML data format. For example, we are proposing to simplify the rounding conventions of Form 13F by requiring all dollar values listed on Form 13F to be rounded to the nearest dollar, rather than to the nearest one thousand dollars as is currently required.[74] We are also proposing to remove the requirement that filers, when reporting dollar values on Form 13F, omit the ''000''.[75] As a space saving measure, current Form 13F instructs filers to omit the ''000'' and thus, for example, report a security with a value of $5 million as $5,000. As proposed, such a filer would report the security's value as $5,000,000. Since column width is no longer an issue with the structured XML data format, we believe that this change will reduce filer mistakes and data inaccuracies.[76] For

[68] *See* proposed amendments to Special Instruction 5 of Form 13F.

[69] A manager can make a Form 13F–NT filing if all the securities for which the manager has investment discretion are reported by another manager. *See* Special Instruction 6 of Form 13F. Similarly, if a manager's Form 13F–HR reports the holdings of managers other than the reporting manager, the reporting manager would be required to include the CRD number and SEC filing number of those other managers in the ''List of Other Included Managers'' on the cover page. *See* Special Instruction 8 of Form 13F.

[70] *See* section 13(f)(4) of the Exchange Act [15 U.S.C. 78m(f)(4)] (requiring the Commission to tabulate information contained in Form 13F reports in a manner that would ''maximize the usefulness of the information to other Federal and State authorities and the public''). The ability to identify interrelationships between managers easily could also allow third party vendors that compile Form 13F data to provide more complete trading information. *See* Pekarek, *supra* footnote 52, at n.91 (noting that most academic studies rely on 13F filings compiled quarterly by third party vendors).

[71] *See* Section III below for a discussion of estimated burdens associated with Form 13F under the Paperwork Reduction Act.

[72] *Id.*

[73] Other regulatory filings also require similar identifying information. *See e.g.,* Form N–CEN [referenced in 17 CFR 274.101]; Form ADV [referenced in 17 CFR 279.1].

[74] *See* proposed amendments to Special Instruction 9 of Form 13F.

[75] *Id.*

[76] *See* Anne Anderson & Paul Brockman, *An Examination of 13F Filings,* 41 J. Fin. Res. 295, 312–314 (2018) (the authors analyzed the accuracy of Form 13F data and concluded that mistakes in applying Form 13F's rounding guidelines leads to

similar reasons, we also are proposing to remove the 80 character limit imposed on the information filers can include on the cover page and the summary page and the 132 character limit on the information table.[77] We believe that these amendments would enhance the accuracy of the data provided on Form 13F and make it easier to understand and use. Additionally we are proposing to remove duplicative definitions and streamline certain sections to simplify Form 13F's instructions.[78] We estimate that each manager will initially spend 10 hours per year implementing these changes.[79] Therefore, these amendments would impose $1,417,350 of costs on all managers who would be required to file Form 13F under the proposed reporting threshold.[80]

We request comment on our proposed technical amendments, and the following issues:

26. Should we require filers to round all dollar values listed on Form 13F to the nearest dollar and remove the requirement to omit ''000''? Should we, alternatively, maintain the current rounding conventions? Should we adopt some other rounding conventions? Should we no longer permit rounding?

27. Are there any other amendments we should make to streamline Form 13F or simplify its instructions? If so, what are they?

28. Will our proposed technical amendments increase the accuracy of Form 13F data?

29. Will our proposed technical amendments make Form 13F data easier to understand and more accessible to the public?

30. Would these proposed technical amendments impose costs or burdens on filers?

We are also proposing to amend the instructions on the Form 13F for confidential treatment requests to require managers seeking confidential treatment for information contained in Form 13F to demonstrate that the information is both customarily and actually kept private by the manager, and to show how the release of this information could cause harm to the manager.[81] We believe the proposed amendment is necessary in light of a U.S. Supreme Court decision in June 2019 that changed the standard for determining whether information is ''confidential'' under exemption 4 of the Freedom of Information Act (''FOIA'').[82] Our proposed amendment is necessary because a FOIA analysis is part of a Form 13F CTR determination. Section 13(f)(4) of the Exchange Act authorizes the Commission, as it determines to be necessary or appropriate in the public interest or for the protection of investors, to delay or prevent public disclosure of certain Form 13F information in accordance with the FOIA. Additionally, Section 13(f)(5) of the Exchange Act requires that the Commission, in exercising its authority under section 13(f), ''determine (and so state) that its action is necessary or appropriate in the public interest and for the protection of investors or to maintain fair and orderly markets.'' We seek comment on our proposed modified standard for Form 13F CTRs, and the following issue:

31. Does the amendment appropriately reflect the effect of the U.S. Supreme Court's June 24, 2019, decision in *Food Marketing Institute* v. *Argus Leader Media* on the type of information that is required to substantiate confidential treatment in accordance with Exchange Act sections 13(f)(4) and (5) and rule 24b–2 thereunder?

Finally, we are proposing technical amendments to Form 13F's instructions for confidential treatment requests to reflect amendments to the Commission's FOIA regulations that were amended in 2018.[83]

F. Efficiency, Competition, and Capital Formation

We are sensitive to the costs and benefits of the rules we are proposing, and section 23(a)(2) of the Exchange Act requires us to consider, among other matters, the impact that any new rule would have on competition and states that the Commission shall not adopt any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, section 3(f) of the Exchange Act directs us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. The impacts of the proposed amendments on efficiency, competition, and capital formation are discussed throughout this section and elsewhere in this release. The following discussion highlights several such impacts.

The Commission believes that, for smaller managers, the proposed Form 13F reporting threshold increase is likely not only to enhance competition by lowering the cost to participate in the market but also to promote efficiency, which can benefit investors in the form of lower management fees and/or enhanced services. Furthermore, because the proposed Form 13F reporting threshold increase would potentially reduce the exposure of smaller managers to harmful, and in many cases inappropriate, actions by other market participants, such as front running, smaller managers would likely be encouraged to invest in small and mid-size portfolio companies that are more susceptible to the harmful effects of these behaviors.[84] This increased investment would facilitate capital formation in smaller and medium sized companies. Similarly, protecting smaller managers from these harmful behaviors would likely promote competition between smaller and larger managers by helping to level the playing field for smaller managers. Investors would similarly benefit from the price impacts of this competition as well as any reduction in harmful trading behaviors.

The Commission also believes that the proposed increase in the Form 13F reporting threshold would enhance efficiency by reducing the reporting burden of Form 13F which would enable smaller managers to devote more resources to, for example, market research that might promote price discovery. Similarly, the Commission believes that the proposed technical amendments would increase efficiency by enhancing the accuracy of the data provided on Form 13F and thus improving the data's usefulness. Furthermore, by requiring managers to provide additional identifying information, and identifying information of other managers covered

many discrepancies in the reported values on Form 13F).

[77] These character limits are imposed by 17 CFR 232.305 [rule 305 of Regulation S–T].

[78] *See* proposed amendments to General Instructions 1 and 3 well as Special Instructions 3, 7, 8, and 13 of Form 13F. We are also proposing to streamline the discussion in the Paperwork Reduction Act Section of Form 13F.

[79] *See* Section III below for a discussion of estimated burdens associated with Form 13F under the Paperwork Reduction Act.

[80] *Id.*

[81] *See* proposed amendments to Instruction 2.d for Confidential Treatment Requests of Form 13F.

[82] 5 U.S.C. 552(b)(4). *See Food Marketing Institute* v. *Argus Leader Media,* 139 S. Ct. 2356 (2019) (stating that ''[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4'').

[83] Proposed amendments to Instructions for Confidential Treatment Requests of Form 13F. *See* Amendments to the Commission's Freedom of Information Act Regulations, Exchange Act Release No. 83506 (June 25, 2018) [83 FR 30322] (June 28, 2018).

[84] *See supra* footnote 34.

by the report, these proposed amendments would enhance efficiency by making it easier for regulators and the public to identify a Form 13F filer's other regulatory filings and the interrelationships between managers who share investment discretion over 13(f) securities.

This rulemaking also would remove the omission threshold for Form 13F filers. The Commission believes that this will have only negligible effects on efficiency, competition, and capital formations because, on the one hand, the additional immaterial information is not likely to be of significant value, and on the other hand, the costs of reporting these small positions is *de minimis* for filers with at least $3.5 billion of 13(f) securities. Further, to the extent an asymmetry in reporting could occur between larger and smaller managers with respect to holdings in small and medium sized companies, if a larger manager were to determine that disclosure of a small holding may negatively affect its competitive position, we believe that a larger manager would be able to seek appropriate protection without undue burden by filing a Form 13F CTR.

We request comment on all aspects of our analysis, including the potential benefits and costs of the proposed amendments, and whether the proposed amendments, if adopted, would promote efficiency, competition, and capital formation or have an impact on investor protection. Commenters are requested to provide empirical data, estimation methodologies, and other factual support for their views, in particular, on the estimates of costs and benefits for the affected parties.

32. Would relieving smaller managers from the compliance burdens of Form 13F reduce costs and enhance competition and add efficiency, including enhancing the ability of smaller managers to compete in the market? To what extent, if any, would the benefits be passed on to investors in the form of lower management fees and/or enhanced services? Would the proposed increase in the Form 13F threshold protect smaller managers from harmful behaviors such as front-running? Would reducing this risk for smaller managers promote capital formation by encouraging these managers to invest more in small and mid-size portfolio companies? Would reducing this risk for smaller managers benefit investors?

33. Would the proposed technical amendments increase efficiency by enhancing the accuracy of Form 13F data? Are the cost estimates appropriate?

34. Would the proposed additional identifying information increase efficiency by making it easier to identify a Form 13F filer's other regulatory filings and the interrelationships between managers who share investment discretion over 13(f) securities?

III. Paperwork Reduction Act Analysis

Certain provisions of the proposed amendments to Form 13F would affect the ''collection of information'' burden under Form 13F within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[85] We are submitting the proposed collection of information to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[86] The title for the existing collection of information is: ''Form 13F, Report of Institutional Investment Managers (Pursuant to Section 13(f) of the Securities Exchange of 1934)'' (OMB Control No. 3235–0006). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The requirements of this collection of information are mandatory. Responses are not kept confidential, unless they are confidential pending review pursuant to rule 24b–2(c) under the Exchange Act or the Commission grants an application for confidential treatment pursuant to section 13(f)(4) of the Exchange Act.

A. Form 13F

In our most recent PRA submission for Form 13F, we estimated a total hour burden of 472,521.6 hours, with an internal cost burden of $31,186,425.60, and with no annual external cost burden.[87] Based on staff analysis and outreach to managers, however, we believe that these estimates do not reflect all of the information collection costs associated with Form 13F. The current burden estimates for Form 13F assume that all of the functions are carried out by a compliance clerk, whereas we understand that additional professionals are typically involved. The current burden estimates also do not include external costs for third-party vendors, which we understand many managers use in connection with their filings on Form 13F, or external legal counsel, who may provide advice in connection with the form's reporting requirements or actual or potential requests for confidential treatment. Furthermore, the current burden estimates assume that the same number of hours and costs are necessary to prepare and file Form 13F–HR and 13F–NT filings, even though reports on Form 13F–HR would involve greater burdens. This results in a current overestimation of the costs associated with filing Form 13F–NT. Therefore, we are revising the current PRA burdens associated with filing Form 13F.

The table below summarizes our adjustments to the current PRA estimates and the initial and ongoing annual burden estimates associated with the proposed amendments to Form 13F. Staff estimates that the proposed amendments will not change the PRA hour burdens associated with making amended filings on Form 13F.

TABLE 2—FORM 13F PRA ESTIMATES

	Initial hours	Annual hours		Wage rate	Internal time cost	External costs [1]
REVISIONS TO CURRENT PRA BURDEN ESTIMATES Revised Burdens for 13F–HR Filings						
Current estimated annual burden of Form 13F–HR per filer.		80.8 hours	×	$66 [2]	$5,332.80.	

[85] 44 U.S.C. 3501 through 3520.

[86] 44 U.S.C. 3507(d); 5 CFR 1320.11.

[87] This estimate is based on the last time the rule's information collection was submitted for PRA renewal in 2018.

TABLE 2—FORM 13F PRA ESTIMATES—Continued

	Initial hours	Annual hours		Wage rate	Internal time cost	External costs [1]
Revised current annual estimated burden per filer.		80.8 hours × 5,089 filers [3].	×	$257.70 (blended rate for compliance attorney, senior programmer, and compliance clerk) [4].	$20,822.16 × 5,089 filers	$789 [5] × 5,089 filers.
Revised current annual burden of Form 13F–HR filings.		411,191.2 hours			$105,963,972	$4,015,221.[6]
Revised Burdens for 13F–NT Filings						
Current estimated annual burden of Form 13F–NT.		80.8 hours.				
Revised current estimated Form 13F–NT burden per filing.		4 hours × 4 filings.				
Revised current annual burden of Form 13F–NT per filer.		16 hours × 1,570 filers [7].	×	$71 (wage rate for compliance clerk).	$1,136 × 1,570 filers	$300 × 1,570 filers.
		25,120 hours			$1,783,520	$471,000.
Revised Burdens for Form 13F Amendment Filings						
Current estimated burden per amendment filing.		4 hours		$66.00	$264.	
Revised current estimated burden per amendment.	.	4 hours × 1,066 amendments.	×	$257.70 (blended rate for compliance attorney, senior programmer, and compliance clerk).	$1,030.80 × 1,066 amendments	$300 × 1,066 amendments.
Revised current annual estimated burden of all amendments.		4,264 hours			$1,098,832.80	$319,800.
PROPOSED AMENDMENTS TO FORM 13F Estimated Form 13F–HR Burdens						
Proposed Amendments to Form 13F–HR (additional identifying information, technical amendments, change in omission threshold) per filer.	16	5.8 hours [8]	×	$257.70 (blended rate for compliance attorney, senior programmer, and compliance clerk) [9].	$1,494.66	$0.
New annual estimated Form 13F–HR burden per filer.		86.6 hours			$22,316.82	$789.
Number of annual filers.		× 550 filers [10]			× 550 filers	× 550 filers.
Total new annual burden.		47,630 hours			$12,274,251	$433,950.
Estimated Form 13F–NT Burdens						
Proposed Amendments to Form 13F–NT (additional identifying information).	6	2.5 hours [8]	×	71.00 (wage rate for compliance clerk) [11].	$177.50	$0.
New annual estimated Form 13F–NT burden per filer.		18.5 hours × 738 filers [12].			$1,313.50 × 738 filers	$300 × 738 filers.
Number of annual filers.						
Total new annual burden.		13,653 hours			$969,363	$221,400.
Estimated Amendment Filings Burdens						
Revised estimated number of Amendments.		344 amendments [13] × 4 hours.				$300 × 344 amendments.
Estimated total burden of amendments.		1,376 hours	×	$257.70 (blended rate for compliance attorney, senior programmer, and compliance clerk).	$354,595.2	$103,200.
TOTAL ESTIMATED FORM 13F BURDEN						
Currently approved burden estimates.	472,521.6 hours				$31,186,425.60	$0.
Revised current burden estimates.	440,575.2 hours				$108,846,325	$4,806,021.

TABLE 2—FORM 13F PRA ESTIMATES—Continued

	Initial hours	Annual hours		Wage rate	Internal time cost	External costs [1]
Burden estimates under the proposal.	62,659 hours			.....	$13,598,209.2	$758,550.

Notes:

[1] The external costs of complying with Form 13F can vary among filers. Some filers use third-party vendors for a range of services in connection with filing reports on Form 13F, while other filers use vendors for more limited purposes such as providing more user-friendly versions of the list of section 13(f) securities. For purposes of the PRA, we estimate that each filer will spend an average of $300 on vendor services each year in connection with the filer's four quarterly reports on Form 13F–HR or Form 13F–NT, as applicable, in addition to the estimated vendor costs associated with any amendments. In addition, some filers engage outside legal services in connection with the preparation of requests for confidential treatment or analyses regarding possible requests, or in connection with the form's disclosure requirements. For purposes of the PRA, we estimate that each manager filing reports on Form 13F–HR will incur $489 for one hour of outside legal services each year.

[2] $66 was the estimated wage rate for a compliance clerk in 2018.

[3] This estimate is based on the number of 13F–HR filers as of December 2018.

[4] The $257.7 wage rate reflects current estimates of the blended hourly rate for an in-house compliance attorney ($368), a senior programmer ($334) and in-house compliance clerk ($71). $257.7 is based on the following calculation: ($368 + $334 + $71)/3 = $257.7. The $368 per hour and $334 per hour figures for a compliance attorney and a senior programmer, respectively, are based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association's Office Salaries in the Securities Industry 2013 (''SIFMA Report''), modified by Commission staff to account for an 1800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The $71 per hour figure for a compliance clerk is based on salary information from the SIFMA Report, modified by Commission staff to account for an 1800-hour work-year and inflation, and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

[5] $789 includes an estimated $300 paid to a third-party vendor in connection with the Form 13F–HR filing as well as an estimated $489 for one hour of outside legal services.

[6] We estimate that Form 13F–HR filers will require some level of external legal counsel in connection with these filings.

[7] This estimate is based on the number of Form 13F–NT filers as of December 2018.

[8] Includes initial burden estimates annualized over a three-year period, plus 0.5 hours of ongoing annual burden hours.

[9] These PRA estimates assume that the same types of professionals would be involved in satisfying the proposed amendments that we believe otherwise would be involved in preparing and filing reports on Form 13F–HR.

[10] This estimate is based on the Form 13F–HR filers as of December 2018 that would continue to be required to file Form 13F under the proposed $3.5 billion reporting threshold.

[11] These PRA estimates assume that the same types of professionals would be involved in satisfying the proposed amendments that we believe otherwise would be involved in preparing and filing reports on Form 13F–NT.

[12] This estimate is based on the number of Form 13F–NT filers as of December 2018, and assumes that a Form 13F–NT filing linked to a Form 13F–HR filing of a manager that exceeds the $3.5 billion threshold would continue to be filed.

[13] We estimate that 86 filers would file amendments to Form 13F if the $3.5 billion reporting threshold is adopted. 86 amendments × 4 annual filings = 344 amendments.

B. Request for Comments

We request comment on whether these estimates are reasonable. Specifically, we request comment on whether our estimated average costs are reasonable in light of the proposed increase in the Form 13F reporting threshold. The proposal would limit the form's reporting obligations to larger managers, while the average burden estimate of 86.6 hours represents the average burden of complying with Form 13F across all current filers. Furthermore, the proposal assumes that a compliance attorney, a senior programmer, and a compliance clerk would be equally involved in fulfilling a manager's compliance burdens associated with Form 13F. We request comment on these assumptions, recognizing that there will be some variation among different managers. Additionally, we seek comment on our estimated external costs of complying with Form 13F–HR and any amendments and Form 13F–NT.

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (1) Evaluate whether the 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 the 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) determine whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons wishing to submit comments on the collection of information requirements of the proposed amendments should direct them to the OMB Desk Officer for the Securities and Exchange Commission, *MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov*, and should send a copy to, Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File No. S7–08–20. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this release; therefore a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication of this release. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–08–20, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

IV. Initial Regulatory Flexibility Analysis

Pursuant to Section 605(b) of the Regulatory Flexibility Act (''RFA''),[88] the Commission hereby certifies that the proposed amendments to rule 13f–1 and Form 13F under the Exchange Act, relating to increasing the reporting threshold for Form 13F from $100 million to $3.5 billion, along with certain technical amendments, would not, if adopted, have a significant economic impact on a substantial number of small entities. The definition of the term ''small entity'' in the Exchange Act does not explicitly reference institutional investment managers.[89] However, rule 0–10 provides that the Commission may ''otherwise define'' small entities for purposes of a particular rulemaking proceeding. For purposes of the proposed amendments relating to the reporting threshold of Form 13F, the Commission has determined to use the definition of small entity under 17 CFR 275.0–7(a) as more appropriate to the functions of managers. The Commission believes that the proposed definition would help ensure that all persons or entities that might be institutional investment managers under section 13(f) of the Exchange Act will be included within a category addressed by the definition. Therefore, for purposes of

[88] 5 U.S.C. 605(b).

[89] 17 CFR 240.0–10 (''rule 0–10'').

this rulemaking and the RFA, a manager is a small entity if it: (i) Has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[90] The Commission requests comments on the use of this definition.

Managers are not required to submit reports on Form 13F unless they exercise investment discretion with respect to accounts holding 13(f) securities having an aggregate fair market value on the last trading day of any month of any calendar year of at least $100 million. Therefore, no small entities for purposes of rule 0–10 under the Exchange Act are affected by the form or by an increase to the reporting threshold. The Commission requests written comments regarding these certifications. The Commission requests that commenters describe the nature of any impact on small businesses and provide empirical data to support the extent of the impact.

V. Consideration of the Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''),[91] we must advise OMB whether a proposed regulation constitutes a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results in or is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effects on competition, investment or innovation.

The Commission requests comment on the potential impact of the proposed amendments on the economy on an annual basis. The Commission requests that commenters provide empirical data and other factual support for their views to the extent possible.

VI. Statutory Authority

The Commission is proposing amendments to rule 13f–1 and Form 13F pursuant to the authority set forth in sections 3(b), 13(f), 23, 24, and 36 of the Exchange Act [15 U.S.C. 78c(b), 78m(f), 78w, 78x, and 78mm].

List of Subjects

17 CFR Part 240

Confidential business information, Reporting and recordkeeping requirements, Securities.

17 CFR Part 249

Reporting and recordkeeping requirements, Securities.

Text of Proposed Rule and Form Amendments

For the reasons set out in the preamble, the Commission proposes to amend title 17, chapter II of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The general authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

§ 240.13f–1 [Amended]

■ 2. Amend § 240.13f–1 by:
■ a. In paragraph (a)(1), removing ''$100,000,000'' and adding in its place ''$3.5 billion'';
■ b. In paragraph (c), removing ''$100,000,000'' and adding in its place ''$3.5 billion''; and
■ c. Removing the authority citation at the end of the section.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 3. The general authority citation for part 249 continues to read as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* 18 U.S.C. 1350; Sec. 953(b), Pub. L. 111–203, 124 Stat. 1904; Sec. 102(a)(3), Pub. L. 112–106, 126 Stat. 309 (2012); Sec. 107, Pub. L. 112–106, 126 Stat. 313 (2012), and Sec. 72001, Pub. L. 114–94, 129 Stat. 1312 (2015), unless otherwise noted.

* * * * *

■ 4. Form 13F (referenced in § 249.325) is amended by:
■ a. In General Instruction 1, revising ''$100,000,000'' to read ''$3.5 billion'';
■ b. In General Instruction 3, revising the first sentence to read ''Rule 13f–1(a)(1) provides that a Manager must file a Form 13F report with the Commission within 45 days after the end of the calendar year and each of the first three calendar quarters of the subsequent calendar year.'';
■ c. In General Instruction 3, replacing ''the EDGAR Filing'' with ''the filing made on the Commission's Electronic Data Gathering, Analysis, and Retrieval (''EDGAR'') system'';
■ d. In the last sentence of the second paragraph of the Instructions for Confidential Treatment Requests, delete the phrase ''the Commission's rules and regulations adopted under'';
■ e. In Instruction 2.d for Confidential Treatment Requests, revising it to read as follows: ''Demonstrate that the information is both customarily and actually kept private by the Manager, and how release of this information could cause harm to the Manager.''
■ f. In Special Instruction 3, deleting the phrase ''(and in the EDGAR submission header)'';
■ g. In Special Instruction 5, revising it to read as follows: ''Present the Cover Page and the Summary Page information in the format and order provided in the form. If the Manager has a number assigned by the Financial Industry Regulatory Authority's Central Registration Depository system or by the Investment Adviser Registration Depository system (''CRD number''), provide the Manager's CRD number. If the Manager has a filing number (*e.g.,* 801–, 8–, 866–, 802–) assigned by the Commission (''SEC filing number''), provide the Manager's SEC filing number. The Cover Page may include information in addition to the required information, so long as the additional information does not, either by its nature, quantity, or manner of presentation, impede the understanding or presentation of the required information. Place all additional information after the signature of the person signing the report (immediately preceding the Report Type section). Do not include any additional information on the Summary Page or in the Information Table.'';
■ h. In Special Instruction 7, deleting the phrase ''on the Summary Page'';
■ i. In Special Instruction 7.a, deleting the phrase ''on the Summary Page'';
■ j. In Special Instruction 8, deleting the phrase ''on the Summary Page'';
■ k. Replacing the first sentence of Special Instruction 8.b with the following ''If this Form 13F report reports the holdings of one or more

[90] 17 CFR 275.0–7(a) (''rule 0–7(a)''). Recognizing the growth in assets under management at investment advisers since rule 0–7(a) was adopted, the Commission plans to revisit the definition of a small entity in rule 0–7(a).

[91] Public Law 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

Managers other than the Manager filing this report, enter in the List of Other Included Managers all such Managers together with any CRD Number or SEC filing number assigned to each Manager and, if known, the Managers' respective Form 13F file numbers (The Form 13F file numbers are assigned to Managers when they file their first Form 13F.).'';

■ l. In Special Instruction 9, revising ''rounded to the nearest one thousand dollars (with ''000'' omitted)'' to read ''rounded to the nearest dollar'';

■ m. Deleting Special Instruction 10 and renumbering Special Instructions 11, 12, and 13 to 10, 11, and 12, respectively;

■ n. In renumbered Special Instruction 10, revising ''$100,000,000'' to read ''$3.5 billion'';

■ o. In renumbered Special Instruction 11.b.i, revising the phrase ''rule 13f–1(c) (the ''13F List'')'' to read ''the 13F List''; and

■ p. Deleting renumbered Special Instruction 12 in its entirety and replacing it with the following:

''**Filing of Reports**

■ 13. Reports must be filed electronically using EDGAR in accordance with Regulation S–T. Consult the EDGAR Filer Manual and Appendices for EDGAR filing instructions.''

■ q. Deleting the Paperwork Reduction Act Information section in its entirety and replacing it with the following:

''PAPERWORK REDUCTION ACT INFORMATION

Persons who are to respond to the collection of information contained in this form are not required to respond to the collection of information unless the form displays a currently valid Office of Management and Budget (''OMB'') control number. Please direct comments concerning the accuracy of the information collection burden estimate and any suggestions for reducing the burden to the Secretary, Securities and Exchange Commission, Washington, DC 20549. OMB has reviewed this collection of information under the clearance requirements of 44 U.S.C. 3507.'';

■ r. In the Institutional Investment Manager Filing this Report section on the Cover Page, adding ''CRD Number (if applicable):____'' and ''SEC Filing Number (if applicable):____ '';

■ s. In the List of Other Managers Reporting for this Manager section on the Cover Page, adding ''CRD Number (if applicable)'' and ''SEC Filing Number (if applicable)'' columns;

■ t. In the Report Summary on the Form 13F Summary Page, replacing ''(thousands)'' with ''(round to the nearest dollar)'' in the Form 13F Information Table Value Total row.

■ u. In the List of Other Included Managers section of the Form 13F Summary Page, adding ''CRD Number (if applicable)'' and ''SEC Filing Number (if applicable)'' columns; and

■ v. In the Form 13F Information Table, replacing ''(x$1000)'' with ''(to the nearest dollar)'' in the Value subcolumn.

By the Commission.

Dated: July 10, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–15322 Filed 7–30–20; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 40 and 49

[REG–112042–19]

RIN 1545–BP37

Excise Taxes; Transportation of Persons by Air; Transportation of Property by Air; Aircraft Management Services

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and partial withdrawal of notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the excise taxes imposed on certain amounts paid for transportation of persons and property by air. Specifically, the proposed regulations relate to the exemption for amounts paid for certain aircraft management services. The proposed regulations also amend, revise, redesignate, and remove provisions of existing regulations that are out-of-date or obsolete and generally update the existing regulations to incorporate statutory changes, case law, and other published guidance. In addition, the proposed regulations withdraw a provision that was included in a prior notice of proposed rulemaking that was never finalized and re-propose it. The proposed regulations affect persons that provide air transportation of persons and property, and persons that pay for those services.

DATES: Written or electronic comments and requests for a public hearing must be received by September 29, 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 *www.regulations.gov* (indicate IRS and REG–112042–19) 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 paper submissions to: CC:PA:LPD:PR (REG–112042–19), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Michael H. Beker or Rachel S. Smith at (202) 317–6855; concerning submissions of comments and/or requests for a public hearing, Regina Johnson, (202) 317–5177 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Facilities and Services Excise Tax Regulations (26 CFR part 49) under sections 4261, 4262, 4263, 4264, 4271, 4281, and 4282 of the Internal Revenue Code (Code). This document also contains proposed amendments to the Excise Tax Procedural Regulations (26 CFR part 40).

Section 4261 imposes an excise tax on certain amounts paid for transportation of persons by air. Section 4271 imposes an excise tax on certain amounts paid for transportation of property by air. The excise taxes imposed by sections 4261 and 4271 (collectively, air transportation excise tax), as well as certain Federal fuel taxes, are deposited into the Airport and Airway Trust Fund, which funds the Federal Aviation Administration's (FAA) operations, air transportation infrastructure, and other aviation-related programs. *See* section 9502 of the Code.

Section 13822 of Public Law 115–97, 131 Stat. 2054, 2182 (2017), commonly referred to as the Tax Cuts and Jobs Act (TCJA), amended the Code by adding paragraph (e)(5) to section 4261. The

new provision provides that no tax shall be imposed by section 4261 or 4271 on any amount paid by an aircraft owner for aircraft management services related to: (1) Maintenance and support of the aircraft owner's aircraft, or (2) flights on the aircraft owner's aircraft.

Section 4261(e)(5)(B) defines the term ''aircraft management services'' to include assisting an aircraft owner with: (1) Administrative and support services, such as scheduling, flight planning, and weather forecasting; (2) obtaining insurance; (3) maintenance, storage, and fueling of aircraft; (4) hiring, training, and provision of pilots and crew; (5) establishing and complying with safety standards; and (6) such other services as are necessary to support flights operated by an aircraft owner.

Section 4261(e)(5)(C)(i) provides that the term ''aircraft owner'' includes a person who leases an aircraft other than under a ''disqualified lease.'' Section 4261(e)(5)(C)(ii) defines the term ''disqualified lease'' for purposes of section 4261(e)(5)(C)(i) as a lease from a person providing aircraft management services with respect to the aircraft (or a related person (within the meaning of section 465(b)(3)(C)) to the person providing such services), if the lease is for a term of 31 days or less.

Finally, section 4261(e)(5)(D) provides that in the case of amounts paid to any person which (but for section 4261(e)(5)) are subject to air transportation excise tax, a portion of which consists of amounts described in section 4261(e)(5)(A), section 4261(e)(5) shall apply on a pro rata basis only to the portion which consists of amounts described in section 4261(e)(5)(A).

The Conference Report accompanying the TCJA, H.R. Rep. No. 115–466, at 536 (2017) (Conference Report), explains that section 4261(e)(5) ''exempts certain payments related to the management of private aircraft from the excise taxes imposed on taxable transportation of persons by air.'' The Conference Report further explains that certain arrangements that do not qualify a person as an ''aircraft owner'' for purposes of section 4261(e)(5) include ownership of stock in a commercial airline and participation in a fractional ownership aircraft program. *Id.* at 536 n.1190.

With regard to commercial airlines, the Conference Report specifically states that ownership of stock in a commercial airline cannot qualify an individual as an ''aircraft owner'' of a commercial airline's aircraft, and amounts paid for transportation on such flights remain subject to air transportation excise tax. *Id.*

The Conference Report further states that participation in a fractional ownership aircraft program does not constitute ''aircraft ownership'' for purposes of section 4261(e)(5). *Id.* Amounts paid to a fractional ownership aircraft program for transportation under such a program are already exempt from air transportation excise tax pursuant to section 4261(j) if certain requirements provided in section 4043 of the Code are satisfied, including that the aircraft is operated under subpart K of part 91 of Title 14 of the Code of Federal Regulations (subpart K). *Id.* Flights under a fractional ownership aircraft program are subject to both the fuel tax levied on noncommercial aviation and an additional fuel surtax imposed by section 4043 (fuel surtax). *Id.* As a result, the Conference Report explains that ''a business arrangement seeking to circumvent the fuel surtax by operating outside of subpart K, allowing an aircraft owner the right to use any of a fleet of aircraft, be it through an aircraft interchange agreement, through holding nominal shares in a fleet of aircraft, or any other arrangement that does not reflect true tax ownership of the aircraft being flown upon, is not considered ownership for purposes of [section 4261(e)(5)].'' *Id.*

With regard to the pro rata allocation rule in section 4261(e)(5)(D), the Conference Report states that in the event that a payment made to an aircraft management company is allocated in part to exempt services and flights on the aircraft owner's aircraft, and in part to flights on aircraft other than that of the aircraft owner, air transportation excise tax must be collected on that portion of the payment attributable to flights on aircraft not owned by the aircraft owner. *Id.* at 536.

Section 4007 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law 116–136, 134 Stat. 181 (2020), created an excise tax holiday on certain aviation taxes by suspending air transportation excise tax and certain fuel excise taxes from March 28, 2020, through December 31, 2020. Nothing in these proposed regulations should be construed as affecting the excise tax holiday created by the CARES Act. In addition, except with regard to the provisions in 26 CFR part 40, the Treasury decision adopting these proposed regulations as final regulations will apply no sooner than January 1, 2021.

Explanation of Provisions

1. Aircraft Management Services

The proposed regulations provide rules related to the exemption from air transportation excise tax for amounts paid by an aircraft owner for aircraft management services pursuant to section 4261(e)(5).

During the development of these proposed regulations, the Treasury Department and the IRS received various requests for guidance from stakeholders (referred to herein as ''commenters'') related to the first five issues discussed in part 1 of this Explanation of Provisions.

a. Applicability of Possession, Command, and Control Test

Commenters requested clarification on the applicability of the possession, command, and control test in existing guidance to amounts paid for aircraft management services in light of section 4261(e)(5). The possession, command, and control test is a facts-and-circumstances analytical framework that is used to determine whether a person is providing taxable transportation to another person in cases where each of the parties contribute some, but not all, of the elements necessary for complete air transportation services. *See e.g.,* Rev. Rul. 60–311 (1960–2 C.B. 341), Rev. Rul. 70–325 (1970–1 C.B. 231), and Rev. Rul. 76–394 (1976–2 C.B. 355). Section 4261(e)(5) directly addresses a situation that, but for section 4261(e)(5), would be analyzed using the possession, command, and control test. As a result, in situations to which the section 4261(e)(5) exemption applies, the possession, command, and control test is not relevant.

b. Related-Party Payments

The second issue for which commenters requested guidance relates to the treatment of payments for aircraft management services made by a person who has a close relationship to the aircraft owner, but is not itself the owner of the aircraft. The commenters suggested that payments that are made by certain parties related to the aircraft owner should be considered as though made by the aircraft owner.

First, the commenters suggested that the proposed regulations should treat payments made by one member of an affiliated group (as that term is used in section 4282) on behalf of an aircraft owner that is a member of the same affiliated group as being made by the aircraft owner.

Second, the commenters suggested that payments made by an owner of a special purpose entity should be treated as being made by the aircraft owner if the special purpose entity owns the aircraft. For example, individuals and corporations often create a single member limited liability company

(SMLLC) to own an aircraft in order to comply with FAA regulations or limit liability exposure. In such cases, the owner of the SMLLC often makes payments for aircraft management services on behalf of the SMLLC.

Finally, the commenters suggested that payments made by an aircraft owner's family members, as well as other persons and entities (for example, trusts, as well as the trust's fiduciaries and beneficiaries) closely related to an aircraft owner be treated as being made by the aircraft owner. For this purpose, the commenters suggested that the proposed regulations should treat payments for aircraft management services made on behalf of the aircraft owner by a family member of the aircraft owner and by persons and entities bearing relationships to the aircraft owner described in sections 267(b) and 707(b) of the Code as amounts paid by the aircraft owner.

The Treasury Department and the IRS understand that it is common practice in the private aviation sector for persons that bear certain close relationships to an aircraft owner to make payments for aircraft management services on behalf of the aircraft owner. However, exceptions to tax, like deductions, are matters of legislative grace, and such provisions are construed narrowly. *See Comm'r* v. *Nat'l Alfalfa Dehydrating & Milling Co.,* 417 U.S. 134, 148–9 (1974) (''The propriety of a deduction [. . .] depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.'' (citations omitted)); *Shami* v. *Comm'r,* 741 F.3d 560, 567 (5th Cir. 2014) (''Tax credits are a matter of legislative grace, are only allowed as clearly provided for by statute, and are narrowly construed.'' (citation omitted)); *Lettie Pate Whitehead Found., Inc.* v. *U.S.,* 606 F.2d 534, 539 (5th Cir. 1979) (''Deductions are matters of legislative grace and must be narrowly construed.'' (citation omitted)); *Chrysler Corp.* v. *Comm'r,* 436 F.3d 644, 654 (6th Cir. 2006) (''While statutes imposing a tax are generally construed liberally in favor of the taxpayer, those granting a deduction are matters of legislative grace and are strictly construed in favor of the government.'' (citations omitted)). Section 4261(e)(5) specifically states that the exemption applies to ''amounts paid by an aircraft owner'' and makes no reference to any other entity or arrangement. The Treasury Department and the IRS are concerned that if the regulations were to treat payments for aircraft management services made on behalf of an aircraft owner (other than in a principal-agent scenario in which the aircraft owner is the principal) as being made by the aircraft owner itself, the regulations would effectively expand the exemption in a manner not authorized by Congress.

Additionally, a qualified subchapter S subsidiary (QSub) (as defined in section 1361(b)(3)(B)) that is generally not treated as a separate corporation from its S corporation owner under section 1361(b)(3)(A), and a non-corporate, wholly-owned business entity, such as a SMLLC, that is disregarded as an entity separate from its owner for Federal income tax purposes (under §§ 301.7701–1 through 301.7701–3 of the Procedure and Administration Regulations), are each treated as an entity separate from its owner for certain Federal excise tax purposes. *See* § 1.1361–4(a)(8) of the Income Tax Regulations and § 301.7701–2(c)(2)(v). The rules under §§ 1.1361–4(a)(8) and 301.7701–2(c)(2)(v) were adopted because difficulties arose from the interaction of the rules in section 1361(b)(3)(A) and §§ 301.7701–1 through 301.7701–3 with the Federal excise tax rules. It would be contrary to the existing rules in §§ 1.1361–4(a)(8) and 301.7701–2(c)(2)(v) to treat a person or entity that is separate from the aircraft owner as the aircraft owner for purposes of the exemption from air transportation excise tax in section 4261(e)(5). For these reasons, the proposed regulations do not adopt the commenters' suggestion to provide a related-party rule.

c. Choice of Flight Rules

The third issue for which commenters requested guidance relates to whether an aircraft owner's decision to operate its aircraft under certain parts of the Federal Aviation Regulations (FARs) promulgated by the FAA affects the application of section 4261(e)(5). Part 91 of the FARs governs general aviation. However, some aircraft owners choose to operate their aircraft under Part 135 of the FARs (governing on-demand and commuter flights), which imposes additional FAA regulatory requirements related to operational safety and enhanced liability protection. Commenters suggested that the proposed regulations provide that if an aircraft owner elects to conduct flights on its own aircraft under Part 135 of the FARs (rather than under Part 91 of the FARs), then payments made by the aircraft owner for aircraft management services related to those flights qualify for the exemption provided in section 4261(e)(5) in the same manner as a flight conducted under Part 91 of the FARs.

It has long been the position of the Treasury Department and the IRS that rules promulgated by the FAA, including the FARs, do not control for Federal excise tax purposes. *See* Rev. Rul. 78–75 (1978–1 C.B. 340). Further, section 4261(e)(5) makes no reference to the FARs; under the plain language of section 4261(e)(5), its application does not depend upon the FAR flight rules under which an aircraft is operated. The Treasury Department and the IRS agree with the commenters' suggestion. Accordingly, the proposed regulations provide that whether an aircraft owner operates its aircraft pursuant to the rules under FARs Part 91 or pursuant to the rules under FARs Part 135 does not affect the application of section 4261(e)(5).

d. Charters

The fourth issue for which commenters requested guidance relates to situations in which an aircraft owner permits an air charter operator (which may or may not be the same person as the person or persons providing aircraft management services to the aircraft owner) to use the aircraft owner's aircraft to provide charter flights. It is common for an aircraft owner to permit an air charter operator to use the aircraft owner's aircraft for a fee (in cash or in kind) when the aircraft would otherwise sit idle or when the aircraft is being repositioned and would otherwise not carry any passengers. In such instances, amounts paid for charter flights operated on the aircraft owner's aircraft are subject to air transportation excise tax, unless otherwise exempt from the taxes (for example, in the case of an aircraft used as an air ambulance dedicated to acute care emergency medical services under section 4261(g)(2)). *See* § 49.4261–7(h) for the rules regarding the taxation of charter flights.

The commenters suggested that the proposed regulations clarify that the application of section 4261(e)(5) is not affected by an aircraft owner permitting a charter operator to use the aircraft owner's aircraft for charter flights. The Treasury Department and the IRS agree with the commenters that, in general, the application of section 4261(e)(5) should not be affected by an aircraft owner permitting an aircraft management services provider or other person to use the aircraft owner's aircraft for for-hire flights (such as charter flights, air taxi flights, and flightseeing flights). Accordingly, the proposed regulations provide that whether an aircraft owner permits its aircraft to be used for for-hire flights does not affect the application of section 4261(e)(5) to amounts paid by the aircraft owner for aircraft management services.

The proposed regulations also clarify that to the extent such for-hire flights are subject to the tax imposed by section 4261 or 4271, taxable fuel (as defined in section 4083(a) of the Code) or any other liquid taxable under section 4041(c) of the Code that is used as fuel on such flights is used in commercial aviation, as that term is defined in section 4083(b). *See* sections 4081(a)(2) and 4041(c) for the applicable fuel tax rates.

e. Payment Arrangements

The fifth issue for which commenters requested guidance relates to business decisions made by a person providing aircraft management services regarding how to charge, invoice, or bill (referred to collectively herein as ''bill'' or ''billed'') aircraft owners for their services. An aircraft owner may be billed for aircraft management services in a variety of ways. For example, an aircraft owner may be charged a monthly fee for aircraft management services and an hourly fee for each hour of flight time. Alternatively, an aircraft owner may be billed for specific costs related to the operation of the aircraft, plus a mark-up to compensate the aircraft management services provider. In addition to these two examples, there are many other possible arrangements that may be used to bill an aircraft owner based on the particular agreement between an aircraft owner and the aircraft management services provider. The commenters suggested that the proposed regulations should clarify that the manner in which an aircraft owner is billed for aircraft management services should not control whether the exemption from air transportation excise tax provided in section 4261(e)(5) applies to amounts paid for those services.

The Treasury Department and the IRS agree with the commenters that the manner in which an aircraft owner is billed for aircraft management services is a business decision that providers of aircraft management services and aircraft owners should be free to make with each other in order to satisfy their particular needs. Accordingly, the proposed regulations provide that the method or manner by which an aircraft owner is billed for aircraft management services does not affect whether the exemption from air transportation excise tax provided in section 4261(e)(5) applies to amounts paid for those services.

While the proposed regulations acknowledge that the manner in which an aircraft owner is billed for aircraft management services is a business decision, the proposed regulations require both the aircraft owner and the aircraft management services provider to maintain adequate records to show that amounts paid by the aircraft owner to the aircraft management services provider relate to aircraft management services specifically for the aircraft owner's aircraft or for flights on the aircraft owner's aircraft.

f. Other Proposed Aircraft Management Services Rules

The proposed regulations clarify that the exemption from air transportation excise tax in section 4261(e)(5) is limited to private aviation. Section 49.4261–10(b)(6) of the proposed regulations defines ''private aviation'' as the use of an aircraft for civilian flights except scheduled passenger service. This rule is consistent with the Conference Report, which explicitly states that section 4261(e)(5) ''exempts certain payments related to the management of private aircraft from the excise taxes imposed on taxable transportation by air.'' Conference Report at 536.

The proposed regulations also clarify the application of section 4261(e)(5)(D), which requires a pro rata allocation of the amounts paid for aircraft management services between services that relate to flights taken by an aircraft owner on the aircraft owner's aircraft and services that relate to flights taken by an aircraft owner on an aircraft that is not owned by the aircraft owner. An aircraft that is not owned by the aircraft owner is referred to in the proposed regulations as a ''substitute aircraft.'' Section 4261(e)(5)(D) limits the section 4261(e)(5) exemption to amounts paid for aircraft management services related to flights taken by an aircraft owner on the aircraft owner's aircraft. Therefore, the section 4261(e)(5) exemption does not extend to those amounts paid for aircraft management services that relate to flights taken by an aircraft owner on a substitute aircraft (that is, an aircraft not owned by the aircraft owner). The proposed regulations provide that the pro rata allocation is calculated by applying to the amount paid by the aircraft owner for aircraft management services the ratio of flight hours provided on substitute aircraft during the calendar quarter over the total flight hours flown by the aircraft owner on both the aircraft owner's aircraft and substitute aircraft during the calendar quarter. The Treasury Department and the IRS request comments regarding whether the proposed flight hour ratio allocation method is fair and practicable or whether a different allocation method should be required (and if so, what exactly such required method should be).

In addition, the proposed regulations clarify that taxable fuel (as defined in section 4083(a)) or any other liquid taxable under section 4041(c) that is used as fuel on a flight for which amounts paid are exempt from the taxes imposed by sections 4261 and 4271 by reason of section 4261(e)(5) is not fuel used in commercial aviation, as that term is defined in section 4083(b). *See* sections 4081(a)(2) and 4041(c) for the applicable fuel tax rates.

Finally, the section 4043 fuel surtax applies to fuel used in fractional program aircraft operated under FARs Part 91K (14 CFR part 91K) but not to fuel used on flights for which amounts paid are exempt by reason of section 4261(e)(5). The Treasury Department and the IRS are concerned that this creates an incentive for persons to operate flights that would otherwise be subject to the section 4043 fuel surtax outside of FARs Part 91K in order to avoid the surtax. In these instances, such persons would likely also argue that amounts paid for aircraft management services related to the fractional program aircraft are exempt from air transportation excise tax under section 4261(e)(5).

To address this issue, the proposed regulations include an anti-abuse rule providing that the section 4261(e)(5) exemption does not apply to any amount paid for aircraft management services by a participant in any transaction or arrangement, or through other means, that seeks to circumvent the surtax imposed by section 4043. In addition, the proposed regulations clarify that the section 4261(e)(5) exemption does not apply to amounts paid for aircraft management services related to flights on fractional program aircraft operated (or required to be operated) under FARs Part 91K. The proposed regulations also provide that if an amount paid qualifies for both the exemption provided in section 4261(e)(5) and the exemption provided in section 4261(j), the section 4261(j) exemption applies to the amount paid and the surtax imposed by section 4043 applies to any liquid used in the fractional program aircraft as fuel. *See* sections 4261(j) and 4043. This provision is consistent with the Conference Report and the definition of ''aircraft owner'' in § 49.4261–10(b)(3)(B) in the proposed regulations.

2. Additional Proposed Changes to the Regulations

a. Changes to Part 40

The privilege to file consolidated returns under section 1501 applies only to income tax returns and not to excise

tax returns. The proposed regulations add § 40.0–1(d) to note this rule and also reflect the rules of §§ 1.1361–4(a)(8) and 301.7701–2(c)(2)(v) that treat QSubs and certain business entities as entities separate from their owners for Federal excise tax purposes. *See also* Revenue Ruling 2008–18 (2008–1 C.B. 674). Thus, proposed § 40.0–1(d) treats each business unit that has, or is required to have, a separate Employer Identification Number as a separate person. In the context of air transportation excise tax, this rule applies with respect to both the person required to pay the tax under proposed § 49.4261–1(b) and the person required to collect and pay over the tax under § 40.6011(a)–1(a)(3) and section 4291 of the Code.

Proposed § 40.0–1(d) was originally proposed on July 29, 2008, in a notice of proposed rulemaking (REG–155087–05) published in the **Federal Register** (73 FR 43890), but the rules in that regulation project have not been finalized. Because of the length of time that has passed since it was originally proposed, this document withdraws proposed § 40.0–1(d) and re-proposes the provision as part of these proposed regulations.

Existing § 40.6071(a)–3 provides excise tax return filing rules that apply only to the quarterly return required under § 40.6011(a)–1(a) for the third calendar quarter of 2001. The proposed regulations remove § 40.6071(a)–3 in its entirety because it is obsolete.

b. Changes to Part 49

The existing regulations under section 4261 have not been revised since 1962. The proposed regulations remove existing language relating to taxes on transportation by rail, motor vehicle, and water, which have been repealed, and otherwise update the existing regulations to conform to current law. The proposed regulations also remove references to exemptions that were repealed in 1970. More specifically, the proposed regulations update § 49.4261–1 to reflect: (i) The enactment of the international travel facilities tax in 1970 (Airport and Airway Development Act of 1970 (AADA), Public Law 91–258, 84 Stat. 236 (1970)); (ii) the enactment of the domestic segment tax in 1997 (Taxpayer Relief Act of 1997, Pub. L. 105–34, 111 Stat. 788 (1997)), and (iii) the current statutory exemptions from tax under sections 4261(e)(5), 4261(f), 4261(g), 4261(h), 4261(j), 4281, 4282, and 4293 of the Code.

Section 49.4261–1(b)(1) of the proposed regulations incorporates the payment and collection rules in sections 4261(d) and 4291.

Section 49.4261–1(b)(2) of the proposed regulations reflects the statutory change to section 4263(c) under section 1031 of the Taxpayer Relief Act of 1997, and case law interpreting that revision. Under prior law, section 4263(c) provided that where any tax imposed by section 4261 was not paid at the time payment for transportation was made, the tax was paid by the person paying for the transportation or by the person using the transportation. In other words, the prior law placed no payment obligation on the air carrier. The current version of section 4263(c) provides that where any tax imposed by section 4261 is not paid at the time the payment for transportation is made, the air carrier providing the initial segment of transportation that begins and ends in the United States is liable for the tax. Several courts have rejected arguments that current section 4263(c) imposes only secondary liability for the applicable section 4261 tax on the air carrier if the tax is not otherwise collected. *See Sundance Helicopters, Inc.* v. *U.S.,* 104 Fed. Cl. 1, 11 (2012) (''The plain language of IRC [section] 4263(c) provides that the air carrier is to pay the tax if it is not otherwise collected. There is no mention of primary versus secondary liability in the text of the statute [. . .] The language of IRC [section] 4263(c) clearly imposes a payment obligation on the air carrier.''); *Temsco Helicopters, Inc.* v. *U.S.,* 409 F.App'x. 64, 67 (9th Cir. 2010) (''nothing in [section] 4263(c) requires that the government first attempt to collect the [air transportation excise tax] from the purchasers . . .''); *Papillon Airways, Inc.* v. *U.S.,* 105 Fed. Cl. 154, 163 (2012) (IRC 4263(c) makes ''the carrier's liability conditional on *whether the tax was collected* at the time payment for transportation was made, *not whether the government is unsuccessful at collecting the tax.*'' (emphasis in original)).

Section 49.4261–1(d) of the proposed regulations generally incorporates the holdings of Revenue Ruling 71–126 (1971–1 C.B. 363) regarding the general applicability of the section 4261 taxes to the transportation of persons on all types of aircraft, and Revenue Ruling 67–414 (1967–2 C.B. 382) regarding the inapplicability of the section 4261 taxes to the transportation of persons on hovercraft.

Section 49.4261–2 of the proposed regulations generally updates the existing regulations to reflect the statutory additions of the domestic segment tax and the international travel facilities tax to section 4261. This section also incorporates the holdings in Revenue Ruling 72–309 (1972–1 C.B. 348) and Revenue Ruling 2002–34 (2002–1 C.B. 1150) regarding the computation of the domestic segment tax and the international travel facilities tax.

Section 49.4261–9(a) of the proposed regulations reflects the rule in section 4261(e)(3)(A) regarding the tax treatment of mileage awards. The Treasury Department and the IRS are currently considering whether to exercise their authority under section 4261(e)(3)(C) to prescribe rules for excluding from the tax base amounts attributable to mileage awards that are used other than for transportation of persons by air. *See* Notice 2015–76 (2015–46 I.R.B. 669). Nothing in these proposed regulations can be construed as an exercise of that authority. The proposed regulations reserve § 49.4261–9(b) for the possible future exercise of the authority granted to the Secretary of the Treasury or his delegate under section 4261(e)(3)(C).

The regulations under sections 4262 and 4263 also have generally not been revised since the 1960s. Amendments to the Code since then, including the repeal of the seats and berths tax, a change to the definition of ''uninterrupted international air transportation'' under section 4262(c)(3), and a change to the rules in section 4263(c), have rendered certain provisions in the existing regulations obsolete. The proposed regulations remove obsolete provisions and generally update the existing regulations to conform to current law.

Section 4264 of the Code was redesignated as section 4263 in 1970 by Title II, section 205(c)(2), of the AADA. However, the regulations under section 4264 were not similarly redesignated. The proposed regulations redesignate the current section 4264 regulations as section 4263 regulations, remove obsolete provisions, and generally update the existing regulations to conform to current law.

The proposed regulations update the rule in § 49.4263–5 (which the proposed regulations redesignate as § 49.4281–1) relating to small aircraft on nonestablished lines to reflect statutory changes to the exemption. Specifically, the current regulation provides, in relevant part, that amounts paid to transport a person on a small aircraft are ''exempt from the tax imposed under section 4261 provided the aircraft: (1) Has a gross take-off weight of less than 12,500 pounds [. . .] and (2) has a passenger seating capacity of less than 10 adult passengers, including the pilot.'' In 1970, the permissible aircraft weight to qualify for the exemption for

small aircraft on nonestablished lines was reduced to a maximum certificated take-off weight of 6,000 pounds or less and the maximum passenger seating capacity rule was eliminated. AADA, Title II, section 205(a)(1). In 2005, Congress amended section 4281 to clarify that flights for which the sole purpose is sightseeing are not considered to be operated on an established line. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Public Law 109–59, section 11124(a), 119 Stat 1144 (2005). In 2012, Congress amended section 4281 to exclude jet aircraft from the exemption. FAA Modernization and Reform Act of 2012, Public Law 112–95, section 1107(a), 126 Stat 11 (2012). The proposed regulations incorporate the changes to the exemption for small aircraft on nonestablished lines as described above.

Section 4282 provides an exemption from the taxes imposed by section 4261 and 4271 for certain transportation by air for members of an affiliated group. The Treasury Department and the IRS have not issued regulations regarding this provision. The proposed regulations reserve § 49.4282–1 for future rules regarding the affiliated group exemption under section 4282.

The updates to part 49 in these proposed regulations are not comprehensive and do not fully update every provision and example that require modernization. The updates are intended to address only the most straightforward and well-settled issues; they are not intended to introduce new rules or address issues that may require a more nuanced approach. The Treasury Department and the IRS believe that these updates will help reduce the burden on taxpayers, collectors, and revenue agents by providing much needed basic updates to the part 49 regulations.

Effect on Other Documents

Revenue Ruling 67–414 (1967–2 C.B. 382), Revenue Ruling 72–309 (1972–1 C.B. 348), and Revenue Ruling 2002–34 (2002–1 C.B. 1150) will be obsoleted on the date these regulations are published as final regulations in the **Federal Register**.

Partial Withdrawal of Proposed Regulations

Under the authority of 26 U.S.C. 7805, § 40.0–1(d) of the notice of proposed rulemaking (REG–155087–05) published in the **Federal Register** on July 29, 2008 (73 FR 43890) is withdrawn.

Proposed Applicability Date

The regulations, other than § 40.0–1(d), generally are proposed to apply on and after the later of the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register** or January 1, 2021. Section 40.0–1(d) of the regulations is proposed to apply on and after the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**.

Special Analyses

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations.

Because the regulation does not impose a collection of information on small entities a Regulatory Flexibility Act (5 U.S.C. chapter 6) analysis is not required.

Pursuant to section 7805(f) of the Code these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, Notices and other guidance cited in this document are published in the Internal Revenue Bulletin and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *http://www.irs.gov.*

Comments and Requests for a Public Hearing

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in the preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Any electronic comments submitted, and to the extent practicable any paper comments submitted, will be made available at *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 made 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 I.R.B. 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 authors of these regulations are Michael H. Beker and Rachel S. Smith, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects

26 CFR Part 40

Excise taxes, Reporting and recordkeeping requirements.

26 CFR Part 49

Excise taxes, Reporting and recordkeeping requirements, Telephone, Transportation.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 40 and 49 are proposed to be amended as follows:

PART 40—EXCISE TAX PROCEDURAL REGULATIONS

■ **Paragraph 1.** The authority citation for part 40 is amended by removing the entry for § 40.6071(a)–3 to read in part as follows:

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

■ **Par. 2.** Section 40.0–1 is amended by redesignating paragraph (d) as paragraph (e), adding a new paragraph (d), and revising newly redesignated paragraph (e) to read as follows:

§ 40.0–1 Introduction.

* * * * *

(d) *Person.* For purposes of this part, each business unit that has, or is required to have, a separate employer identification number is treated as a separate person. Thus, business units (for example, a parent corporation and a subsidiary corporation, a partner and the partner's partnership, or the various members of a consolidated group), each of which has, or is required to have, a different employer identification number, are separate persons.

(e) *Applicability date*—(1) *Paragraphs (a), (b), and (c).* Paragraphs (a), (b), and (c) of this section apply to returns that relate to periods beginning after March 31, 2013. For rules that apply before that date, *see* 26 CFR part 40, revised as of April 1, 2013.

(2) *Paragraph (d).* Paragraph (d) of this section applies to returns that relate to periods beginning on or after [date these regulations are published as final regulations in the **Federal Register**]. For rules that apply before that date, *see* 26 CFR part 40, revised as of April 1, 2020.

§ 40.6071(a)–3 [Removed]

■ **Par. 3.** Section 40.6071(a)–3 is removed.

PART 49—FACILITIES AND SERVICES EXCISE TAX REGULATIONS

■ **Par. 4.** The authority citation for part 49 continues to read in part as follows:

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

■ **Par. 5.** Section 49.4261–1 is revised to read as follows:

§ 49.4261–1 Imposition of tax; in general.

(a) *In general.* Section 4261 of the Internal Revenue Code (Code) imposes three separate taxes on amounts paid for certain transportation of persons by air. Tax attaches at the time of payment for any transportation taxable under section 4261. The applicability of each section 4261 tax is generally determined on a flight-by-flight basis.

(1) *Percentage tax.* Section 4261(a) imposes a 7.5 percent tax on the amount paid for the taxable transportation of any person. *See* section 4262(a) of the Code and § 49.4262–1(a) for the definition of the term *taxable transportation.*

(2) *Domestic segment tax.* Section 4261(b)(1) imposes a $3 tax (indexed annually for inflation pursuant to section 4261(e)(4)) on the amount paid for each domestic segment of taxable transportation. *See* section 4261(b)(2) for the definition of the term *domestic segment.* The domestic segment tax does not apply to a domestic segment beginning or ending at an airport that is a rural airport for the calendar year in which the segment begins or ends (as the case may be). *See* section 4261(e)(1)(B) for the definition of the term *rural airport.*

(3) *International travel facilities tax.* Section 4261(c) imposes a $12 tax (indexed annually for inflation pursuant to section 4261(e)(4)) on any amount paid (whether within or without the United States) for any transportation by air that begins or ends in the United States. The international travel facilities tax does not apply to any transportation that is entirely taxable under section 4261(a) (determined without regard to sections 4281 and 4282). *See* section 4261(c)(2). A special rule applies to Alaska and Hawaii flights. *See* section 4261(c)(3).

(b) *Payment and collection obligations*—(1) *In general.* The taxes imposed by section 4261 are collected taxes. In general, the person making the payment subject to tax is the *taxpayer. See* section 4261(d). The person receiving the payment is the *collector* (also commonly referred to as the collecting agent). *See* section 4291 of the Code. The collector must collect the applicable tax from the taxpayer, report the tax on Form 720, *Quarterly Federal Excise Tax Return,* and remit the tax to the Internal Revenue Service. *See* sections 4291, 6011, and 7501 of the Code. *See* § 40.6011(a)–1 of this chapter and § 49.4291–1. The collector must also make semimonthly deposits of the taxes imposed by section 4261. *See* section 6302(e) of the Code. *See* §§ 40.0–1(c), 40.6302(c)–1, and 40.6302(c)–3 of this chapter. *See* section 4263(a) and (c) of the Code for special rules relating to the payment and collection of tax.

(2) *Failure to collect tax.* Where any tax imposed by section 4261 is not paid at the time payment for transportation is made, then, to the extent the tax is not collected under any other provision of subchapter C of chapter 33 of the Code, the tax must be paid by the carrier providing the initial segment of transportation that begins or ends in the United States. *See* section 4263(c). In other words, if an amount paid for transportation is subject to tax under section 4261 and the applicable tax is not collected at the time the payment is made, the carrier providing the initial segment of transportation that begins or ends in the United States is liable for the tax. *See* section 6672 of the Code for rules relating to the application of the trust fund recovery penalty.

(c) *Type of aircraft.* The taxes imposed by section 4261 generally apply regardless of the type of aircraft on which the transportation is provided, provided all of the other conditions for liability are present and no specific statutory exemption applies. *See* paragraph (f) of this section for a list of statutory exemptions from tax. Amounts paid for the transportation of persons by air cushion vehicles, also known as hovercraft, are not subject to the taxes imposed by section 4261.

(d) *Purpose of transportation.* The purpose of the transportation (for example, business or pleasure) is not a factor in determining taxability under section 4261.

(e) *Routes.* Amounts paid for transportation may be taxable even if the transportation is not between two definite points. Unless otherwise exempt, a payment for continuous transportation that begins and ends at the same point is subject to tax. *See* section 4281 of the Code and § 49.4282–1 for the exemption for small aircraft on nonestablished lines.

(f) *Exemptions from tax; cross-references*—(1) *Aircraft management services.* For the exemption for certain aircraft management services, see section 4261(e)(5) of the Code and § 49.4261–10.

(2) *Hard minerals, oil, and gas.* For the exemption for certain uses related to the exploration, development, or removal of hard minerals, oil, or gas, see section 4261(f)(1).

(3) *Trees and logging operations.* For the exemption for certain uses related to trees and logging operations, see section 4261(f)(2).

(4) *Air ambulances.* For the exemption for air ambulances providing certain emergency medical transportation, see section 4261(g).

(5) *Skydiving.* For the exemption for certain skydiving uses, see section 4261(h).

(6) *Seaplanes.* For the exemption for certain seaplane segments, see section 4261(i).

(7) *Fractionally-owned aircraft.* For the exemption for certain aircraft in fractional ownership aircraft programs, see section 4261(j).

(8) *Small aircraft on nonestablished lines.* For the exemption for certain small aircraft on nonestablished lines, see section 4281 of the Code and § 49.4281–1.

(9) *Affiliated groups.* For the exemption for certain transportation of members of an affiliated group, see section 4282.

(10) *United States and territories.* For exemptions authorized by the Secretary of the Treasury or his delegate for the exclusive use of the United States, see section 4293.

(g) *Applicability date.* This section applies on and after the later of [date these regulations are published as final regulations in the **Federal Register**] or January 1, 2021. For rules that apply before that date, see 26 CFR part 49, revised as of April 1, 2020.

■ **Par. 6.** Section 49.4261–2 is amended by:

■ 1. Revising paragraphs (a) and (b).

■ 2. Adding paragraph (d).

The revisions and addition read as follows:

§ 49.4261–2 Application of tax.

(a) *Tax on total amount paid.* The tax imposed by section 4261(a) of the Internal Revenue Code (Code) is measured by the total amount paid for taxable transportation, whether paid in cash or in kind.

(b) *Tax on transportation of each person.* The taxes imposed by section

4261(b) and (c) of the Code are head taxes and, therefore, apply on a per-passenger basis. The taxes apply to each passenger for whom an amount is paid, regardless of whether the payment is made as a single lump sum or is made individually for each passenger. In the case of charter flights for which a fixed amount is paid, the section 4261(b) and (c) taxes are computed by multiplying the applicable rate of tax by the number of passengers transported on the aircraft.

* * * * *

(d) *Applicability date.* Paragraphs (a) and (b) of this section apply on and after the later of [date these regulations are published as final regulations in the **Federal Register**] or January 1, 2021. For rules that apply before that date, *see* 26 CFR part 49, revised as of April 1, 2020.

■ **Par. 7.** Section 49.4261–3 is amended by:

■ 1. Removing ''§ 49.4262(c)–1'' wherever it appears and adding ''§ 49.4262–3'' in its place.

■ 2. In the first sentence of paragraph (a), removing ''The tax imposed by section 4261(a)'' and adding ''The taxes imposed by section 4261(a) and (b) of the Internal Revenue Code (Code)'' in its place.

■ 3. In the second sentence of paragraph (a), adding ''under section 4261(a) and (b)'' at the end of the sentence.

■ 4. Removing (b) introductory text and (b)(1) and redesignating paragraph (b)(2) as paragraph (b).

■ 5. Revising newly redesignated paragraph (b).

■ 6. Revising paragraph (c).

■ 7. In paragraph (d), removing ''section 4262(b) and § 49.4262(b)–1'' and adding ''section 4262(b) of the Code and § 49.4262–2'' in its place.

■ 8. Adding paragraph (e).

The revisions and additions read as follows:

§ 49.4261–3 Payments made within the United States.

* * * * *

(b) *Other transportation.* In the case of transportation, other than that described in paragraph (a) of this section, for which payment is made in the United States, the taxes imposed by section 4261(a) and (b) apply with respect to the amount paid for that portion of such transportation by air which is directly or indirectly from one port or station in the United States to another port or station in the United States, but only if such portion is not a part of uninterrupted international air transportation within the meaning of section 4262(c)(3) of the Code and § 49.4262–3(c). Transportation that:

(1) Begins in the United States or the 225-mile zone and ends outside such area,

(2) Begins outside the United States or the 225-mile zone and ends inside such area, or

(3) Begins outside the United States and ends outside such area, is taxable only with respect to such portion of the transportation by air which is directly or indirectly from one port or station in the United States to another port or station in the United States, but only if such portion is not a part of ''uninterrupted international air transportation'' within the meaning of section 4262(c)(3) and § 49.4262–3(c). Thus, on a trip by air from Chicago to London, England, with a stopover at New York, for which payment is made in the United States, if the portion from Chicago to New York is not a part of ''uninterrupted international air transportation'' within the meaning of section 4262(c)(3) and § 49.4262–3(c), the taxes would apply to the part of the payment which is applicable to the transportation from Chicago to New York. However, if the portion from Chicago to New York is a part of ''uninterrupted international air transportation'' within the meaning of section 4262(c)(3) and § 49.4262–3(c), the taxes would not apply.

(c) *Method of computing tax on taxable portion.* Where a payment is made for transportation which is partially taxable under paragraph (b) of this section, the tax imposed by section 4261(a) may be computed on that proportion of the total amount paid which the mileage of the taxable portion of the transportation bears to the mileage of the entire trip.

* * * * *

(e) *Applicability date.* This section applies on and after the later of [the date these regulations are published as final regulations in the **Federal Register**] or January 1, 2021. For rules that apply before that date, *see* 26 CFR part 49, revised as of April 1, 2020.

§ 49.4261–4 [Amended]

■ **Par. 8.** Section 49.4261–4 is amended by:

■ 1. In paragraph (a), removing the first ''4261(a)'' and add ''4261 of the Internal Revenue Code (Code)'' in its place.

■ 2. In paragraph (a), removing ''section 4261(a) (see section 4264(d))'' and adding ''section 4261 (see section 4263(d) of the Code)'' in its place.

■ 3. In paragraph (b), removing ''§ 49.4262(c)–1'' and adding ''§ 49.4262–3'' in its place.

■ 4. In the first sentence of paragraph (d), removing ''§ 49.4262(c)–1'' and adding ''§ 49.4262–3'' in its place.

■ 5. In the first sentence of paragraph (d), removing ''six-hour'' and adding ''12-hour'' in its place.

§ 49.4261–5 [Amended]

■ **Par. 9.** Section 49.4261–5 is amended as follows:

■ 1. In paragraph (a), remove ''4261(b)'' wherever it appears and add ''4261(a) and (b)'' in its place.

■ 2. In paragraph (c), remove ''§ 49.4262(b)–1'' and add ''§ 49.4262–2'' in its place.

■ **Par. 10.** Section 49.4261–7 is amended by:

■ 1. In the introductory paragraph, removing ''4263, 4292, 4293, or 4294'' and adding ''4261, 4281, 4282 or 4293 of the Internal Revenue Code'' in its place.

■ 2. Removing and reserving paragraphs (b), (d), (e), and (g).

■ 3. Revising paragraph (h).

■ 4. In paragraph (i), remove ''paragraph (c) of § 49.4261–2 and paragraph (f)(4) of § 49.4261–8'' and add ''§§ 49.4261–2(c) and 49.4261–8(f)(4)'' in its place.

■ 5. Adding paragraph (k).

The revision and addition read as follows:

§ 49.4261–7 Examples of payments subject to tax.

* * * * *

(h) *Aircraft charters*—(1) When no charge is made by the charterer of an aircraft to the persons transported, the amount paid by the charterer for the charter of the aircraft is subject to tax.

(2) The charterer of an aircraft who sells transportation to other persons must collect and account for the tax with respect to all amounts paid to the charterer by such other persons. In such case, no tax will be due on the amount paid by the charterer for the charter of the aircraft but it shall be the duty of the owner of the aircraft to advise the charterer of the charterer's obligation for collecting, accounting for, and paying over the tax to the Internal Revenue Service.

* * * * *

(k) *Applicability date.* Paragraph (h) of this section applies on and after the later of [the date these regulations are published as final regulations in the **Federal Register**] or January 1, 2021. For rules that apply before that date, *see* 26 CFR part 49, revised as of April 1, 2020.

§ 49.4261–8 [Amended]

■ **Par. 11.** Section 49.4261–8 is amended as follows:

■ 1. In the introductory paragraph, remove ''4263, 4292, 4293, or 4294'' and add ''4261, 4281, 4282 or 4293 of the Internal Revenue Code'' in its place.

■ 2. Paragraphs (f)(2), (3), and (5) are removed and reserved.

■ **Par. 12.** Section 49.4261–9 is revised to read as follows:

§ 49.4261–9 Mileage awards.

(a) *Tax imposed.* Any amount paid (and the value of any other benefit provided) to an air carrier (or any related person) for the right to provide mileage awards for or other reductions in the cost of any transportation of persons by air is an amount paid for taxable transportation and is therefore subject to the tax imposed by section 4261(a) of the Internal Revenue Code. *See* section 4261(e)(3)(A).

(b) *[Reserved]*

(c) *Applicability date.* This section applies on and after the later of [date these regulations are published as final regulations in the **Federal Register**] or January 1, 2021.

■ **Par. 13.** Section 49.4261–10 is revised to read as follows:

§ 49.4261–10 Aircraft management services.

(a) *In general*—(1) *Overview.* This section prescribes rules relating to the exemption from tax for amounts paid (in cash or in kind) by an aircraft owner to an aircraft management services provider for certain aircraft management services. Pursuant to section 4261(e)(5) of the Internal Revenue Code (Code), the taxes imposed by sections 4261 and 4271 of the Code do not apply to amounts paid by an aircraft owner to an aircraft management services provider for aircraft management services related to maintenance and support of the aircraft owner's aircraft; or related to flights (flight services) on the aircraft owner's aircraft. The exemption in section 4261(e)(5) applies to amounts paid by an aircraft owner to an aircraft management services provider for flight services on the aircraft owner's aircraft, even if the aircraft owner is not on the flight. The exemption in section 4261(e)(5) does not apply to amounts paid to an aircraft management services provider on behalf of an aircraft owner (other than in a principal-agent scenario in which the aircraft owner is the principal). For example, amounts paid for aircraft management services by one member of an affiliated group (as that term is defined in section 4282 of the Code) for flights on an aircraft owned by another member of the affiliated group are not treated as amounts paid by the aircraft owner. *See* paragraph (b) of this section for definitions of terms used in this section.

(2) *Private aviation.* The exemption in section 4261(e)(5) is limited to aircraft management services related to aircraft used in private aviation.

(3) *Adequate records required.* In order to qualify for the exemption in section 4261(e)(5), an aircraft owner and aircraft management services provider must maintain adequate records to show that the amounts paid by the aircraft owner to the aircraft management services provider relate to aircraft management services specifically for the aircraft owner's aircraft or for flights on the aircraft owner's aircraft.

(b) *Definitions.* This paragraph provides definitions applicable to this section.

(1) *Aircraft management services.* The term *aircraft management services* means—

(i) *Statutory services.* The services listed in section 4261(e)(5)(B); and

(ii) *Other services.* Any service (including, but not limited to, purchasing fuel, purchasing aircraft parts, and arranging for the fueling of an aircraft owner's aircraft) provided directly or indirectly by an aircraft management services provider to an aircraft owner, that is necessary to keep the aircraft owner's aircraft in an airworthy state or to provide air transportation to the aircraft owner on the aircraft owner's aircraft at a level and quality of service required under the agreement between the aircraft owner and the aircraft management services provider.

(2) *Aircraft management services provider.* The term *aircraft management services provider* means a person that provides aircraft management services, as defined in paragraph (b)(1) of this section, to an aircraft owner, as defined in paragraph (b)(3) of this section.

(3) *Aircraft owner*—(i) *In general.* The term *aircraft owner* means an individual or entity that leases or owns (that is, holds title to or substantial incidents of ownership in) an aircraft managed by an aircraft management services provider (commonly referred to as a managed aircraft). The term *aircraft owner* does not include a lessee of an aircraft under a disqualified lease, as defined in paragraph (b)(4) of this section. A person that owns stock in a commercial airline does not qualify as an aircraft owner of that commercial airline's aircraft.

(ii) *Fractional aircraft ownership and similar arrangements.* A participant in a fractional aircraft ownership program, as defined in section 4043(c)(2) of the Code, does not qualify as an aircraft owner of the program's managed aircraft if the amount paid for such person's participation is exempt from the taxes imposed by sections 4261 and 4271 by reason of section 4261(j). Similarly, a participant in a business arrangement seeking to circumvent the surtax imposed by section 4043 by operating outside of subpart K of 14 CFR part 91, that allows an aircraft owner the right to use any of a fleet of aircraft (through an aircraft interchange agreement, through holding nominal shares in a fleet of aircraft, or any other similar arrangement), is not an aircraft owner with respect to any of the aircraft owned or leased as part of that business arrangement.

(4) *Disqualified lease.* The term *disqualified lease* has the meaning given to it by section 4261(e)(5)(C)(ii). A disqualified lease also includes any arrangement that seeks to circumvent the rule in section 4261(e)(5)(C)(ii) by providing a lease term that is greater than 31 days but does not provide the lessee with exclusive and uninterrupted access and use of the leased aircraft, as identified by the aircraft's airframe serial number and tail number. For purposes of the preceding sentence, the fact that a lease permits the lessee to use the aircraft for for-hire flights, as defined in paragraph (b)(5) of this section, when the lessee is otherwise not using the aircraft does not, because of this fact alone, cause a lease with a term that is greater than 31 days to be a disqualified lease.

(5) *For-hire flight.* The term *for-hire flight* means the use of an aircraft to transport passengers for compensation that is paid in cash or in kind. The term includes, but is not limited to, charter flights, air taxi flights, and sightseeing flights (commonly referred to as flightseeing flights).

(6) *Private aviation.* The term *private aviation* means the use of an aircraft for civilian flights except scheduled passenger service.

(7) *Substitute aircraft.* The term *substitute aircraft* means an aircraft, other than the aircraft owner's aircraft, that is provided by an aircraft management services provider to the aircraft owner when the aircraft owner's aircraft is not available, regardless of the reason for the unavailability.

(c) *Substitute Aircraft*—(1) *Allocation required.* If an aircraft management services provider provides flight services to an aircraft owner on a substitute aircraft during a calendar quarter, the taxes imposed by section 4261 (including the taxes imposed by section 4261(b) or (c), as appropriate, on each passenger transported) or 4271, as the case may be, apply to that portion of the amounts paid by the aircraft owner to the aircraft management services provider, determined on a pro rata basis, as described in paragraph (c)(2) of this section, that are related to the flight services provided on the substitute aircraft.

(2) *How calculated.* The allocation described in paragraph (c)(1) of this section is calculated by applying to the total amount paid by an aircraft owner to an aircraft management services provider during the calendar quarter the ratio of—

(i) *Substitute aircraft hours.* The total flight hours provided on substitute aircraft during the calendar quarter; over

(ii) *Total hours.* The sum of—

(A) The total flight hours made on the aircraft owner's aircraft during the calendar quarter; and

(B) The total flight hours provided to the aircraft owner on substitute aircraft during the calendar quarter.

(d) *Choice of flight rules.* Whether a flight on an aircraft owner's aircraft operates pursuant to the rules under Federal Aviation Regulations prescribed by the Federal Aviation Administration (FARs) Part 91 (14 CFR part 91) or pursuant to the rules under FARs Part 135 (14 CFR part 135) does not affect the application of section 4261(e)(5).

(e) *Aircraft available for hire*—(1) *In general.* Whether an aircraft owner permits an aircraft management services provider or other person to use its aircraft to provide for-hire flights (for example, when the aircraft is not being used by the aircraft owner or when the aircraft is being moved in deadhead service) does not affect the application of section 4261(e)(5). However, an amount paid for for-hire flights on the aircraft owner's aircraft does not qualify for the section 4261(e)(5) exemption. Therefore, an amount paid for a for-hire flight on an aircraft owner's aircraft is subject to the tax imposed by section 4261 or 4271, as the case may be, unless the amount paid is otherwise exempt from the tax imposed by section 4261 or 4271 other than by reason of section 4261(e)(5). *See* § 49.4261–7(h) for rules relating to the application of the tax imposed by section 4261 on amounts paid for charter flights.

(2) *Fuel used on for-hire flights.* To the extent amounts paid for for-hire flights are subject to the tax imposed by section 4261 or 4271, taxable fuel (as defined in section 4083(a) of the Code) or any liquid taxable under section 4041(c) of the Code that is used as fuel on such flights is used in commercial aviation, as that term is defined in section 4083(b). *See* sections 4081(a)(2) and 4041(c) for the applicable fuel tax rates.

(f) *Billing methods.* Except as provided in paragraph (a)(3) of this section (relating to adequate records), the method an aircraft management services provider bills, invoices, or otherwise charges an aircraft owner for aircraft management services, whether by specific itemization of costs, flat monthly or hourly fee, or otherwise, does not affect the application section 4261(e)(5).

(g) *Coordination with fuel tax provisions.* Taxable fuel (as defined in section 4083(a)) or any liquid taxable under section 4041(c) that is used as fuel on a flight for which amounts paid are exempt from the taxes imposed by sections 4261 and 4271 by reason of section 4261(e)(5) is not fuel used in commercial aviation, as that term is defined in section 4083(b). *See* sections 4081(a)(2) and 4041(c) for the applicable fuel tax rates.

(h) *Multiple aircraft management services providers not disqualifying.* Whether an aircraft owner pays amounts to more than one aircraft management services provider for aircraft management services does not affect the application of section 4261(e)(5).

(i) *Coordination with exemption for aircraft in fractional ownership aircraft programs and fuel surtax; no choice of exemption; anti-abuse rule.* The exemption in section 4261(e)(5) does not apply to any amount paid for aircraft management services by a participant in any transaction or arrangement, or through other means, that seeks to circumvent the surtax imposed by section 4043. Further, the exemption in section 4261(e)(5) does not apply to any amounts paid for aircraft management services related to flights that are (or are required to be) operated under FARs Part 91K (14 CFR part 91K). As a result, if an amount paid qualifies for both the exemption provided in section 4261(e)(5) and the exemption provided in section 4261(j), the exemption provided in section 4261(j) applies to the amount paid and the surtax imposed by section 4043 applies to any liquid used in the managed aircraft as fuel. *See* sections 4261(j) and 4043.

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

(1) *Example 1*—(i) *Facts.* An aircraft owner, which is organized as corporation under state law, pays a monthly fee of $1,000 to an aircraft management services provider for the provision of a pilot for flights on the aircraft owner's aircraft to transport employees of the aircraft owner's business to business meetings. The flights constitute taxable transportation, as that term is defined in section 4262(a), and no exemptions (other than section 4261(e)(5)) apply. During the first calendar quarter of 2020, the pilot provides 200 flight hours of service on the aircraft owner's aircraft and 50 hours of service on a substitute aircraft.

(ii) *Analysis.* The tax imposed by section 4261(a) applies on a pro rata basis to the pilot's flight hours on a substitute aircraft. The allocation is calculated by applying to the $3,000 total amount paid (3 months × $1,000 monthly fee) by the aircraft owner to the aircraft management services provider during the calendar quarter the ratio of: 50 (the total pilot flight hours provided on substitute aircraft during the calendar quarter) over 250 (the sum of the total pilot flight hours on the aircraft owner's aircraft during the calendar quarter and the total pilot flight hours provided on substitute aircraft during the calendar quarter). The computation is as follows: $3,000 × (50/250) = $600 (amount subject to tax). The portion of the amount paid that is exempt from the section 4261 taxes by application of section 4261(e)(5) is $2,400. The portion of the amount paid that is subject to the tax imposed by section 4261(a) is $600. The tax imposed by section 4261(b) also applies to amounts paid for flights on substitute aircraft on a per-passenger basis. *See* § 49.4261–2(b) for rules regarding the application of the tax imposed by section 4261(b).

(2) *Example 2*—(i) *Facts.* An aircraft owner pays a monthly fee to an aircraft management services provider for aircraft management services related to the aircraft owner's aircraft. When the aircraft is not being used by the owner, the owner sometimes permits a charter company to use the aircraft for charter flights. At other times when the aircraft is not being used by the owner, the owner permits a tour operator to use the aircraft for flightseeing tours. All charter and flightseeing flights on the aircraft constitute taxable transportation, as that term is defined in section 4262(a), and no exemptions (other than section 4261(e)(5)) apply. The aircraft's maximum certificated takeoff weight is 7,000 pounds and the aircraft uses kerosene as fuel.

(ii) *Analysis.* Amounts paid by the aircraft owner to the aircraft management services provider for aircraft management services related to the aircraft owner's own aircraft are exempt under section 4261(e)(5). Amounts paid by the charterer or passengers for the charter flights are subject to tax under section 4261(a) and (b). *See* § 49.4261–7(h) for rules relating to the application of the tax imposed by section 4261 on amounts paid for charter flights. *See* § 49.4261–2(b) for rules regarding the application of the tax imposed by section 4261(b). Amounts paid by flightseeing customers for flightseeing tours are also subject to tax under section 4261(a) and (b). If a payment for a flightseeing tour includes

charges for nontransportation services, the charges for the nontransportation services may be excluded in computing the tax payable provided the payments are separable and provided in exact amounts. *See* § 49.4261–2(c). The kerosene used as fuel on the charter flights and the flightseeing flights is subject to the tax imposed by section 4081(a) at the commercial rate.

(k) *Applicability date.* This section applies on and after the later of [date these regulations are published as final regulations in the **Federal Register**] or January 1, 2021.

§ 49.4262(a)–1 [Redesignated]

■ **Par. 14.** Section 49.4262(a)–1 is redesignated as § 49.4262–1.

■ **Par. 15.** Newly redesignated § 49.4262–1 is amended by:

■ 1. In paragraph (a) introductory text, removing ''section 4262(b) (see § 49.4262(b)–1)'' and adding ''section 4262(b) of the Internal Revenue Code (Code) (see § 49.4262–2)'' in its place.

■ 2. In the first sentence of paragraph (a)(1), removing ''Transportation'' and adding ''Transportation by air'' in its place.

■ 3. In the first sentence of paragraph (a)(1), removing ''(the ''225-mile zone'')'' and adding ''(225-mile zone)'' in its place.

■ 4. Revising paragraphs (a)(2) and (b)(2).

■ 5. In paragraph (b), removing ''subparagraphs (1) and (5) of this paragraph'' and adding ''paragraph (b)(1) and (5) of this section'' in its place.

■ 6. In paragraph (b), removing ''subject to the tax'' and adding ''subject to the taxes imposed by section 4261(a) and (b)'' in its place.

■ 7. Removing and reserving paragraph (c).

■ 8. Revising introductory paragraph (d); designating *Example (1)* as paragraph (d)(1) and revising new paragraph (d)(1) *Example 1.*

■ 9. In paragraph (d), designating *Example (2)* as (d)(2) and removing and reserving newly designated paragraph (d)(2) *Example 2.*

■ 10. In paragraph (d), designating *Example (3)* as paragraph (d)(3) and removing ''6 hours'' wherever it appears and adding ''12 hours'' in its place and also removing ''subject to tax'' wherever it appears and adding ''subject to the taxes imposed by section 4261(a) and (b)'' in its place.

■ 11. In paragraph (d), designating *Example (4)* as paragraph (d)(4), and removing ''six hours'' wherever it appears and adding ''12 hours'' in its place and also removing ''subject to tax'' wherever it appears and adding ''subject to the taxes imposed by section 4261(a) and (b)'' in its place.

■ 12. Revising paragraph (e).

■ 13. Adding paragraph (f).

The revisions and addition read as follows:

§ 49.4262–1 Taxable transportation.

(a) * * *

(2) In the case of any other transportation by air, that portion of such transportation that is directly or indirectly from one port or station in the United States to another port or station in the United States, but only if such transportation is not part of *uninterrupted international air transportation* within the meaning of section 4262(c)(3) of the Code and § 49.4262–3(c). Transportation from one port or station in the United States occurs whenever a carrier, after leaving any port or station in the United States, makes a regularly scheduled stop at another port or station in the United States irrespective of whether stopovers are permitted or whether passengers disembark.

* * * * *

(b) * * *

(2) New York to Vancouver, Canada, with a stop at Toronto, Canada;

* * * * *

(d) *Examples.* The following examples illustrate the application of section 4262(a)(2) and the taxes imposed by section 4261(a) and (b) of the Code:

(1) *Example (i).* A purchases in New York a ticket for air transportation from New York to Nassau, Bahamas, with a scheduled stopover of 14 hours in Miami. The part of the transportation from New York to Miami is taxable transportation as defined in section 4262(a) because such transportation is from one station in the United States to another station in the United States and the trip is not uninterrupted international air transportation (because the scheduled stopover interval in Miami is greater than 12 hours). Therefore, the amount paid for the transportation from New York to Miami is subject to the taxes imposed by section 4261(a) and (b).

* * * * *

(e) *Examples of transportation that is not taxable transportation.* The following examples illustrate transportation that is not taxable transportation:

(1) New York to Trinidad with no intervening stops;

(2) Minneapolis to Edmonton, Canada, with a stop at Winnipeg, Canada;

(3) Los Angeles to Mexico City, Mexico, with stops at Tijuana and Guadalajara, Mexico;

(4) New York to Whitehorse, Yukon Territory, Canada, by air with a scheduled stopover in Chicago of five hours. Amounts paid for the transportation referred to in examples set forth in paragraphs (e)(1), (2), and (3) of this section are not subject to the tax regardless of where payment is made, since none of the trips:

(i) Begin in the United States or in the 225-mile zone and end in the United States or in the 225-mile zone, nor

(ii) Contain a portion of transportation which is directly or indirectly from one port or station in the United States to another port or station in the United States. The amount paid within the United States for the transportation referred to in the example set forth in paragraph (4) of this section is not subject to tax since the entire trip (including the domestic portion thereof) is ''uninterrupted international air transportation'' within the meaning of section 4262(c)(3) and paragraph (c) of § 49.4262–3. In the event the transportation is paid for outside the United States, no tax is due since the transportation does not begin and end in the United States.

* * * * *

(f) *Applicability date.* This section applies on and after the later of [date these regulations are published as final regulations in the **Federal Register**] or January 1, 2021. For rules that apply before that date, *see* 26 CFR part 49, revised as of April 1, 2020.

§ 49.4262(b)–1 [Redesignated]

■ **Par. 16.** Section 49.4262(b)–1 is redesignated as § 49.4262–2.

§ 49.4262–2 [Amended]

■ **Par. 17.** Newly redesignated § 49.4262–2 is amended as follows:

■ 1. In paragraph (a), ''section 4262(b)'' is removed and ''section 4262(b) of the Internal Revenue Code'' is added in its place.

■ 2. In paragraph (b)(2), *Example (2)* is removed and reserved.

■ 3. Revise paragraph (d). ''Illustration'' and add ''Example'' in its place.

The revisions and additions reads as follows:

§ 49.4262–2 Exclusion of certain travel.

* * * * *

(d) *Example.* The application of paragraph (c) of this section may be illustrated by the following example: A purchases in San Francisco a ticket for transportation by air to Honolulu, Hawaii. The portion of the transportation which is outside the continental United States and is outside Hawaii is excluded from taxable transportation. The tax applies to that

part of the payment made by A which is applicable to the portion of the transportation between the airport in San Francisco and the three-mile limit off the coast of California (a distance of 15 miles) and between the three-mile limit off the coast of Hawaii and the airport in Honolulu (a distance of 5 miles). The part of the payment made by A which is applicable to the taxable portion of his transportation and the tax due thereon are computed in accordance with paragraph (c)(1) as follows:

Mileage of entire trip (San Francisco airport to Honolulu airport) (miles)	2,400
Mileage in continental United States (miles)	15
Mileage in Hawaii (miles)	5
	20
Fare from San Francisco to Honolulu	$168.00
Payment for taxable portion (20/2400 × $168)	$1.40
Tax due (7.5% (rate in effect on date of payment) × $1.40)	$0.11

(All distances and fares assumed for purposes of this example. This example only addresses the computation of the tax imposed by section 4261(a). It does not address the computation of any other tax imposed by section 4261 that may apply to these facts.)

§ 49.4262(c)–1 [Redesignated]

■ **Par. 18.** Section 49.4262(c)–1 is redesignated as § 49.4262–3.

■ **Par. 19.** Newly redesignated § 49.4262–3 is amended as follows:

■ 1. In the first sentence of paragraph (a), remove ''includes only the 48 States existing on July 25, 1956 (the date of the enactment of the Act of July 25, 1956 (Pub. L. 796, 84th Cong., 70 Stat. 644) and the District of Columbia'' and add ''means the District of Columbia and the States other than Alaska and Hawaii'' in its place.

■ 2. In paragraph (a), the last sentence is removed.

■ 3. In paragraph (c), remove ''six hours'' wherever it appears and add ''12 hours'' in its place.

■ 4. In paragraph (c), remove ''6 hours'' wherever it appears and add ''12 hours'' in its place.

■ 5. In paragraph (c), remove ''six-hour'' wherever it appears and add ''12-hour'' in its place.

■ 6. In paragraph (c)(2), remove ''paragraph (a)(2) of § 49.4264(c)–1'' and add ''§ 49.4263–3(a)(2)'' in its place.

■ 7. Adding paragraphs (d) and (e).

The additions read as follows:

§ 49.4262–3 Definitions.

* * * * *

(d) *Transportation.* For purposes of the regulations in this subpart, the term *transportation* includes layover or waiting time and movement of the aircraft in deadhead service.

(e) *Applicability date.* This section applies on and after the later of [date these regulations are published as final regulations in the **Federal Register**] or January 1, 2021. For rules that apply before that date, *see* 26 CFR part 49, revised as of April 1, 2020.

§ 49.4263–5 [Redesignated]

■ **Par. 20.** Section 49.4263–5 is redesignated as § 49.4281–1.

■ **Par. 21.** Newly redesignated § 49.4281–1 is amended by:

■ 1. Revising paragraphs (a) and (b).

■ 2. In paragraph (c), adding a sentence at the end of the paragraph.

■ 3. Adding paragraphs (d) and (e).

The revisions and additions read as follows:

§ 49.4281–1 Small aircraft on nonestablished lines.

(a) *In general.* Amounts paid for the transportation of persons on a small aircraft of the type sometimes referred to as air taxis shall be exempt from the tax imposed under section 4261 of the Internal Revenue Code provided the aircraft has a maximum certificated takeoff weight of 6,000 pounds or less determined as provided in paragraph (b) of this section. The exemption does not apply, however, when the aircraft is operated on an established line or when the aircraft is a jet aircraft.

(b) *Maximum certificated takeoff weight.* The term *maximum certificated takeoff weight* means the maximum certificated takeoff weight shown in the type certificate or airworthiness certificate issued by the Federal Aviation Administration.

(c) * * * An aircraft is not considered as operated on an established line at any time during which the aircraft is being operated on a flight the sole purpose of which is sightseeing.

(d) *Jet aircraft.* For purposes of this section, the term *jet aircraft* does not include any aircraft which is a rotorcraft (such as a helicopter) or propeller aircraft.

(e) *Applicability date.* This section applies on and after the later of [date these regulations are published as final regulations in the **Federal Register**] or January 1, 2021. For rules that apply before that date, see 26 CFR part 49, revised as of April 1, 2020.

§ 49.4264(a)–1 [Redesignated]

■ **Par. 22.** Section 49.4264(a)–1 is redesignated as § 49.4263–1.

■ **Par. 23.** Newly redesignated § 49.4263–1 is revised to read as follows:

§ 49.4263–1 Duty to collect the tax; payments made outside the United States.

Where payment upon which tax is imposed by section 4261 of the Internal Revenue Code is made outside the United States for a prepaid order, exchange order, or similar order, the person furnishing the initial transportation pursuant to such order shall collect the applicable tax. See section 4291 and the regulations thereunder for cases where persons receiving payment must collect the tax.

§ 49.4264(b)–1 [Redesignated]

■ **Par. 24.** Section 49.4264(b)–1 is redesignated as § 49.4263–2.

§ 49.4263–2 [Amended]

■ **Par. 25.** Newly redesignated § 49.4263–2 is amended as follows:

■ 1. In the first sentence of paragraph (a), remove ''4264(b)'' and add ''4263(b) of the Internal Revenue Code (Code)'' in its place.

■ 2. In the last sentence of paragraph (a), remove ''office of the district director for the district in which the person making the report is located,'' and add ''Commissioner'' in its place.

■ 3. In paragraph (b), add ''of the Code'' at the end of the paragraph.

■ 4. In paragraph (c), remove ''*Illustration.*'' and add ''*Example.*'' in its place.

■ 5. In the last sentence of paragraph (c), remove ''office of the district director of internal revenue for the district in which the carrier is located,'' and add in its place ''Commissioner''.

§ 49.4264(c)–1 [Redesignated]

■ **Par. 26.** Section 49.4264(c)–1 is redesignated as § 49.4263–3.

■ **Par. 27.** Newly redesignated § 49.4263–3 is amended by:

■ 1. Removing ''a district director'' wherever it appears and adding ''Commissioner'' in its place.

■ 2. Revising paragraph (a).

■ 3. In paragraph (b), removing the second sentence.

■ 4. In paragraph (b), removing ''4264'' wherever it appears and adding ''4263'' in its place.

■ 5. In paragraph (b), add ''of the Code'' after ''4291''.

■ 6. Removing and reserving paragraph (c).

The revisions read as follows:

§ 49.4263–3 Special rule for the payment of tax.

(a) *In general*—(1) For the rules applicable under section 4263(c) of the Internal Revenue Code, see § 49.4261–1(b).

* * * * *

§ 49.4264(d)–1 [Redesignated]

■ **Par. 28.** Section 49.4264(d)–1 is redesignated as § 49.4263–4.

§ 49.4263–4 [Amended]

■ **Par. 29.** Newly redesignated § 49.4263–4 is amended by removing ''4264(d)'' and adding ''4263(d)'' in its place.

§ 49.4264(e)–1 [Redesignated]

■ **Par. 30.** Section 49.4264(e)–1 is redesignated as § 49.4263–5.

§ 49.4264(f)–1 [Redesignated]

■ **Par. 31.** Section 49.4264(f)–1 is redesignated as § 49.4263–6.

§ 49.4263–6 [Amended]

■ **Par. 32.** Newly redesignated § 49.4263–6 is amended by removing and reserving paragraph (b).

■ **Par. 33.** In § 49.4271–1, revise paragraphs (a) and (b) to read as follows:

§ 49.4271–1 Tax on transportation of property by air.

(a) Purpose of this section. Section 4271 of the Internal Revenue Code (Code) imposes a 6.25% tax on amounts paid within or without the United States for the taxable transportation of property (as defined in section 4272). This section sets forth rules as to the general applicability of the tax. This section also sets forth rules authorized by section 4272(b)(2) of the Code which exempt from tax payments for the transportation of property by air in the course of exportation (including shipment to a possession of the United States) by continuous movement, and in due course so exported.

(b) *Imposition of tax.* (1) The tax imposed by section 4271 applies only to amounts paid to persons engaged in the business of transporting property by air for hire.

(2) The tax imposed by section 4271 does not apply to amounts paid for the transportation of property by air if such transportation is furnished on an aircraft having a maximum certificated takeoff weight (as defined in section 4281(b) of the Code) of 6,000 pounds or less, unless such aircraft is operated on an established line or when such aircraft is a jet aircraft. The tax imposed by section 4271 also does not apply to any payment made by one member of an affiliated group (as defined in section 4282(b) of the Code) to another member of such group for services furnished in connection with the use of an aircraft if such aircraft is owned or leased by a member of the affiliated group and is not available for hire by persons who are not members of such group.

* * * * *

■ **Par. 34.** Section 49.4271–2 is added to read as follows:

§ 49.4271–2 Aircraft management services.

For rules regarding the exemption for certain amounts paid by aircraft owners for aircraft management services, see § 49.4261–10.

§ 49.4282–1 [Reserved]

■ **Par. 35.** Add and reserve § 49.4282–1.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2020–15504 Filed 7–29–20; 11:15 am]

BILLING CODE 4830–01–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3050

[Docket No. RM2020–9; Order No. 5586]

Periodic Reporting

AGENCY: Postal Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is requesting that they initiate an informal rulemaking proceeding to change how the Postal Service determines incremental costs and how it accounts for peak-season costs in its periodic reports. This rulemaking informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: Technical conference to be held: September 29, 2020 at 11 a.m. EST. Notice of Intent to Participate due: September 14, 2020.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

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

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

On May 29, 2020, United Parcel Service, Inc. (UPS) filed a petition pursuant to 39 CFR 3050.11.[1] UPS requests the Commission to initiate a proceeding to change how the Postal Service determines incremental costs and how it accounts for peak-season costs in its periodic reports. Petition at 1. UPS contends that pursuant to 39 U.S.C. 3652(a), these periodic reports apply the Postal Service's costing methodologies to determine, among other things, ''whether the Postal Service's 'costs, revenues, rates, and quality of service' comply with Title 39, including [section] 3633, which applies to competitive products.'' *Id.*

II. Summary of the Petition

UPS alleges that the Postal Service's current costing models do not fully account for the increase in peak-season costs driven by package shipments. *Id.* UPS asserts that these shipments ''take on sharply different seasonal patterns than letters,'' which causes a ''disconnect between costing models and package delivery.'' *Id.* at 1–2. UPS asserts further that peak-season costs incurred in December and caused by competitive products would not exist if the Postal Service did not deliver packages and that, therefore, these costs are incremental costs, which should be attributed to competitive products. *Id.* at 2–3. Based on its analysis, UPS alleges that the current costing models fail to attribute approximately $500 million of the ''additional peak-season costs'' annually, thereby ''effectively ignoring them'' under 39 U.S.C. 3633(a). *Id. a*t 3. According to UPS, this alleged failure may be contributing to the Postal Service's growing losses. *Id.* at 4.

UPS requests the Commission to address the alleged failure of existing cost models by directing the Postal Service to:

(1) Attribute what UPS characterizes as ''unexplained peak-season costs'' to competitive products as a group under the incremental cost test utilized for 39 U.S.C. 3633(a)(1).

(2) Properly analyze the seasonality effects and revise the cost models to accurately account for such effects, with respect to 39 U.S.C. 3633(a)(2).

(3) Produce additional data regarding peak-season operations, which would lead to an improved costing methodology.

(4) Develop a new methodological approach for 39 U.S.C. 3633(a)(1) and (a)(2) that addresses more generally

[1] Petition of United Parcel Service, Inc. for the Initiation of Proceedings to Make Changes to Postal Service Costing Methodologies, May 29, 2020 (Petition). UPS also filed a library reference in support of the Petition. *See* Notice of Filing of Library Reference UPS–LR–RM2020–9/1, May 29, 2020.

peak-season costs and the deficiencies in allocating incremental costs.

See id. at 39–41. UPS also suggests that ''a comprehensive technical conference would be an appropriate next step. . . .'' *Id.* at 41.

III. Commission Analysis

The Commission established periodic reporting rules in 39 CFR part 3050 on April 16, 2009.[2] In Order No. 3506, the Commission directed the Postal Service ''to use incremental costs as the basis for class-level and product-level attributable costs'' in accounting for costs in its periodic reports.[3] UPS asserts that peak-season costs ''are caused by competitive products'' and ''*would not exist* if the Postal Service did not deliver packages.'' Petition at 2–3 (emphasis in original). UPS therefore concludes that ''[p]eak-season costs plainly qualify as incremental costs'' and that ''the current costing models approved by the Commission fail to account for peak-season cost increases, effectively ignoring them under 39 U.S.C. 3633(a).'' *Id.* at 3. To remedy these alleged shortcomings, UPS proposes changes which, if approved, would constitute changes in analytical principles relating to the Postal Service's periodic reports. As such, the proposed changes are properly presented under 39 CFR 3050.11.

IV. Video Technical Conference

Procedures for considering proposals to change accepted analytical principles are provided in section 3050.11(c). 39 CFR 3050.11(c). That section authorizes the Commission to order ''the petitioner and/or the Postal Service . . . to participate in technical conferences, prepare statements clarifying or supplementing their views, or answer questions posed by the Commission or its representatives.'' *Id.*

Based upon allegations in the Petition, the Commission believes it would be appropriate to consider areas of possible improvement in costing methodology related to peak-season costs. As a preliminary step, the Commission intends to explore the ability of current costing models to identify and attribute additional peak-season costs. Accordingly, the Commission is establishing Docket No. RM2020–9 and scheduling a video technical conference to consider the alleged shortcomings of the Postal Service's costing methodologies and potential improvements. The Commission directs both UPS and the Postal Service to make presentations and participate in a discussion of relevant issues in that technical conference. The technical conference will be held online via WebEx on September 29, 2020 at 11:00 a.m. EST. Interested persons who wish to participate must file a notice of intent to participate (Notice) no later than September 14, 2020.

The Notice shall provide the name and email address for each individual who will participate at the WebEx conference using an individual device (*e.g.,* a desktop computer, laptop, tablet or smart phone). Entities, such as corporations, associations, or government agencies that identify more than one individual wishing to participate in the conference shall provide the names of interested persons with their email addresses and designate the individual who will serve as the primary point of contact for the entity.

Prior to the conference, the Commission will provide participants with a WebEx link and a guide explaining how to connect to the conference, and detailing its schedule and procedures to be followed.

At the conference, UPS shall present the analysis underlying its Petition and discuss its proposed modifications to the Postal Service's costing methodologies. UPS should specifically clarify:

(1) How the attribution methodology, if modified, would ensure that the costs are attributed to products (or groups of products) through reliably identified causal relationships, as required by 39 U.S.C. 3622(c)(2).

(2) How the variability costing models, if modified, would be used consistently during both peak- and off-peak time periods.

The Postal Service shall discuss how the current costing methodologies account for the peak-season costs. The Postal Service's presentation should address:

(1) How the Postal Service's costing models (including, but not limited to, the city carrier street time regular delivery letter routes, city carrier street time Special Purpose Routes, and highway transportation models) account for seasonal volume spikes and peak-season costs.

(2) The extent to which the seasonal volume spikes are caused by competitive products and whether and how the current cost attribution methodology accounts for these volume spikes and any associated cost increases.

(3) Whether and, if so, how the Postal Service's recently adopted changes to the methodology of incremental cost attribution allow for accounting for the peak-season cost increases in general and those caused by delivery of competitive products .[4]

Pursuant to 39 U.S.C. 505, Lawrence Fenster is designated as officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

The Commission will establish additional procedures, as necessary, by further orders.

V. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. RM2020–9 for consideration of the matters raised by the Petition, filed May 29, 2020.

2. A video technical conference is scheduled on September 29, 2020, at 11:00 a.m. EST and will be held online via WebEx to address issues identified in this Order and related to this matter.

3. Interested persons who wish to participate in the technical conference shall file a notice of intent to participate on or before September 14, 2020.

4. After the technical conference, the Commission shall post a recording of the conference on its website, which will be available to the general public.

5. Additional procedures, including procedures following conclusion of the technical conference, will be established by further orders of the Commission.

6. Pursuant to 39 U.S.C. 505, the Commission appoints Lawrence Fenster to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

7. The Secretary shall arrange for publication of this order in the **Federal Register**.

[2] Docket No. RM2008–4, Notice of Final Rule Prescribing Form and Content of Periodic Reports, April 16, 2009 (Order No. 203). Section 3050.60(f) of the periodic reporting rules requires the Postal Service to file periodic reports with an explanation of its costing methodologies, which describe the Postal Service's current methodologies and recent changes. 39 CFR 3050.60(f). For the most recent report, *see* Rule 39 CFR 3050.60(f) Report for FY 2019 (Summary Descriptions), July 1, 2020, subfolders ''Rule 39 CFR Sec 3050.60f_Report FY19,'' ''SummaryDescriptionsFY2019.'' A non-public version of the Summary Descriptions is filed under seal. *See* PDF file *Letter_FY 2019_3050_60f.pdf.*

[3] Docket No. RM2016–2, Order Concerning United Parcel Service, Inc.'s Proposed Changes to Postal Service Costing Methodologies (UPS Proposals One, Two, and Three), September 9, 2016, at 125 (Order No. 3506); Notice of Errata, October 19, 2016. Incremental costs are also used for other purposes, such as for testing for cross-subsidy of competitive products. *See* Order No. 3506 at 13.

[4] *See, e.g.,* Order No. 3506 at 60; Docket No. RM2016–13, Order Adopting Final Rules on Changes Concerning Attributable Costing, December 1, 2016, at 1, 13–15 (Order No. 3641); Docket No. RM2018–6, Order on Analytical Principles Used in Periodic Reporting (Proposal Three), July 19, 2018, at 1–2, 7–10 (Order No. 4719).

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2020–15403 Filed 7–30–20; 8:45 am]

BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 22, 124, and 257

[EPA–HQ–OLEM–2019–0361; FRL–10012–99–OLEM]

RIN 2050–AH07

Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Federal CCR Permit Program; Reopening of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; reopening of comment period.

SUMMARY: The Environmental Protection Agency (EPA) issued a proposed rule in the **Federal Register** of February 20, 2020, concerning establishment of a federal permit program for disposal of coal combustion residuals (CCR). EPA has decided to reopen the comment period to allow submittal of additional comments on the proposal.

DATES: The comment period for the proposed rule published February 20, 2020, at 85 FR 9940, is reopened. Comments, identified by docket identification (ID) number EPA–HQ–OLEM–2019–0361, must be received on or before August 7, 2020.

ADDRESSES: Follow the detailed instructions provided under **ADDRESSES** in the **Federal Register** document of February 20, 2020 (85 FR 9940).

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Stacey Yonce, Office of Resource Conservation and Recovery, Environmental Protection Agency, 5304P, Washington, DC 20460; telephone number: (703) 308–8476; email address: *yonce.stacey@epa.gov.* For more information on this rulemaking please visit *https://www.epa.gov/coalash.*

SUPPLEMENTARY INFORMATION: This document reopens the public comment period established in the **Federal Register** document of February 20, 2020 (85 FR 9940), for 7 days, from July 31, 2020, to August 7, 2020. In that document, EPA proposed to establish a federal CCR permit program in accordance with the requirements of the Water Infrastructure Improvements for the Nation (WIIN) Act. EPA is hereby reopening the comment period for 7 days.

To submit comments, or access the docket, please follow the detailed instructions provided under **ADDRESSES** in the **Federal Register** document of February 20, 2020 (85 FR 9940). Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, 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 may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.If* you have questions, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects

40 CFR Part 22

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Hazardous waste, Penalties, Pesticides and pests, Poison prevention, Water pollution control.

40 CFR Part 124

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous waste, Indians—lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 257

Environmental protection, Beneficial use, Coal combustion products, Coal combustion residuals, Coal combustion waste, Disposal, Hazardous waste, Landfill, Surface impoundment.

Donna Salyer,

Acting Director, Office of Resource Conservation and Recovery.

[FR Doc. 2020–16482 Filed 7–30–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2020–0157; FRL–10012–73–Region 3]

Air Plan Approval; Pennsylvania; Allegheny County Area Attainment Plan for the 2012 Fine Particulate Matter National Ambient Air Quality Standard; Reopening of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; reopening of the comment period.

SUMMARY: The Environmental Protection Agency (EPA) is reopening the comment period for a document published in the **Federal Register** on June 12, 2020. EPA is reopening the comment period based on the Clean Air Council's request for a 30-day extension. Clean Air Council's request seeks an extension of the comment period until August 13, 2020.

DATES: The comment period for the proposed rule published June 12, 2020 (85 FR 35852), is reopened. The EPA must receive comments on or before August 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 for comments on this proposed approval of the Allegheny County Area $PM_{2.5}$ plan, 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

http://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: EPA proposed to approve portions of a state implementation plan (SIP) revision submitted on September 30, 2019 by the Pennsylvania Department of Environmental Protection (PADEP) on behalf of the Allegheny County Health Department (ACHD). The SIP submittal (also referred to as ''the Allegheny County $PM_{2.5}$ Plan'') addresses 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''). EPA's June 12, 2020 document proposed to fully approve all elements of the plan except for those addressing contingency measure requirements and motor vehicle emissions budgets, which EPA proposed to conditionally approve.

EPA is reopening the comment period based on a request by Clean Air Council for a 30-day extension of the comment period. Clean Air Council's request, which is in the docket [1] for this matter, seeks an extension of the comment period until August 13, 2020. Their justification for such an extension included the complexity of the plan and EPA's proposed action, substantial changes to the plan made by ACHD following public comment at the local level, and the fact that EPA's proposed rule's July 13, 2020 close of comment period occurs at a similar time as those of several other state and Federal actions related to air quality in the area, for which comments are due on or around the same time. After reviewing these arguments, EPA has decided to reopen the comment period to August 13, 2020. All comments received on or before August 13, 2020 will be entered into the public record and considered by EPA before taking final action on the proposed rule. Comments submitted between the close of the original comment period and the re-opening of this comment period will be accepted and considered.

[1] *https://regulations.gov,* Docket ID No. EPA–R03–OAR–2020–0157.

Dated: July 17, 2020.

Cosmo Servidio,

Regional Administrator, Region III.

[FR Doc. 2020–15870 Filed 7–30–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, and 27

[PS Docket No. 13–42; FCC 20–89; FRS 16931]

Reallocation of 470–512 MHz (T-Band) Spectrum

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission seeks comment on reallocating spectrum associated with broadcast television channels 14–20 (470–512 MHz or T-Band), assigning new licenses by auction for the 6 megahertz to 18 megahertz of spectrum that is potentially available in each of the eleven urbanized areas, and relocating ''public safety eligibles'' from the T-Band. Specifically, the Commission proposes rules that would allow for flexible use in the auctioned T-Band, including wireless (fixed or mobile) use. The Commission also proposes to permit broadcast operations and seeks comment on how best to facilitate this and other potential uses. The Commission seeks comment on transition mechanisms and costs for relocating public safety eligibles from the T-Band, including whether to transition these licensees only where auction revenues exceed anticipated transition costs. The Commission also proposes an auction framework and licensing, operating, and technical rules for the reallocated spectrum that would preserve the current environment for incumbents remaining in the T-Band. Finally, the Commission seeks comment on how to best address the non-public safety operations in the T-Band to maximize opportunities for new entrants, including whether and how to transition non-public safety operations.

DATES: Interested parties may file comments on or before August 31, 2020; and reply comments on or before September 29, 2020.

ADDRESSES: You may submit comments, identified by PS Docket No. 13–42, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *http://apps.fcc.gov/ecfs/* in docket number PS Docket No. 13–42. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.

Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy,* Public Notice, DA 20–304 (March 19, 2020). *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*
- During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

FOR FURTHER INFORMATION CONTACT: Melissa Conway, *Melissa.Conway@fcc.gov,* of the Wireless Telecommunications Bureau, Mobility Division, (202) 418–2887. For additional information concerning the PRA information collection requirements contained in this document, contact Cathy Williams at (202) 418–2918 or send an email to *PRA@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking (*NPRM*) in PS Docket No. 13–42, FCC 20–89, released on July 6, 2020. The complete text of the *NPRM* is available for viewing via the Commission's ECFS website by entering the docket number, PS Docket No. 13–42.

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format),

send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before the dates indicated on the first page of this document.

Ex Parte Rules

This proceeding shall continue to be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules (47 CFR 1.1200). Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Initial Paperwork Reduction Analysis

This document contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Initial Regulatory Flexibility Act Analysis

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

Synopsis

Section 6103 of the Middle Class Tax Relief and Job Creation Act of 2012 (T-Band Mandate) [1] directs the Commission to reallocate T-Band spectrum used by ''public safety eligibles'' and begin a system of competitive bidding to grant new initial licenses for the use of the spectrum by February 22, 2021, to relocate these public safety entities from the T-Band no later than two years after completion of the system of competitive bidding, and to make auction proceeds available to the National Telecommunications and Information Administration (NTIA) to make grants as necessary to cover relocation costs for the public safety entities for which the statute requires relocation. This *NPRM* is the commencement of the process to meet each of the statutory deadlines and directives.

A. Allocation and Use of T-Band Frequencies

In 1970, the Commission allocated spectrum in the 470–512 MHz band in certain ''major urbanized areas'' for sharing between broadcast television and ''public safety, industrial, and land transportation'' private land mobile radio services (PLMR). The Commission did so to address spectrum shortages and congestion in certain urbanized areas for those services and to anticipate future PLMR growth and spectrum needs. Today, T-Band spectrum is assigned to Public Safety Pool and Industrial/Business PLMR operations in the following eleven urbanized areas: Boston, MA; Chicago, IL; Dallas/Fort Worth, TX; Houston, TX; Los Angeles, CA; Miami, FL; New York, NY/NE NJ; Philadelphia, PA; Pittsburgh, PA; San Francisco/Oakland, CA; and Washington, DC/MD/VA. Additionally, in some urbanized areas, T-Band spectrum within the lowest 300 kilohertz of each broadcast television channel is designated for part 22 public mobile service. Commission rules allow T-Band licensees an operational radius of 128 kilometers (80 miles) from the geographic center of each urbanized area.

Each television broadcast channel consists of a 6 megahertz block, with the number and frequency range of broadcast channel(s) open for assignment to T-Band users varying in each urbanized area. With limited exceptions, T-Band frequency assignments within each broadcast channel are available in the eleven urbanized areas for use by either type of licensee. Paired frequencies are assigned in 12.5 kilohertz or 25 kilohertz bandwidths, with each frequency pair separated by 3 megahertz to avoid interference. As a result, Public Safety frequency assignments are interleaved with Industrial/Business frequency assignments in most T-Band channels. T-Band spectrum consists of interleaved narrowband channels and is heavily used by these entities across the eleven urbanized areas. According to Commission licensing records, there are approximately 925 Public Safety licensees with 3,000 stations, and approximately 700 non-public safety entities with 1700 stations throughout the T-Band spectrum. In addition, some entities in the T-Band, both public safety and Industrial/Business, operate through waivers of § 90.305 of the Commission's rules governing location of T-Band stations. The ratio of public safety to Industrial/Business usage

[1] Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112–96, section 6103, 126 Stat. 156, 205–206 (2012), (codified at 47 U.S.C. 1413) (Spectrum Act).

varies from urbanized area to urbanized area.

B. Statutory Directive

In analyzing the T-Band Mandate's potential impact, the Government Accountability Office concluded in 2019 that T-Band relocation poses significant challenges, including uncertainty of available spectrum, high cost, and interoperability concerns, and that implementation of the T-Band Mandate could deprive first responders of their current ability to communicate by radio. The National Public Safety Telecommunications Council, in both a 2013 report and a 2016 updated report, calculated the cost to relocate public safety operations from the T-Band would be approximately $5.9 billion. The Commission's own estimates from early 2019 indicated that relocating public safety users from the T-Band would have an estimated cost between $5 and $6 billion and that these estimated relocation costs would greatly exceed the total expected revenues from an auction for both wireless use and the provision of broadcast services.

Bipartisan Congressional opposition to the T-Band Mandate has increased as the deadline approaches. Multiple bills have been introduced that would repeal the T-Band Mandate. Congressional statements calling for repeal note the critical nature of these public safety communications as well as the substantial concern that the potential value of the spectrum at auction would not cover relocation costs.

In this proceeding, the Commission proposes an approach to implement the T-Band Mandate for the 470–512 MHz band and address a variety of issues, such as an expanded allocation, band plan, spectrum block size, overlay license rights, and license area size, that would allow new flexible-use licensees to make use of the spectrum vacated by the mandatory transition of public safety eligibles. The Commission also addresses issues related to the transition of public safety incumbents out of the band, including which entities require transition, and seek comment on potential paths forward for incumbent Industrial/Business licensees and licensees operating in the T-Band pursuant to part 22 of the Commission's rules, as the T-Band Mandate is silent with regard to treatment of those licensees. Finally, the Commission proposes rules that would allow for flexible use under part 27 of the Commission's rules in the auctioned T-Band spectrum.

C. Reallocation and Licensing of T-Band Spectrum for Flexible Use

The T-Band Mandate provides that the ''Commission shall . . . reallocate the spectrum in the 470–512 MHz band . . . currently used by public safety eligibles as identified in § 90.303'' of the Commission's rules. In considering how to reallocate this spectrum, and consistent with the Commission's approach to allocation of certain other bands, the Commission seeks to provide flexibility for new T-Band licensees, after relocation of public safety operations, to tailor the use of the band to their specific operational needs and to maximize network efficiency. The Commission therefore proposes a modification of the current 470–512 MHz band co-primary allocations to provide for Mobile Service, Fixed Service, and Broadcasting. The Commission seeks comment on this proposal. In particular, the Commission asks whether the expansion of the Land Mobile Service allocation for the 470–512 MHz band to permit Mobile Service, which would include not only Land Mobile Service, but Aeronautical Service and Maritime Service, would allow for more efficient use of the spectrum? How might an expanded allocation affect the resulting interference environment in the band, and would additional protections be necessary? How should the addition of either or both of these expanded allocations be reflected in the proposed rules? Commenters should discuss in detail the costs and benefits of any expanded allocations.

The Commission believes that its proposal meets the requirements for the allocation of flexible use spectrum under section 303(y) of the Communications Act of 1934, as amended (Act). That section allows the Commission to allocate spectrum for flexible uses if the allocation is consistent with international agreements and if it finds that: (1) The allocation is in the public interest; (2) the allocation does not deter investment in communications services, systems, or development of technologies; and (3) such use would not result in harmful interference among users. The proposed allocation is consistent with international allocations for use of the 470–512 MHz band. Further, the proposed licensing framework for the new T-Band operations could spur innovation and investment in communications services, systems, and wireless technologies. The Commission seeks comment on this proposal.

Band Plan. The Commission proposes the band plan below in Figure 1 that would accommodate an auction of geographic area licenses of six megahertz blocks on a block-by-block basis in the 470–512 MHz band. The Commission proposes that the following blocks will be available in the listed urbanized areas, consistent with the current T-Band frequency assignments set forth in §§ 90.303 and 90.311 of our rules: A Block (Boston, Chicago, Los Angeles, Miami, New York, Pittsburgh); B Block (Chicago, New York); C Block (Boston, Dallas, Los Angeles, New York, San Francisco); D Block (Houston, San Francisco, Washington DC); E Block (Pittsburgh, Washington, DC); F Block (Philadelphia): G Block (Los Angeles, Philadelphia), shown in Figure 2. The Commission seeks comment on this proposed band plan and any appropriate alternatives, as well as the costs and benefits of any alternatives.

Figure 1

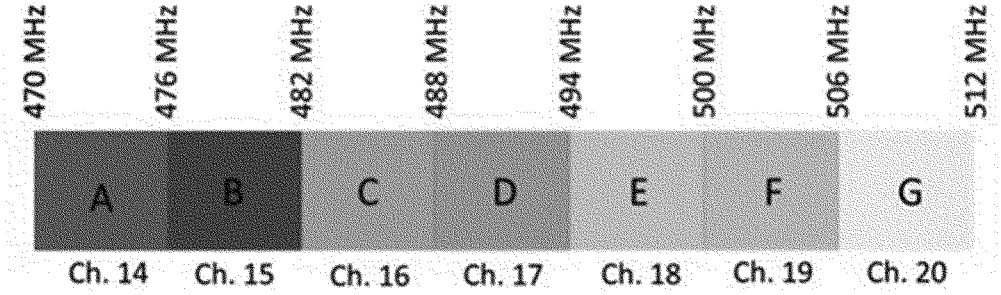

Figure 2

Ch. No.	Block	L Freq.	U Freq.	Bos.	Chi.	Dal.	Hou.	LA	Mia.	NY/ NE NJ	Phila.	Pitts.	SF	DC
14	A	470	476											
15	B	476	482											
16	C	482	488											
17	D	488	494											
18	E	494	500											
19	F	500	506											
20	G	506	512											

The Commission emphasizes that it is not proposing any changes to the other, non-public safety allocations in the band at this time.

Spectrum Block Size and Overlay Licensing. In proposing the spectrum block sizes for new licenses in the 470–512 MHz band, the Commission is mindful of the existing spectral environment. The T-Band Mandate requires that the Commission use competitive bidding to grant new initial licenses for the use of spectrum currently used by public safety eligibles as identified in § 90.303 of the Commission's rules and to relocate those public safety licensees from the T-Band. This approach would necessarily limit available channels to discrete frequency pairings within the six megahertz block in a given urbanized area, and would exclude from competitive bidding all frequencies currently authorized to Industrial/Business licensees pursuant to part 90 of the Commission's rules and all frequencies currently authorized to licensees for point to multi-point operation pursuant to part 22 of the Commission's rules. In the event that the Commission accepts mutually exclusive applications for licenses in the band, it will grant the licenses through a system of competitive bidding, consistent with section 309(j) of the Act. Further, to facilitate increased flexibility, the Commission proposes to use its authority pursuant to the T-Band Mandate and section 309(j) of the Act to make available for licensing through competitive bidding in a given urbanized area the full six megahertz blocks in the 470–512 MHz band as an overlay authorization. An overlay license authorizes operations for a geographic area ''overlaid'' on existing incumbent licensees, consisting in the T-Band of part 90 Industrial/Business and Public Safety Pool licensees, and part 22 point to multi-point licensees. This approach requires the overlay licensee to protect existing incumbents from interference indefinitely, *i.e.,* until the incumbent rights are relinquished. The Commission concludes that offering overlay licenses will best protect the rights of incumbent licensees that might remain in the band.

Consistent with an overlay approach, any new licensee operation on a frequency pair within the six megahertz is fully dependent upon whether an incumbent licensee is relocated from the T-Band spectrum. The Commission proposes that, as required by the T-Band Mandate, only ''public safety eligibles'' using T-Band spectrum are to be mandatorily relocated from the T-Band at this time. Would issuing overlay authorizations for the current six megahertz spectrum block, with only public safety eligibles proposed to be relocated from the T-Band, allow for both the provision of potential new services and the maintenance of a status quo incumbent interference environment for existing operations? The Commission seeks comment in general on the overlay auction approach with public safety eligibles relocating from the T-Band. The Commission seeks specific comment on whether this approach would lay the foundation for promoting the most efficient and intensive use of the spectrum and the recovery for the public of a portion of the value of the public spectrum resource. The Commission also seeks comment any alternatives approaches and the associated costs and benefits.

The Commission proposes that an overlay licensee in the T-Band would have a right to operate within the channel block to the extent: (1) A frequency is not assigned to an incumbent (either for shared or exclusive use); (2) the incumbent vacates the frequency, whether as required by the T-Band Mandate,

voluntary transition, acquisition, failure to renew, or permanent discontinuance; or (3) the incumbent and overlay licensee reach an agreement permitting such operation. The Commission also proposes that for a frequency to be considered vacated, the overlay licensee must clear all incumbents, such that there would be no overlap in authorized bandwidth of incumbent and overlay licensee transmissions.

Additionally, given the need to protect adjacent broadcast licensees, the Commission does not find feasible, and therefore do not propose, that an overlay licensee can operate co-channel on a frequency licensed to an incumbent by meeting, for example, a specified minimum mileage separation, or through an interference protection showing relying on contour calculations. The Commission seeks comment on this approach and whether we should adopt an alternative methodology whereby a technical showing could be made supporting co-channel operation of an overlay licensee while protecting existing incumbents in the same geographic area.

Geographic License Area Size. The Commission proposes to license the 470–512 MHz band on a geographic area basis with a 128-kilometer (80-mile) operational radius for each urbanized area based on the geographic centers set forth in §§ 90.303 and 90.305 of our rules. The Commission considers promoting a range of objectives when designing a system of competitive bidding and determining the appropriate geographic license size, including: (1) Facilitating access to spectrum by a wide variety of providers, including small entities and rural providers; (2) providing for the efficient use of spectrum; (3) encouraging deployment of wireless broadband services to consumers; and (4) promoting investment in and rapid deployment of new technologies and services. Other relevant factors here are the presence of incumbent broadcast operations and of non-public safety, Industrial/Business PLMR operations. In light of these factors, the Commission proposes to license the 470–512 MHz band with a geographic area consistent with the current T-Band operational radius.

The Commission seeks comment on this geographic-area licensing approach, and on any alternative licensing approach, including the costs and benefits of adopting such a licensing approach. Commenters also should address how any alternative licensing approach would be consistent with the requirements of section 309(j) and the statutory objectives that the Commission seeks to promote in establishing methodologies for competitive bidding.

Licensing Trigger. The T-Band Mandate provides that auction proceeds shall be available to cover relocation costs of public safety entities from the T-Band. As noted above, prior assessments predict that the cost of relocating public safety licensees may approach $6 billon. The Commission thus proposes to issue licenses only where net winning bids would exceed the total estimated relocation costs for all public safety T-Band licensees subject to mandatory relocation, as informed by earlier analyses in the record and the detailed comment we expect to receive in response to this *NPRM* regarding the costs of providing comparable facilities to relocated public safety licensees. The Commission seeks comment on this proposal, as well as on the statutory meaning of certain terms that will inform the likelihood that net winning bids will in fact exceed total estimated relocation costs. The Commission seeks comment on whether the term ''proceeds,'' as used in the T-Band Mandate, should be limited to monies paid for licenses covering spectrum ''currently used by public safety eligibles as identified in § 90.303.'' The Commission also seeks comment on whether the term ''relocation costs,'' should be defined consistent with the its approach in other proceedings.

Commenters should address how this approach, or any alternative, would or would not be consistent with the statutory requirements of section 309(j) and with the T-Band Mandate's statutory directives. For example, the Commission seeks comment on how to address any deficit in net winning bids—should it require public safety licensees to relocate on a city-by-city basis if the bids for a particular urbanized area meet or exceed the cost estimates to relocate public safety licensees in that particular area? Similarly, should licensees be required to relocate on a channel-by-channel basis within urbanized areas where bids for that channel meet or exceed the cost of clearing the channel? Are there alternative spectrum block sizes, licensing areas, or band plans that would meet the statutory directives, result in a status quo inference environment, and nonetheless ensure efficient use of spectrum? Commenters offering alternate methods should address the costs and benefits of a proposed alternate method.

D. Transition of Incumbents From T-Band Spectrum

1. Public Safety Transition

As directed by the T-Band Mandate, the Commission proposes to relocate from T-Band spectrum all ''public safety eligibles as identified in § 90.303'' of our rules, and to do so ''not later than 2 years after the date on which the system of competitive bidding described in [the statute] is completed.'' The Commission also proposes to require that comparable facilities be provided to relocated licensees, and notes that transition of Public Safety licensees out of the T-Band to such facilities is subject to reimbursement from auction proceeds to ''cover relocation costs.'' The Commission seeks comment on this approach and on the availability of a suitable spectrum destination(s) for Public Safety entities relocated from the T-Band. The Commission emphasizes that it is committed under any scenario to ensuring the continuity of such licensees' public safety mission-critical communications.

Public Safety Entities. Section 6103(a)(2) requires the auction of ''the spectrum in the 470–512 MHz band . . . currently used by public safety eligibles as identified in § 90.303 of title 47, Code of Federal Regulations.'' Section 90.303 states that frequency assignments in the 482–488 MHz band (broadcast television channel 16) are available ''for use by eligibles in the Public Safety Radio Pool'' in Los Angeles; New York City; Nassau, Suffolk, and Westchester counties in New York State; and Bergen County, New Jersey. Section 90.303 also provides that other frequencies are available for assignment in eleven specific urbanized areas, and that these frequencies are listed in § 90.311. Section 90.311, in turn, provides that 470–512 MHz Band frequencies are available to listed ''categories of users,'' including ''[p]ublic safety (as defined in § 90.20(a)) [the Public Safety Pool].'' The Commission thus interprets ''public safety eligibles'' to include the entities named in § 90.303(b) and (c) and the entities referenced by § 90.303 that operate on frequencies assigned to the public safety category of users by § 90.311. The Commission seeks comment on this statutory interpretation and any alternatives that are consistent with the T-Band Mandate.

Following passage of the T-Band Mandate, the Bureaus imposed a freeze on future licensing or expanded operations in the 470–512 MHz band, thus preventing significant changes to the composition of the T-Band. The Commission interprets the statute's reference to spectrum ''currently used

by public safety eligibles'' as limiting the reallocation and auction required by the T-Band Mandate to those frequencies in use by the public safety eligibles in the T-Band at the time the freeze was imposed, as opposed to frequencies in use by non-public safety licensees or that are unassigned. The Commission seeks comment on this interpretation and, with respect to the applicable licensing timeframe, whether it should interpret ''currently used'' as the time of the statute's enactment (*i.e.,* February 22, 2012), which would not take into account subsequent licensing changes in the T-Band.

The Commission reiterates that some public safety licensees operate in the T-Band pursuant to waiver on channels not listed or referenced in § 90.303 of our rules, and thus are arguably outside the scope of the T-Band Mandate. For example, the 476–482 MHz block (broadcast television channel 15) in Los Angeles currently is used by public safety incumbents pursuant to a waiver, and 476–482 MHz is specifically excluded from the list of available frequencies identified in § 90.303. In addition, other T-Band public safety entities have received waivers of § 90.305 of the Commission's rules or are operating via frequency pair assignments classified as Industrial/Business, pursuant to waivers of § 90.311(a)(2) of the rules. The Commission seeks comment on whether it should interpret the statute to require it to auction T-Band spectrum licensed to public safety entities under the aforementioned waivers, and to require these licensees to relocate out of the T-Band.

The Commission seeks comment on any issues that may arise if public safety waiver licensees or those operating through Industrial/Business assignments are allowed to remain in the T-Band. For example, what would be the effect on interoperability between public safety systems operating with and without waivers if only public safety licensees not subject to waiver were subject to relocation? Similarly, if a public safety waiver licensee has base station operations both inside and outside the 50-mile radius for base stations, would any operations outside the area authorized by the rules function as a splintered or partial system? Or should such a public safety waiver licensee be required to relocate all operations from the T-Band? Finally, if public safety waiver licensees are not relocated from the T-Band, what criteria would be appropriate to ensure interference is minimized between such licensees and auction licensees?

Comparable Facilities. Consistent with its approach to mandatory relocation in other services, the Commission proposes that public safety licensees relocated from the T-Band will be compensated for reasonable relocation costs and provided with comparable facilities. Provision of comparable facilities should ensure that public safety eligibles are not unduly burdened and that their operations are not inordinately disrupted by mandatory relocation from the T-Band. Importantly, the Commission seeks to ensure that, in providing comparable facilities, the relocation process does not result in degradation of existing service or cause an adverse effect on important public safety communications operations. The Commission proposes to define ''comparable facility'' as a replacement system that is at least equivalent to the public safety eligible's existing T-Band system with respect to the following four factors: (1) System, (2) capacity, (3) quality of service, and (4) operating costs. The Commission seeks comment on this proposal.

The Commission also proposes guidelines on how these factors would apply in providing a comparable facility and seek comment on each factor. The Commission proposes that a comparable system would be functionally determined from the end user's point of view (*i.e.,* base station facilities operating on an integrated basis to provide service to a common end user, and all associated mobile units). The Commission proposes that a system may include multiple-licensed facilities operated as a unified system if the end user can access all such facilities.

The Commission proposes that comparable channel capacity must have the same overall capacity as the original configuration, including equivalent signaling capacity, baud rate, and access time, and must achieve coextensive geographic coverage with that of the original system.

The Commission proposes that comparable quality of service would require the end user to enjoy the same level of interference protection. Quality of service necessarily requires reliability, or the degree to which information is transferred accurately within the system. For analog or digital voice transmissions, this would be measured by the percent of time that audio signal quality meets an established threshold.

With respect to operating costs, the Commission proposes that compensable costs would include all reasonable engineering, equipment, site and Commission fees, as well as any reasonable, additional costs that the covered incumbent may incur as a result of mandatory relocation. Should the Commission assume that the compensation regime would provide for recovery of all costs associated with relocation, including planning and administrative costs, or should it limit compensable costs to only the cost of retuning and/or replacing equipment? Should the Commission establish a rebuttable presumption or guideline regarding soft costs, including potentially establishing a cap on soft costs as a percentage of hard costs, to determine what is reasonably and unavoidably incurred, and thus properly compensable, consistent with other recent proceedings?

Relocation Cost Grants. The T-Band Mandate provides that ''[p]roceeds (including deposits and upfront payments from successful bidders) from the competitive bidding system described in subsection (a)(2) shall be available to the Assistant Secretary [of NTIA] to make grants in such sums as necessary to cover relocation costs for the relocation of public safety entities from the T-Band spectrum.'' The statute refers solely to NTIA's responsibility for the issuance of grants, appearing to leave responsibility with the Commission to determine reimbursable amounts with respect to costs of relocation, including the provision of comparable facilities. The Commission seeks comment on whether Congress intended for the Commission to rely on its expertise to determine the appropriate grant amounts based on both the provision of comparable facilities as well as on other individual licensee relocation costs. Alternatively, the Commission seeks comment on whether Congress intended NTIA to issue rules regarding eligible entities and eligible costs in accordance with the statute. Under this alternative reading, the Commission seeks comment on how the its expertise could be leveraged to inform the NTIA grant program.

The Commission seeks comment on additional relocation costs public safety licensees are likely to incur to relocate out of the T-Band, with the caveat that the destination spectrum bands are not yet determined. Should relocation costs for each licensee be determined based on a cost model, such as the model developed by the National Public Safety Telecommunications Council in its T-Band Report? The Commission seeks recommendations on formulas and calculation methods, and what parameters should be considered.

Relocation Spectrum. The T-Band Mandate does not identify spectrum bands to which public safety entities

could be relocated. Prior submissions in the extensive record in this proceeding have discussed the availability of the FirstNet public safety broadband network; the 450–470 MHz band; the 700 MHz band; the 800 MHz band; and the 900 MHz band, though many of these submissions and GAO have questioned whether sufficient alternative spectrum is available to accommodate relocation of any T-Band public safety licensees. The Commission therefore seeks detailed comment on the suitability of these or any other spectrum bands to serve as relocation spectrum, what characteristics must be present to consider a band a viable relocation option—for example, capacity, readily available equipment, and similar propagation characteristics—and the costs and benefits of relocating public safety licensees to a particular band(s). Are there relocation alternatives other than replacement spectrum that we should consider, such as third-party service or other media?

Relocation Deadline. The T-Band Mandate imposes a specific completion deadline, directing that ''[r]elocation shall be completed not later than 2 years after the date on which the system of competitive bidding . . . is completed.'' The Commission seeks comment on what constitutes the completion of relocation for purposes of section 6103(c). Commenters should discuss the steps a public safety entity must take to relocate its system, and the estimated timelines for these steps. For example, the Commission expects a transition would require a T-Band public safety licensee to develop, test, and commence operations in destination spectrum band(s) before discontinuing operations in the T-Band. Commenters should provide details of transition planning and specific anticipated timeframes for each phase. In the alternative, the Commission asks whether relocation would be completed once the Public Safety incumbent commences operations on its replacement frequencies, even if the incumbent has not completed all the tasks associated with the relocation.

2. Non-Public Safety Transition

The T-Band Mandate does not require relocation nor provide for reimbursement of non-public safety licensees operating in the T-Band. Therefore, under the Commission's proposal, the T-Band would remain encumbered with part 90 Industrial/Business licensees on interleaved frequencies and with part 22 licensees in the lowest 300 kHz of most six megahertz blocks. Allowing non-public safety incumbents to remain in the T-Band would result in continued co-channel use of spectrum in a limited geographic area, which likely will prevent broadcast or wireless use by an overlay licensee. In light of these considerations and the statutory mandate to use auction proceeds to fund the relocation of Public Safety incumbents, the Commission seeks comment on requiring a mandatory transition of all non-public safety incumbents (*i.e.,* part 90 Industrial/Business licensees and part 22 licensees) out of the T-Band, subject to payment of relocation costs, including provision of comparable facilities, by the overlay licensee.

Section 316(a)(1) of the Act provides that ''[a]ny station license . . . may be modified by the Commission . . . if in the judgment of the Commission such action will promote the public interest, convenience and necessity.'' The Commission seeks comment on whether making contiguous spectrum available for auction, enhancing the usefulness of the spectrum and promoting auction competition, and thus increasing the chances of a successful auction so that the directives of section 6103 may be executed, would support a determination that ordering license modifications of non-public safety incumbents (*e.g.,* entities that section 6103 does not take into consideration) would promote the public interest, convenience, and necessity, given all the relevant circumstances, including such factors as the effects on all the incumbent licensees and the costs and benefits to the public that are likely to result from the reconfiguration of this spectrum.

The Commission also seeks comment on potential other transition or realignment approaches that could meet the statutory mandate to fund public safety relocation costs from auction proceeds and to allow for efficient use of spectrum without requiring a full transition from the T-Band. For example, should the Commission instead realign interleaved Industrial/Business and part 22 licensees in order to create more contiguous spectrum for auction, either within single channel blocks or by relocating Industrial/Business and part 22 operations to a single channel in a city with multiple T-Band channels, resulting in at least one unencumbered six-megahertz channel? The Commission notes that, as 3 MHz separation between base and mobile transmit frequencies is required to prevent intra-system interference, any realignment within a channel would still leave two portions of a six-megahertz channel block encumbered. Should the Commission sunset the 2012 waiver of the narrowbanding requirement for T-Band licensees and set new narrowbanding deadlines for Industrial/Business licensees in the T-Band? Commenters advocating for realignment or other approaches should also address transition mechanisms, technical issues, such as ease of retuning existing radios, timing and cost considerations, and whether additional protections or rules might be necessary to protect incumbents, whether part 90 Industrial/Business, part 22, or broadcast, from harmful interference.

The T-Band Mandate does not confer authority to use T-Band auction revenues to fund non-Public Safety relocation or realignment, whether out of the T-Band, within a T-Band channel, or to different channels within the band. However, the Commission has authority to condition licenses in the public interest, such as by requiring overlay licensees to pay for the costs associated with license modifications and has used this authority in prior proceedings. To the extent that the Commission may require T-Band part 90 Industrial/Business and part 22 licensees to relocate from their current frequency assignments, it seeks comment on whether to require an overlay licensee to pay for relocation costs of such licensees to comparable facilities. As with mandatory relocation of public safety licensees above, ''comparable facilities'' would require that a replacement system be provided to an incumbent during mandatory relocation that is at least equivalent to the incumbent's existing T-Band system with respect to: (1) System, (2) capacity, (3) quality of service, and (4) operating costs.

The Commission also seeks comment on spectrum bands to which part 90 Industrial/Business and part 22 entities could be relocated. As with public safety entity relocation, the Commission seeks comment on whether there are spectrum bands that can accommodate relocation of these incumbents. Are there additional bands that would be more suitable for part 90 Industrial/Business or part 22 licensees, but potentially less appropriate for public safety licensee relocation? The Commission seeks comment on the characteristics required to consider a band a viable relocation option—for example, capacity, readily available equipment, and similar propagation characteristics—and the costs and benefits of relocating part 90 Industrial/Business and part 22 licensees to a particular band(s). Are there relocation alternatives other than replacement spectrum that the Commission should

consider, such as third-party service or other media?

E. Licensing and Operating Rules; Regulatory Issues

Given the Commission's proposal to auction T-Band licenses on a block-by-block basis for fixed and mobile use, the Commission proposes to designate the new T-Band spectrum as a Miscellaneous Wireless Communications Service governed by part 27 of the Commission's rules. The Commission therefore proposes that all future licensees in the T-Band would be required to comply with licensing and operating rules applicable to all part 27 services, including assignment of licenses by competitive bidding, flexible use, regulatory status, foreign ownership reporting, compliance with construction notification requirements, renewal criteria, permanent discontinuance of operations, partitioning and disaggregation, and spectrum leasing. The Commission seeks comment on its approach and asks commenters to identify any aspects of its general part 27 service rules that should be modified to accommodate the particular characteristics of the T-Band.

The Commission has also sought comment in this *NPRM* regarding potential broadcast use of the T-Band, or if there are other uses of T-Band outside of flexible wireless use. How should the Commission modify its licensing and operating rules if there are broadcast or other uses in the band?

In addition, the Commission seeks comment on service-specific rules for the T-Band, including eligibility, mobile spectrum holdings policies, license term, performance requirements, renewal term construction obligations, and other licensing and operating rules. In addressing these issues, commenters should discuss the costs and benefits associated with these proposals and any proposed alternatives. In the alternative, the Commission asks commenters to address whether new T-Band licensees should be regulated under part 90 of our rules so that new T-Band licensees and incumbent PLMR licensees would be subject to a single set of rules. Commenters favoring this approach should identify the part 90 rules that would need to be amended and suggest specific rule language.

1. Eligibility

Consistent with established Commission practice, the Commission proposes to adopt an open eligibility standard for licenses in the T-Band. The Commission seeks comment on this approach. Specifically, the Commission seeks comment on whether adopting an open eligibility standard for the licensing of the T-Band would encourage the development of new technologies, products, and services, while helping to ensure efficient use of this spectrum. The Commission notes that an open eligibility approach would not affect citizenship, character, or other generally applicable qualifications that may apply under our rules. Commenters should discuss the costs and benefits of the open eligibility proposal on competition, innovation, and investment.

Finally, a person that, for reasons of national security, has been barred by any agency of the Federal Government from bidding on a contract, participating in an auction, or receiving a grant ''is ineligible to hold a license that is required by [the Spectrum Act] to be assigned by a system of competitive bidding under section 309(j) of the Communications Act.'' This eligibility restriction would apply to the auction of spectrum ''currently used by public safety eligibles as identified in § 90.303'' of our rules. The Commission seeks comment on how this eligibility restriction would apply to the auction of spectrum blocks used by a mixture of Public Safety, Industrial/Business, and part 22 incumbents.

2. Mobile Spectrum Holding Policies

Spectrum is an essential input for the provision of mobile wireless services, and the Commission has developed policies to ensure that spectrum is assigned in a manner that promotes competition, innovation, and efficient use. The Commission seeks comment generally on whether and how to address any mobile spectrum holdings issues involving T-Band spectrum to meet our statutory requirements and ensure competitive access to the band. Similar to the Commission's approach in the *2017 Spectrum Frontiers Order and FNPRM* and the *1675–1680 MHz NPRM,* the Commission proposes not to adopt a pre-auction, bright line limit on the ability of any entity to acquire spectrum in the T-Band through competitive bidding at auction. Since such pre-auction limits may restrict unnecessarily the ability of entities to participate in and acquire spectrum in an auction, the Commission is not inclined to adopt such limits absent a clear indication that they are necessary to address a specific competitive concern, and seeks comment on any specific concerns of this type.

The Commission does not propose that this band be included in the Commission's spectrum screen, which helps to identify those markets that may warrant further competitive analysis, when evaluating proposed secondary market transactions. Instead, the Commission proposes to review spectrum holdings on a case-by-case basis when applications for initial licenses are filed post-auction to ensure that the public interest benefits of having a threshold on spectrum applicable to secondary market transactions are not rendered ineffective. Commenters should discuss and quantify any costs and benefits associated with any proposals on the applicability of mobile spectrum holdings policies to T-Band spectrum.

The Commission notes that its rules contain restrictions on the common ownership of commercial full power television stations both in a particular local market and nationwide, as well as restrictions on the cross-ownership of such stations with other media outlets. To the extent that a successful bidder seeks to operate a full power television station on the reallocated spectrum awarded as a result of this auction, the Commission seeks comment on whether the permittee of such new station would need to comply with its existing media ownership rules.

3. License Term, Performance Requirements, Renewal Term Construction Obligations

License Term. For licensees other than those providing broadcast services, the Commission proposes a 15-year initial term for new flexible-use T-Band licenses, and a ten-year term for subsequent renewals, given that relocation, and clearance, and initial performance requirements will have been satisfied upon renewal of a given T-Band license. The Commission believes that 15 years affords licensees sufficient time to make long-term investments in deployment and seek comment on the costs and benefits of this proposal. The Commission invites commenters to submit alternate proposals for the appropriate license term, which should similarly include a discussion on the costs and benefits. Importantly, the Commission notes that, in the event this spectrum is used for broadcast services, the license term is statutorily limited to eight years and that shorter term will apply.

Performance Requirements. The Commission seeks comment on adopting specific quantifiable benchmarks as an important component of our performance requirements for licensees not providing broadcast services. The Commission seeks comment on requiring a new T-Band licensee, planning to provide mobile or point-to-multipoint service in accordance with our part 27 rules, to

provide reliable signal coverage and offer service to at least 45% of the population in each of its license areas within six years of the license issue date (first performance benchmark), and to at least 80% of the population in each of its license areas within 12 years from the license issue date (second performance benchmark). For a licensee deploying point-to-point service, the Commission seeks comment on requiring it to demonstrate within six years of the license issue date (first performance benchmark) that it has four links operating and providing service, either to customers or for internal use, if the population within the license area is equal to or less than 268,000. If the population within the license area is greater than 268,000, the Commission seeks comment on requiring a licensee deploying point-to-point service to demonstrate that it has at least one link in operation and that it is providing service per every 67,000 persons within a license area. The Commission seeks comment on requiring a licensee deploying point-to-point service to demonstrate within 12 years of the license issue date (final performance benchmark) that it has eight links operating and providing service, either to customers or for internal use, if the population within the license area is equal to or less than 268,000. If the population within the license area is greater than 268,000, the Commission seeks comment on requiring a licensee deploying point-to-point service to demonstrate that it is providing service and that it has at least two links in operation per every 67,000 persons within a license area. The Commission seeks comment on whether in order to be eligible to be counted under the point-to-point buildout standard, a point-to-point link must operate with a transmit power greater than +43 dBm. The Commission notes that the proposed period for complying with these performance requirements would begin on the date that the license is issued, irrespective of the extent to which the incumbent licensees have been relocated out of the T-Band.

The Commission believes that 12 years will provide sufficient time for any T-Band licensee to meet the proposed coverage requirements. The Commission proposes that a T-Band licensee, after satisfying the 12-year second performance benchmark, be required to continue providing reliable signal coverage, or point-to-point links, as applicable, and offering service at or above that level for the remaining three years in the proposed 15-year license term in order to obtain license renewal. Establishing such benchmarks before the end of the license term will allow us time to verify, to the extent needed, that the performance benchmarks have been met before licensees need to renew their licenses. The Commission seeks comment on its proposal.

The Commission recognizes that new T-Band licensees will have the flexibility to provide a range of services, including broadcast services. In the event that T-Band spectrum is used for broadcast services, the Commission seeks comment on requiring a broadcast station to be constructed and operational through the transmission of broadcast signals within the initial eight-year license term. Are there other parameters that should be included to ensure the efficient and effective use of T-Band spectrum for broadcast services (*e.g.,* a specific level of market penetration)? The Commission seeks comment on this and any other requirements to achieve our goal of ensuring spectrum use. The Commission also seeks comment on whether services potentially less suited to a population coverage metric (*e.g.,* Internet of Things-type fixed and mobile services) would benefit from an alternative performance benchmark, for example, geographic coverage benchmarks. Commenters should discuss the appropriate metric to accommodate such service offerings or other innovative services in the T-Band, as well as the costs and benefits of an alternative approach.

The Commission also seeks comment on whether the proposals discussed above achieve the appropriate balance between license-term length and a significant final buildout requirement. The Commission seeks comment on the proposed buildout requirements and any potential alternatives. Above, the Commission discusses various mechanisms for expanding flexible use in all or part of the T-Band. The Commission asks proponents of the various approaches described above whether there are issues specific to this section and their preferred approach. For example, given the potential use of the T-Band by private wireless users such as electric utilities or other Industrial/Business Pool eligibles, should it adopt specific performance requirements tailored to account for potential use of the spectrum for private internal business purposes? The Commission also seeks comment on whether small entities face any special or unique issues with respect to buildout requirements such that they would require certain accommodations or additional time to comply. Finally, commenters should discuss and quantify how any supported buildout requirements will affect investment and innovation, as well as discuss and quantify other costs and benefits associated with the proposals.

Penalty for Failure to Meet Performance Requirements. Along with performance benchmarks, the Commission seeks to adopt meaningful and enforceable penalties for failing to meet the benchmarks. The Commission seeks comment on which penalties will most effectively ensure timely build-out. Specifically, the Commission proposes that, in the event a T-Band licensee fails to meet the first performance benchmark, the licensee's second benchmark and license term would be reduced by two years, thereby requiring it to meet the second performance benchmark two years sooner (at 10 years into the license term) and reducing its initial license term to 13 years. The Commission further proposes that, in the event a T-Band licensee fails to meet the second performance benchmark for a particular license area, its license for each license area in which it fails to meet the performance benchmark shall terminate automatically without Commission action. How should the Commission modify this proposal in the event the spectrum is used for broadcast services and is subject to an 8-year license term?

The Commission proposes that, in the event a T-Band licensee's authority to operate terminates, the licensee's spectrum rights would become available for reassignment pursuant to the competitive bidding provisions of section 309(j). Further, consistent with the Commission's rules for other part 27 licenses, the Commission proposes that any T-Band licensee that forfeits its license for failure to meet its performance requirements would be precluded from regaining that license. Finally, the Commission seeks comment on other performance requirements and enforcement mechanisms that would effectively ensure timely buildout.

Compliance Procedures. In addition to compliance procedures applicable to all part 27 licensees, including the filing of electronic coverage maps and supporting documentation, the Commission proposes a rule requiring that such electronic coverage maps accurately depict both the boundaries of each licensed area and the coverage boundaries of the actual areas to which the licensee provides service or in the case of a fixed deployment, the locations of the fixed transmitters associated with each link. If a licensee does not provide reliable signal coverage to an entire license area, we propose that it must provide a map that

accurately depicts the boundaries of the area or areas within each license area that are not being served. The Commission further proposes that each licensee must file supporting documentation certifying the type of service it is providing for each licensed area within its service territory and the type of technology used to provide such service. Supporting documentation must include the assumptions used to create the coverage maps, including the propagation model and the signal strength necessary to provide reliable service with the licensee's technology. The Commission believes that such procedures will confirm that the spectrum is being used consistently with the performance requirements. The Commission seeks comment on its proposals. In the event this T-Band spectrum is used for broadcast services, the Commission seeks comment on whether and how it should modify the proposed compliance procedures.

Renewal Term Construction Obligation. In addition to, and independent of, the general renewal requirements contained in § 1.949 of our rules, which apply to all Wireless Radio Services (WRS) licensees, the Commission also seeks comment on application of specific renewal term construction obligations to new T-Band licensees. The *WRS Renewal Reform FNPRM* sought comment on various renewal term construction obligations, such as incremental increases in the construction metric in each subsequent renewal term—*e.g.,* by 5 or 10%—up to a certain threshold. In the event that licensees fail to satisfy any additional renewal term construction obligations, the Commission sought comment on a range of penalties and on methods for reassigning the unused spectrum, including automatic termination, ''keep-what-you-serve,'' and ''use or share'' approaches.

The *WRS Renewal Reform FNPRM* proposed to apply rules adopted in that proceeding to all flexible geographic licenses. Given the Commission's proposal to license this band on a geographic basis for flexible use, any additional renewal term construction obligations proposed in the *WRS Renewal Reform FNPRM* also would apply to licenses in the T-Band. The Commission seeks comment on whether there are unique characteristics of the T-Band that might require a different approach from the proposals contained in the *WRS Renewal Reform FNPRM.* For example, the Commission proposes geographic areas consisting solely of urbanized areas and the discussion of renewal term construction obligations was tailored to ensuring rural build-out. Further, while many existing wireless radio services have 10-year license terms, here the Commission proposes and seeks comment on a 15-year initial license term with 10-year renewal terms for T-Band licensees providing non-broadcast services (eight years for licensees providing broadcast services). Do any of the proposals for this band necessitate a more tailored approach than the rules of general applicability proposed in the *WRS Renewal Reform FNPRM?* For instance, should the Commission require buildout to 85% of the population by the end of second license term, given the increased length of the initial license term? Similarly, in the event the Commission permits licensees to demonstrate compliance with initial term performance requirements by providing IoT services, should an applicant deploying IoT applications in the T-Band be required to exceed its original construction metric by an additional 5%? If a T-Band license is issued for broadcast use, how would this effect renewal term obligations? Commenters advocating rules specific to the T-Band should address the costs and benefits of their proposed rules. Further, they should discuss how a given proposal would encourage investment and deployment in areas that might not otherwise benefit from significant wireless coverage.

4. Competitive Bidding Procedures

Consistent with the competitive bidding procedures the Commission has used in previous auctions, the Commission proposes to conduct any auction for licenses for spectrum in the T-Band in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's rules. The Commission also seeks comment on whether any of our Part 1 rules or other competitive bidding policies would be inappropriate or should be modified for an auction of T-Band licenses. The Commission seeks comment on the costs and benefits of these proposals.

The Commission also seeks comment on whether to make bidding credits for designated entities available for this band. If the Commission decides to offer small business bidding credits, it seeks comment on how to define a small business. In recent years, for other flexible use licenses, the Commission has adopted bidding credits for the two larger designated entity business sizes provided in the Commission's Part 1 standardized schedule of bidding credits. Accordingly, the Commission seeks comment on defining a small business as an entity with average gross revenues for the preceding five years not exceeding $55 million, and a very small business as an entity with average gross revenues for the preceding five years not exceeding $20 million. A qualifying ''small business'' would be eligible for a bidding credit of 15% and a qualifying ''very small business'' would be eligible for a bidding credit of 25%. The Commission also seeks comment on whether the unique characteristics of these frequencies and its proposed licensing model suggest that it should adopt different small business size standards and associated bidding credits than the Commission has in the past.

Because new licenses in this band will only be available in eleven urbanized areas within an operational radius of the geographic center of each area, the Commission proposes not to offer rural service bidding credits and seeks comment on this proposal.

F. Technical Rules

The Commission's goal is to establish technical rules that maximize flexible use of the new T-Band spectrum licenses while appropriately protecting incumbent operations. Many of the technical rules proposed below are based on the rules adopted for the 600 MHz and lower 700 MHz bands, which are similar to T-Band in terms of flexible use, propagation characteristics, and ability to accommodate wideband technologies. The Commission believes that the proposed technical rules regarding transmitter power, antenna height, and out-of-band emissions (OOBE) limits, together with existing interference protection rules, will maintain a status quo interference environment, where an overlay licensee is not permitted to cause harmful interference to any operations that remain in or are adjacent to the 470–512 MHz band (*e.g.,* on broadcast television channel 21 or operations below 470 MHz). The Commission seeks comment on its proposed technical rules and whether they best achieve its objectives of permitting more flexible use of this spectrum, while at the same time protecting co-channel and adjacent spectrum users from harmful interference.

1. Out-of-Band Emissions Limit

Under the proposal, the Commission would license T-Band spectrum in certain geographic areas in six megahertz blocks on a block-by-block basis. Therefore, the Commission must consider how to address potential harmful interference between adjacent blocks within the T-Band, and between T-Band spectrum and adjacent bands.

The Commission previously has concluded that attenuating transmitter

out-of-band emissions (OOBE) by 43 + 10 log (P) dB, where P is the transmit power in watts, is appropriate to minimize harmful electromagnetic interference between operators. The Commission adopted this approach in other bands suited for flexible services, including the 600 MHz and lower 700 MHz bands used for wireless broadband services. To fully define an emissions limit, the Commission's rules generally specify details on how to measure the power of the emissions, such as the measurement bandwidth. For the 600 MHz and lower 700 MHz bands, the measurement bandwidth used to determine compliance with this limit for both mobile stations and base stations is 100 kHz, with some modification within the first 100 kHz. Similarly, the Commission believes that it is reasonable to apply this procedure to both mobile and base transmissions in the T-Band.

Accordingly, to address potential harmful electromagnetic interference immediately outside each T-Band block, the Commission proposes to apply § 27.53(g) of the Commission's rules, which includes OOBE attenuation of 43 + 10 log (P) dB and the associated measurement procedure, to the T-Band. The Commission seeks comment on this proposal, and on whether it would need to modify this proposal if licenses are issued in the band for broadcast operations. The Commission also seeks comment on the effect of the proposed OOBE attenuation on the existing interference environment. For instance, how will the OOBE attenuation affect the current interference environment on any remaining part 90 public safety, Industrial/Business, or part 22 point to multi-point operations? How will the OOBE attenuation affect the separation distance to protect adjacent TV channels? And how will the OOBE attenuation affect the current interference environment on PLMR operations at the upper edge of the 450–470 MHz band?

2. Transmitter Power Limits

The Commission proposes to apply transmitter power limits for T-Band operations that generally are consistent with the 600 MHz and lower 700 MHz bands, while taking into consideration that the proposed band plan for the T-Band does not have a predetermined uplink and downlink. Accordingly, the Commission proposes an effective radiated power (ERP) not to exceed 1,000 watts for fixed and base stations transmitting a signal with an emission bandwidth of 1 MHz or less, with maximum permissible power decreasing as the antenna height above average terrain (HAAT) rises above 305 meters. For base stations transmitting a signal with an emission bandwidth greater than 1 MHz, the Commission proposes an ERP not to exceed 1,000 watts/MHz with the maximum permissible power decreasing as the antenna height above average terrain (HAAT) rises above 305 meters. Alternatively, the Commission seeks comment on whether we should limit the ERP for fixed and base stations to 1,000 watts/MHz for any emission bandwidth, with maximum permissible power decreasing as the antenna height above average terrain (HAAT) rises above 305 meters. The Commission seeks comment on whether this alternate approach would provide sufficient power for narrowband operations in the T-Band. The Commission also proposes to afford additional flexibility for licensees seeking to operate at transmit powers higher than it has proposed, provided they comply with a power flux density limit and the notice requirement specified in our rules to mitigate the risk of harmful interference. This produced power flux density must not exceed 3,000 microwatts per square meter on the ground over the area extending to 1 km from the base of the antenna mounting structure. The Commission further notes that the maximum ERP in the current T-Band rules is limited by the distance to the closest co-channel TV station. The Commission seeks comment on this approach, including costs and benefits, noting that our proposal varies from current T-Band rules, but is consistent with other flexible services, specifically 600 MHz and lower 700 MHz. The Commission also seeks comment on whether modifications to this proposal are necessary if licenses are issued in the band for broadcast operations.

The Commission notes that it did not propose to include a rural component to the power limits for the T-Band, as it has included for other services, because under our proposal T-Band base stations would not be permitted to be located more than 80 kilometers (50 miles) from the geographic center of the urbanized areas listed in § 27.6 of the Commission's rule.

3. Co-Channel Interference Between T-Band Licensees and TV Systems

Since the Commission proposes to license the T-Band on a geographic area basis with an 80-mile operational radius, the Commission seeks to ensure that T-Band licensees do not cause interference to TV co-channel systems operating along common geographic borders. The Commission's 600 MHz and lower 700 MHz rules address the possibility of harmful co-channel interference between geographically adjacent licenses. The rule provides that the predicted or measured median field strength shall not exceed 40 dBμV/m at any location on the edge of the geographical border of the licensee's service area, unless the adjacent affected service area licensee agrees to a different field strength. Given the similarities between the T-Band, lower 700 MHz, and 600 MHz bands, the Commission proposes to apply the signal strength limit currently set forth in § 27.55(a)(2) of our rules to the T-Band. The Commission also proposes to allow licensees in adjacent areas to agree to alternate field strength limits. The Commission seeks comment on this approach, including any costs and benefits, and also seeks comment on whether any modifications to this proposal are necessary if licenses are issued in the T-Band for broadcast operations.

4. Antenna Height Limits

The Commission proposes to apply the flexible 600 MHz and lower 700 MHz antenna height rules, as set forth in § 27.50(c) of our rules, to the T-Band. Although the existing antenna rules for those bands do not set specific antenna height restrictions, ERP reductions are required for base or fixed stations with a height above average terrain (HAAT) exceeding 305 meters and will be applied to T-Band licensees. In addition, other rules effectively limit antenna heights. For example, all part 27 services are subject to rule § 27.56, which prevents antenna heights that would be a hazard to air navigation. Also, the Commission's proposed co-channel interference rules effectively limit antenna heights because of the limitation on field strength at the boundary of a licensee's service area. The Commission believes that the general antenna height restrictions are sufficient to afford necessary protections, and therefore does not propose any band-specific limitations on new T-Band licensees. The Commission seeks comment on this approach, including the costs and benefits, and also seeks comment on whether this approach requires modification if licenses are issued in the band for broadcast operations.

5. Canadian and Mexican Coordination

Under the Commission's current proposal to license the T-Band on a geographic area basis with an 80-mile operational radius, the Commission does not believe that new T-Band licenses will require coordination with either Canada or Mexico as the areas

under consideration are sufficiently separated from the border areas so as to pose no international interference issues. However, if larger geographic license areas are adopted in a future proceeding, international coordination may be required. The Commission notes that § 27.57(c) of its rules provides that all part 27 Wireless Communications Services operations are subject to international agreements between the U.S. and Mexico and between the U.S. and Canada.

6. Protection of Broadcast Television Service in the T-Band From Wireless Operations

The Commission proposes to apply to the T-Band the protections of current broadcast TV rules that are consistent with those applied to 600 MHz band licensees. Specifically, the Commission proposes that licensees authorized to operate wireless services in this band be prohibited from causing harmful interference to public reception of the signals of broadcast television stations transmitting co-channel or on an adjacent channel. The Commission proposes that such wireless operations comply with the desired to undesired (D/U) ratios in Table 5 in OET Bulletin No. 74, Methodology for Predicting Inter-Service Interference to Broadcast Television from Mobile Wireless. If a licensee in this band causes harmful interference within the noise-limited contour or protected contour of a broadcast television station that is operating co-channel or on an adjacent channel, the Commission proposes to require the licensee to eliminate the harmful interference. The Commission seeks comment on this approach, whether additional protections might be necessary, and the cost and benefits of any such modifications.

In the event that a new initial T-Band licensee intends to use the license for provision of broadcast services, the Commission seeks comment on whether such licensees should be subject to part 73 rules regarding television-to-television protection criteria. If so, the Commission seeks comment on what criteria should apply in situations where adjacent licensees hold licenses governed by part 73 and part 27 rules, respectively.

7. Other Technical Issues

Part 27 contains several additional technical rules applicable to all part 27 services, including §§ 27.51 (Equipment authorization), 27.52 (RF safety), 27.54 (Frequency stability), and 27.56 (Antenna structures; air navigation safety). The Commission proposes to apply all of these part 27 technical rules to new T-Band licensees, including those acquiring licenses through assignment, partitioning or disaggregation. The Commission seeks comment on this approach, including the costs and benefits, and it also seeks comment on whether modifications to this proposal are necessary if licenses are issued in the band for broadcast operations.

Ordering Clauses

It is ordered, pursuant to the authority found in sections 1, 2, 4(i), 303, 309 and 316 of the Communications Act of 1934, 47 U.S.C. 151, 152, 154(i), 303, 309, and 316, by section 6103 of the Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112–96, 126 Stat. 156 (2012), section 6103, and § 1.411 of the Commission's rules, 47 CFR 1.411, that this Notice of Proposed Rulemaking *is hereby adopted.*

It is further ordered that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Lists of Subjects in 47 CFR Parts 1, 2, and 27

Administrative practice and procedure, Common carriers, Communications common carriers, Radio, Table of frequency allocations, Telecommunications.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 1, 2, and 27 as follows:

PART 1—PRACTICE AND PROCEDURE

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

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

■ 2. Section 1.9005 is amended by revising paragraph (j) to read as follows:

§ 1.9005 Included services.

* * * * *

(j) The Wireless Communications Service in the 470–512 MHz band and the 698–746 MHz band (part 27 of this chapter);

* * * * *

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

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

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

■ 4. Section 2.106, the Table of Frequency Allocations, is amended by revising page 29 to read as follows:

§ 2.106 Table of Frequency Allocations.

* * * * *

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International Table			United States Table		FCC Rule Part(s)
Region 1 Table	Region 2 Table	Region 3 Table	Federal Table	Non-Federal Table	
456-459 FIXED MOBILE 5.286AA 5.271 5.287 5.288			456-459 US64 US287 US288	456-460 FIXED LAND MOBILE	Public Mobile (22) Maritime (80) Private Land Mobile (90) MedRadio (95I)
459-460 FIXED MOBILE 5.286AA 5.209 5.271 5.286A 5.286B 5.286C 5.286E	459-460 FIXED MOBILE 5.286AA MOBILE-SATELLITE (Earth-to-space) 5.286A 5.286B 5.286C 5.209	459-460 FIXED MOBILE 5.286AA 5.209 5.271 5.286A 5.286B 5.286C 5.286E	459-460	US64 US287 US288 NG32 NG112 NG124 NG148	
460-470 FIXED MOBILE 5.286AA Meteorological-satellite (space-to-Earth) 5.287 5.288 5.289 5.290			460-470 Meteorological-satellite (space-to-Earth) US73 US209 US287 US288 US289	460-462.5375 FIXED LAND MOBILE US209 US289 NG124	Private Land Mobile (90)
				462.5375-462.7375 LAND MOBILE US289	Personal Radio (95)
				462.7375-467.5375 FIXED LAND MOBILE US73 US209 US287 US288 US289 NG124	Maritime (80) Private Land Mobile (90)
				467.5375-467.7375 LAND MOBILE US287 US288 US289	Maritime (80) Personal Radio (95)
				467.7375-470 FIXED LAND MOBILE US73 US288 US289 NG124	Maritime (80) Private Land Mobile (90)
470-694 BROADCASTING	470-512 BROADCASTING Fixed Mobile 5.292 5.293 5.295	470-585 FIXED MOBILE 5.296A BROADCASTING 5.291 5.298	470-608	470-512 FIXED MOBILE BROADCASTING NG5 NG14 NG66 NG115 NG149	Public Mobile (22) Wireless Communications (27) Broadcast Radio (TV)(73) LPTV, TV Translator/Booster (74G) Low Power Auxiliary (74H) Private Land Mobile (90)
	512-608 BROADCASTING 5.295 5.297	585-610 FIXED MOBILE 5.296A BROADCASTING RADIONAVIGATION 5.149 5.305 5.306 5.307		512-608 BROADCASTING NG5 NG14 NG115 NG149	Broadcast Radio (TV)(73) LPTV, TV Translator/Booster (74G) Low Power Auxiliary (74H)
	608-614 RADIO ASTRONOMY Mobile-satellite except aeronautical mobile-satellite (Earth-to-space)	610-890 FIXED MOBILE 5.296A 5.313A 5.317A BROADCASTING	608-614 LAND MOBILE (medical telemetry and medical telecommand) RADIO ASTRONOMY US74 US246		Personal Radio (95)

* * * * *

PART 27—MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES

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

Authority: 47 U.S.C. 154, 301, 302a, 303, 307, 309, 332, 336, 337, 1403, 1404, 1451, and 1452, unless otherwise noted.

■ 6. Section 27.1 is amended by adding paragraph (b)(16) to read as follows:

§ 27.1 Basis and purpose.

* * * * *

(b) * * *

(16) 470–512 MHz.

* * * * *

■ 7. Section 27.5 is amended by adding paragraph (n) to read as follows:

§ 27.5 Frequencies.

* * * * *

(n) *470–512 MHz band.* Seven unpaired channel blocks of 6 megahertz each are available for assignment. The following frequencies are available for licensing pursuant to this part in the 470–512 MHz band:

Block A: 470–476 MHz;
Block B: 476–482 MHz;
Block C: 482–488 MHz;
Block D: 488–494 MHz;
Block E: 494–500 MHz;
Block F: 500–506 MHz; and
Block G: 506–512 MHz.

■ 8. Section 27.6 is amended by adding paragraph (n) to read as follows:

§ 27.6 Service areas.

* * * * *

(n) 470–512 MHz band. The following table lists specific urbanized areas with T-Band frequency bands and blocks that are available for assignment. The available frequencies are listed in § 27.5. The service area for the 470–512 MHz band extends 128 kilometers (80 miles) from the geographic centers of the urban areas listed below:

TABLE 3 TO PARAGRAPH (n)

Urbanized area	Geographic center		Bands (MHz)	TV channels	Blocks
	North latitude	West longitude			
Boston, MA	42°21′24.4″	71°03′23.2″	470–476, 482–488	14, 16	A, C.
Chicago, IL	41°52′28.1″	87°38′22.2″	470–476, 476–482	14, 15	A, B.
Dallas/Fort Worth, TX	32°47′09.5″	96°47′38.0″	482–488	16	C.
Houston, TX	29°45′26.8″	95°21′37.8″	488–494	17	D.
Los Angeles, CA	34°03′15.0″	118°14′31.3″	470–476, 482–488, 506–512	14, 16, 20	A, C, G.
Miami, FL	25°46′38.4″	80°11′31.2″	470–476	14	A.
New York, NY/NE NJ	40°45′06.4″	73°59′37.5″	470–476, 476–482, 482–488	14, 15, 16	A, B, C.
Philadelphia, PA	39°56′58.4″	75°09′19.6″	500–506, 506–512	19, 20	F, G.
Pittsburgh, PA	40°26′19.2″	79°59′59.2″	470–476, 494–500	14, 18	A, E.
San Francisco/Oakland, CA	37°46′38.7″	122°24′43.9″	482–488, 488–494	16, 17	C, D.
Washington, DC/MD/VA	38°53′51.4″	77°00′31.9″	488–494, 494–500	17, 18	D, E.

Note 3 to paragraph (n): Coordinates are referenced to the North American Datum 1983 (NAD83).

■ 9. Section 27.13 is amended by adding paragraph (n) to read as follows:

§ 27.13 License period.

* * * * *

(n) *470–512 MHz band.* Authorization for the 470–512 MHz band will have a term not to exceed fifteen years from the date of issuance and ten years from the date of any subsequent license renewal, except that initial authorizations for a part 27 licensee that provides broadcast services, whether exclusively or in combination with other services, will not exceed eight years.

■ 10. Section 27.14 is amended by revising the first sentence of paragraphs (a) and (k), and adding paragraph (w) to read as follows:

§ 27.14 Construction requirements.

(a) AWS and WCS licensees, with the exception of WCS licensees holding authorizations for the 470–512 MHz band, 600 MHz band, Block A in the 698–704 MHz and 728–734 MHz bands, Block B in the 704–710 MHz and 734–740 MHz bands, Block E in the 722–728 MHz band, Block C, C1 or C2 in the 746–757 MHz and 776–787 MHz bands, Block A in the 2305–2310 MHz and 2350–2355 MHz bands, Block B in the 2310–2315 MHz and 2355–2360 MHz bands, Block C in the 2315–2320 MHz band, Block D in the 2345–2350 MHz band, and in the 3700–3980 MHz band, and with the exception of licensees holding AWS authorizations in the 1915–1920 MHz and 1995–2000 MHz bands, the 2000–2020 MHz and 2180–2200 MHz bands, or 1695–1710 MHz, 1755–1780 MHz and 2155–2180 MHz bands, must, as a performance requirement, make a showing of ''substantial service'' in their license area within the prescribed license term set forth in § 27.13. * * *

* * * * *

(k) Licensees holding WCS or AWS authorizations in the spectrum blocks enumerated in paragraphs (g), (h), (i), (q), (r), (s), (t), (v) and (w) of this section, including any licensee that obtained its license pursuant to the procedures set forth in paragraph (j) of this section, shall demonstrate compliance with performance requirements by filing a construction notification with the Commission, within 15 days of the expiration of the applicable benchmark, in accordance with the provisions set forth in § 1.946(d) of this chapter. * * *

* * * * *

(w) The following provisions apply to any licensee holding an authorization in the 470–512 MHz band:

(1) Licensees relying on mobile or point-to-multipoint service shall provide reliable signal coverage and offer service within eight (8) years from the date of the initial license to at least 45 percent of the population in each of its license areas (''First Buildout Requirement''). Licensee shall provide reliable signal coverage and offer service within 12 years from the date of the initial license to at least 80 percent of the population in each of its license areas (''Second Buildout Requirement''). Licensees relying on point-to-point service shall demonstrate within eight years of the license issue date that they have four links operating and providing service to customers or for internal use if the population within the license area is equal to or less than 268,000 and, if the population is greater than 268,000, that they have at least one link in operation and providing service to customers, or for internal use, per every 67,000 persons within a license area (''First Buildout Requirement''). Licensees relying on point-to-point

service shall demonstrate within 12 years of the license issue date that they have eight links operating and providing service to customers or for internal use if the population within the license area is equal to or less than 268,000 and, if the population within the license area is greater than 268,000, shall demonstrate they are providing service and have at least two links in operation per every 67,000 persons within a license area (''Second Buildout Requirement'').

(2) If a licensee fails to establish that it meets the First Buildout Requirement for a particular license area, the licensee's Second Buildout Requirement deadline and license term will be reduced by two years. If a licensee fails to establish that it meets the Second Buildout Requirement for a particular license area, its authorization for each license area in which it fails to meet the Second Buildout Requirement shall terminate automatically without Commission action, and the licensee will be ineligible to regain it if the Commission makes the license available at a later date.

(3) To demonstrate compliance with these performance requirements, licensees shall use the most recently available decennial U.S. Census Data at the time of measurement and shall base their measurements of population or geographic area served on areas no larger than the Census Tract level. The population or area within a specific Census Tract (or other acceptable identifier) will be deemed served by the licensee only if it provides reliable signal coverage to and offers service within the specific Census Tract (or other acceptable identifier). To the extent the Census Tract (or other acceptable identifier) extends beyond the boundaries of a license area, a licensee with authorizations for such areas may include only the population or geographic area within the Census Tract (or other acceptable identifier) towards meeting the performance requirement of a single, individual license. If a licensee does not provide reliable signal coverage to an entire license area, the license must provide a map that accurately depicts the boundaries of the area or areas within each license area not being served. Each licensee also must file supporting documentation certifying the type of service it is providing for each licensed area within its service territory and the type of technology used to provide such service. Supporting documentation must include the assumptions used to create the coverage maps, including the propagation model and the signal strength necessary to provide reliable service with the licensee's technology.

(4) License Renewal. After satisfying the 12-year, final performance benchmark, a licensee must continue to provide coverage and offer service at or above that level for the remaining three years of the 15-year license term in order to warrant license renewal.

■ 11. Section 27.50 is amended by revising paragraphs (c) introductory text, (c)(2), (4), (5), and (10), and headings for tables 1 and 3 to read as follows:

§ 27.50 Power limits and duty cycle.

* * * * *

(c) The following power and antenna height requirements apply to stations transmitting in the 470–512 MHz band, the 600 MHz band and the 698–746 MHz band:

* * * * *

(2) Fixed and base stations, except for fixed and base stations operating in the 470–512 MHz band, located in a county with population density of 100 or fewer persons per square mile, based upon the most recently available population statistics from the Bureau of the Census, and transmitting a signal with an emission bandwidth of 1 MHz or less must not exceed an ERP of 2000 watts and an antenna height of 305 m HAAT, except that antenna heights greater than 305 m HAAT are permitted if power levels are reduced below 2000 watts ERP in accordance with Table 2 of this section;

* * * * *

(4) Fixed and base stations, except for fixed and base stations operating in the 470–512 MHz band, located in a county with population density of 100 or fewer persons per square mile, based upon the most recently available population statistics from the Bureau of the Census, and transmitting a signal with an emission bandwidth greater than 1 MHz must not exceed an ERP of 2000 watts/MHz and an antenna height of 305 m HAAT, except that antenna heights greater than 305 m HAAT are permitted if power levels are reduced below 2000 watts/MHz ERP in accordance with Table 4 of this section;

(5) Licensees, except for licensees operating in the 470–512 MHz band and the 600 MHz downlink band, seeking to operate a fixed or base station located in a county with population density of 100 or fewer persons per square mile, based upon the most recently available population statistics from the Bureau of the Census, and transmitting a signal at an ERP greater than 1000 watts must:

* * * * *

(10) Portable stations (hand-held devices) in the 470–512 MHz band, the 600 MHz uplink band and the 698–746 MHz band, and fixed and mobile stations in the 470–512 MHz and 600 MHz uplink band are limited to 3 watts ERP.

* * * * *

Table 1 to § 27.50—Permissible Power and Antenna Heights for Base and Fixed Stations in the 757–758 and 775–776 MHz Bands and for Base and Fixed Stations in the 470–512 MHz Band, 600 MHz, 698–757 MHz, 758–763 MHz, 776–787 MHz and 788–793 MHz Bands Transmitting a Signal With an Emission Bandwidth of 1 MHz or Less

* * * * *

Table 3 to § 27.50—Permissible Power and Antenna Heights for Base and Fixed Stations in the 470–512 MHz Band, 600 MHz, 698–757 MHz, 758–763 MHz, 776–787 MHz and 788–793 MHz Bands Transmitting a Signal With an Emission Bandwidth Greater Than 1 MHz

* * * * *

■ 12. Section 27.53 is amended by revising paragraph (g) to read as follows:

§ 27.53 Emission limits.

* * * * *

(g) For operations in the 470–512 MHz band, the 600 MHz band and the 698–746 MHz band, the power of any emission outside a licensee's frequency band(s) of operation shall be attenuated below the transmitter power (P) within the licensed band(s) of operation, measured in watts, by at least 43 + 10 log (P) dB. Compliance with this provision is based on the use of measurement instrumentation employing a resolution bandwidth of 100 kilohertz or greater. However, in the 100 kilohertz bands immediately outside and adjacent to a licensee's frequency block, a resolution bandwidth of at least 30 kHz may be employed.

* * * * *

■ 13. Section 27.55 is amended by revising paragraphs (a)(2) and (b) to read as follows:

§ 27.55 Power strength limits.

(a) * * *

(2) The 470–512 MHz band, 600 MHz, 698–758, and 775–787 MHz bands: 40 dBμV/m.

* * * * *

(b) Power flux density limit for stations operating in the 470–512 MHz band and 698–746 MHz bands. For base and fixed stations operating in the 470–512 MHz band and 698–746 MHz band in accordance with the provisions of § 27.50(c)(6), the power flux density that would be produced by such stations through a combination of antenna height and vertical gain pattern must

not exceed 3000 microwatts per square meter on the ground over the area extending to 1 km from the base of the antenna mounting structure.

* * * * *

■ 14. Section 27.57 is amended by revising paragraph (b) to read as follows:

§ 27.57 International coordination.

* * * * *

(b) Wireless operations in the 470–608 MHz, 614–763 MHz, 775–793 MHz, and 805–806 MHz bands are subject to current and future international agreements between the United States and Canada and the United States and Mexico. Unless otherwise modified by international treaty, licenses must not cause interference to, and must accept harmful interference from, television broadcast operations in Mexico and Canada, where these services are co-primary in the band.

* * * * *

■ 15. Section 27.75 is amended by revising paragraph (a)(2) to read as follows:

§ 27.75 Basic interoperability requirement.

(a) * * *

(2) Mobile and portable stations that operate on any portion of frequencies in the 470–512 MHz band or 600 MHz band must be capable of operating on all frequencies in the 470–512 MHz band or 600 MHz band using the same air interfaces that the equipment utilizes on any frequencies in the 470–512 MHz band or 600 MHz band.

* * * * *

■ 16. Section 27.1310 is amended by revising the section heading and paragraphs (a) introductory text, (a)(2), (b) introductory text, (b)(1), (c), and (d)(4) to read as follows:

§ 27.1310 Protection of Broadcast Television Service in the 470–512 MHz band and 600 MHz band from wireless operations.

(a) Licensees authorized to operate wireless services in the 470–512 MHz band and 600 MHz band must cause no harmful interference to public reception of the signals of broadcast television stations transmitting co-channel or on an adjacent channel.

* * * * *

(2) If a 470–512 MHz band or 600 MHz band licensee causes harmful interference within the noise-limited contour or protected contour of a broadcast television station that is operating co-channel or on an adjacent channel, the 470–512 MHz band or the 600 MHz band licensee must eliminate the harmful interference.

(b) A licensee authorized to operate wireless base stations in the 470–512 MHz band, or authorized to operate wireless services in the 600 MHz downlink band:

(1) Is not permitted to deploy wireless base stations within the noise-limited contour or protected contour of a broadcast television station licensed on a co-channel or adjacent channel in the 470–512 MHz band or 600 MHz downlink band;

* * * * *

(c) A licensee authorized to operate wireless mobile or portable devices in the 470–512 MHz band, or authorized to operate wireless services in the 600 MHz uplink band must limit its service area so that mobile and portable devices do not transmit:

* * * * *

(d) * * *

(4) Co-channel operations in the 470–512 MHz band and 600 MHz band are defined as operations of broadcast television stations and wireless services where their assigned channels or frequencies spectrally overlap;

* * * * *

■ 17. Section 27.1320 is revised to read as follows:

§ 27.1320 Notification to white space database administrators.

To receive interference protection, the 470–512 MHz band and 600 MHz licensees shall notify one of the white space database administrators of the areas where they have commenced operation pursuant to §§ 15.713(j)(10) and 15.715(n) of this chapter.

■ 18. Add subpart P, consisting of §§ 27.1500 through 27.1504, to read as follows:

Subpart P—470–512 MHz Band

Sec.

Subpart P—470–512 MHz Band

§ 27.1500 470–512 MHz band subject to competitive bidding.

Mutually exclusive initial applications for 470–512 MHz band licenses are subject to competitive bidding. The general competitive bidding procedures set forth in 47 CFR part 1, subpart Q of this chapter will apply unless otherwise provided in this subpart.

§ 27.1501 Designated entities in the 470–512 MHz band.

Eligibility for small business provisions.

(a) *Definitions.* For purposes of this section:

(1) *Small business.* A small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding $55 million for the preceding five (5) years.

(2) *Very small business.* A very small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding $20 million for the preceding five (5) years.

(b) *Bidding credits.* A winning bidder that qualifies as a small business, as defined in this section, or a consortium of small businesses may use the bidding credit of 15 percent, as specified in § 1.2110(f)(2)(i)(C) of this chapter, subject to the cap specified in § 1.2110(f)(2)(ii) of this chapter. A winning bidder that qualifies as a very small business, as defined in this section, or a consortium of very small businesses may use the bidding credit of 25 percent, as specified in § 1.2110(f)(2)(i)(B) of this chapter, subject to the cap specified in § 1.2110(f)(2)(ii) of this chapter.

§ 27.1502 Comparable facilities.

To be considered comparable facilities under this subpart, a replacement system provided to a public safety licensee during a mandatory relocation from the 470–512 MHz band must be at least equivalent to the licensee's existing system with respect to the following four factors:

(a) System;

(b) Capacity;

(c) Quality of service; and

(d) Operating costs.

§ 27.1503 Overlay licensee rights.

(a) A licensee authorized under part 27 to operate in the 470–512 MHz band shall be permitted to construct and operate on its authorized frequencies within its geographic license area provided:

(1) A frequency is not assigned to a part 90 or part 22 licensee (either for shared or exclusive use);

(2) The part 90 or part 22 licensee vacates the frequency, whether by mandatory transition pursuant to Public Law 112–96, 126 Stat. 156 (2012) (Act), section 6103, voluntary transition, acquisition, failure to renew its license, or permanent discontinuance. A frequency is considered vacated where

all part 90 and part 22 licensees are no longer operational, such that there would be no overlap in authorized bandwidth of part 90 or part 22 licensees with part 27 overlay licensee transmissions; or

(3) The part 90 and/or part 22 licensee and the part 27 licensee reach an agreement permitting such operation.

§ 27.1504 Permanent discontinuance of 470–512 MHz licenses.

A 470–512 MHz band licensee that permanently discontinues service as defined in § 1.953 of this chapter must notify the Commission of the discontinuance within 10 days by filing FCC Form 601 requesting license cancellation. An authorization will automatically terminate, without specific Commission action, if service is permanently discontinued as defined in § 1.953 of this chapter, even if a licensee fails to file the required form requesting license cancellation.

[FR Doc. 2020–15707 Filed 7–30–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 17–59; FCC 20–96; FRS 16959]

Advanced Methods To Target and Eliminate Unlawful Robocalls

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document the Federal Communications Commission (FCC or Commission) invites comments on proposed revisions to its rules implementing the Telephone Consumer Protection Act and the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act). The Commission proposes: To require voice service providers to respond to certain traceback requests, mitigate bad traffic when notified of such traffic by the Commission, and implement effective measures to prevent new and renewing customers from using its network to originate illegal calls; to extend the safe harbor for blocking based on reasonable analytics including caller ID authentication information to network-based blocking without consumer consent so long as the blocking is specifically designed to block calls that are highly likely to be illegal and is managed with sufficient human oversight and network monitoring to ensure that blocking is working as intended; and to require terminating voice service providers to provide a list of individually blocked calls that were placed to a particular number at the request of the subscriber to that number. These proposals, taken together, implement the TRACED Act and continue the Commission's fight against illegal and unwanted robocalls while taking further steps to ensure that wanted calls are protected.

DATES: Comments are due on or before August 31, 2020, and reply comments are due on or before September 29, 2020.

ADDRESSES: You may submit comments, identified by CG Docket No. 17–59, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *http://apps.fcc.gov/ecfs/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. See *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy,* Public Notice, DA 20–304 (March 19, 2020), *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

FOR FURTHER INFORMATION CONTACT: Jerusha Burnett, Consumer Policy Division, Consumer and Governmental Affairs Bureau, email at *jerusha.burnett@fcc.gov* or by phone at (202) 418–0526.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Fourth Further Notice of Proposed Rulemaking* (*FFNPRM*), in CG Docket No. 17–59, FCC 20–96, adopted on July 16, 2020, and released on July 17, 2020. The *Third Report and Order* that was adopted concurrently with the *FFNPRM* is published elsewhere in this issue of the **Federal Register**. The full text of document FCC 20–96 is available for public inspection and copying via the Commission's Electronic Comment Filing System (ECFS). To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice).

This matter shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. 47 CFR 1.1200 *et seq.* Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substances of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 CFR 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in § 1.1206(b) of the Commission's rules, 47 CFR 1.1206(b).

Initial Paperwork Reduction Act of 1995 Analysis

The *FFNPRM,* FCC 20–96, seeks comment on proposed rule amendments that may result in modified information collection requirements. If the Commission adopts any modified information collection requirements, the Commission will publish another notice in the **Federal Register** inviting the public to comment on the requirements, as required by the Paperwork Reduction Act. Public Law 104–13; 44 U.S.C. 3501–3520. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, the Commission seeks comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees. Public Law 107–198; 44 U.S.C. 3506(c)(4).

Synopsis

1. In the *FNPRM,* the Commission seeks comment on how it can build on its prior work and further implement the TRACED Act. The Commission proposes to establish an affirmative obligation for voice service providers to

respond to certain traceback requests, mitigate bad traffic, and take affirmative measures to prevent customers from originating illegal calls, and proposes to make clear that failure to comply with any of these affirmative obligations is unjust and unreasonable under section 201(b) of the Communications Act. Next, the Commission proposes to extend its safe harbor for blocking of calls based on reasonable analytics to include network-based blocking without consumer opt out. The Commission further seeks comment on additional redress issues. Finally, the Commission proposes to require terminating voice service providers that block calls to provide a list of blocked calls to their customers on demand and at no additional charge.

Section 4 of the TRACED Act

2. The Commission seeks comment on any other instances where it should allow voice service providers to block based in whole or in part on caller ID authentication information. Are there other appropriate ways to approach blocking in part based on caller ID authentication information beyond incorporating that information into other reasonable analytics? Are there any situations in which blocking based solely on caller ID authentication information would be appropriate, such that the Commission should authorize blocking based ''in whole'' on caller ID authentication information? Are there any instances where the Commission should permit voice service providers other than terminating voice service providers to block based on caller ID authentication information? The Commission further seeks comment on extending the safe harbor to cover other types of blocking based on caller ID authentication information or the unintended or inadvertent misidentification of the level of trust for individual calls.

3. The Commission seeks comment on establishing a process for a calling party adversely affected by caller ID authentication information to verify the authenticity of their calls. What might this process look like? If a call is adversely affected due to a combination of caller ID authentication information and, for example, consumer complaints or suspect call patterns, should the same process be available? How might a calling party identify that the caller ID authentication information is the cause of the problem?

4. The Commission seeks comment on any other steps it should take to ensure that voice service providers that are subject to a delay in compliance consistent with the TRACED Act are not unreasonably blocked because they are not able to be authenticated. The Commission tentatively concludes that, because it does not permit blocking based solely on caller ID authentication information, voice service providers subject to a delay in compliance will not be blocked because their calls cannot be authenticated.

5. The Commission seeks comment on any additional steps it should take to ensure that liability is limited based on the extent to which a voice service provider ''blocks or identifies calls based, in whole or in part, on'' caller ID authentication information and ''implemented procedures based, in whole or in part, on'' caller ID authentication information. Are there any additional steps the Commission needs to take to ensure the safe harbor considers whether a voice service provider ''used reasonable care, including making all reasonable efforts to avoid blocking emergency public safety calls?''

Section 7 of the TRACED Act

6. The Commission seeks comment on additional steps to protect a subscriber from receiving unwanted calls or text messages from unauthenticated numbers. Wide implementation of STIR/SHAKEN will decrease the amount of calls made by callers using an unauthenticated number, but some callers will still be unable to place calls using an authenticated number. How can the Commission's rules protect subscribers from receiving unwanted calls from unauthenticated numbers while not disadvantaging callers whose voice service providers are unable to participate in caller ID authentication or whose calls transit non-IP networks?

Section 10 of the TRACED Act

7. The Commission seeks comment on providing transparency and effective redress options for both consumers and callers. Are the steps the Commission takes in the *Third Report and Order* sufficient? What further steps might the Commission take to ensure that both consumers and callers are provided with transparency and effective redress options? Are there any steps the Commission can take to ensure that these options protect lawful callers without benefiting illegal callers?

8. The Commission further seeks comment on providing blocking services with no additional line-item charge to consumers and no additional charge to callers for resolving complaints for erroneously blocked calls. What costs does a blocking provider incur when dealing with complaints of erroneous blocking? Are there steps the Commission can take to reduce these costs while still providing transparency and effective redress?

9. The Commission seeks comment on other steps it should take to ensure that emergency public safety calls are not blocked.

Requiring Voice Service Providers To Meet Certain Standards

10. The Commission seeks comment on affirmatively requiring voice service providers to: (1) Respond to traceback requests from the Commission, law enforcement, or the Traceback Consortium; (2) mitigate bad traffic when notified of that traffic by the Commission; and (3) implement effective measures to prevent new and renewing customers from using its network to originate illegal calls.

11. The Commission proposes to affirmatively require all voice service providers to respond to traceback requests from the Commission, law enforcement, or the Traceback Consortium. Traceback provides valuable information regarding the sources of illegal calls. The Commission proposes to sanction the Traceback Consortium to make these requests and seeks comment on this proposal. What other entities, if any, should the Commission sanction to make these requests? What costs would voice service providers likely incur in order to comply with this requirement?

12. The Commission proposes to require all voice service providers to take effective steps to mitigate bad traffic when notified of that traffic by the Commission. Should the Commission require voice service providers to take particular steps to mitigate bad traffic, or should it leave the steps up to the voice service provider? Should the Commission limit the requirement to notification from one of the mentioned entities? What costs would voice service providers likely incur in order to comply with this requirement?

13. The Commission proposes to require voice service providers to take affirmative, effective measures to prevent new and renewing customers from using their networks to originate illegal calls. What steps might a voice service provider take to ensure its new and renewing customers do not originate bad traffic? Should the Commission require all voice service providers to take specific steps, or should it permit each voice service provider to develop their own plan? What costs would voice service providers likely incur in order to comply with this requirement?

14. The Commission seeks comment on its legal authority to require voice service providers to meet these standards. The Commission tentatively concludes that section 201(b) of the Act provides it with sufficient authority to require common carriers to meet these standards and seeks comment on this conclusion. The Commission further specifically seeks comment on its authority to require non-carrier voice service providers to meet these standards.

Extending Safe Harbor Based on Reasonable Analytics to Network-Based Blocking

15. The Commission proposes to extend its safe harbor to cover network-based blocking, which voice service providers would do on behalf of their customers without those customers having to opt in or out, based on reasonable analytics that incorporate caller ID authentication information, so long as the blocking is specifically designed to block calls that are highly likely to be illegal and is managed with sufficient human oversight and network monitoring to ensure that blocking is working as intended. The Commission seeks comment on how to ensure that network-based blocking based on reasonable analytics without any consumer consent option but with human oversight and network monitoring is used only to block calls that are highly likely to be illegal. Should the Commission require that voice service providers that block at the network level take additional more, specific steps to ensure that the calls are highly likely to be illegal?

Expanding Redress Requirements

16. The Commission seeks comment on setting a more concrete timeline for redress options. For example, is immediate notification or notification within a set time period (for example, 24 hours) feasible? Should a caller be required to request such notification or register with a provider to ensure such notification occurs? Or should voice service providers be given flexibility to use SIP codes, ISUP codes, and intercept messages to notify callers? If so, is immediate notification necessary to provide transparency and effective redress?

17. The Commission similarly seeks comment on requiring voice service providers to respond to disputes about erroneous call blocking within a set time period (such as 24 hours or a week). What is the appropriate amount of time? What steps could a voice service provider take to communicate with the party that raised the dispute to ensure that these disputes are being handled as quickly as possible? What steps could a caller take to ensure prompt resolution of call-blocking concerns?

18. The Commission seeks comment on whether it should address the issue of mislabeling of calls and, if so, how. Should the Commission require transparency and effective redress for mislabeled calls in order to prevent potential harm to legitimate callers? If so, what redress should the Commission require? Should the single point of contact required for the resolution of blocking disputes also handle labeling disputes?

Blocked Calls Lists

19. The Commission proposes to require terminating voice service providers to provide a list of individually blocked calls that were placed to a particular number at the request of the subscriber to that number. The Commission further proposes to require that terminating voice service providers offer this service at no additional charge. Would such a list be valuable to consumers? What information should be included on such a list? What costs would terminating voice service providers incur?

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended, the Commission has prepared the Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *FFNPRM.* Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *FFNPRM* provided.

Need for, and Objectives of, the Proposed Rules

2. The *FFNPRM* continues a process to prevent unwanted calls from reaching consumers while also ensuring that wanted calls are protected. The *FFNPRM* seeks comment on ways to implement certain provisions of the TRACED Act. The *FFNPRM* proposes rules to make voice service providers responsible for the calls that originate on their network. Next, the *FFNPRM* proposes to extend the reasonable analytics call blocking safe harbor to cover network-based blocking without consumer opt out. The *FFNPRM* seeks comment on whether to adopt more extensive redress requirements, including whether to extend these requirements to erroneously labeled calls. Finally, the *FFNPRM* proposes to require terminating voice service providers that block calls to provide a list of calls blocked on an opt-in or opt-out basis to their customers on demand.

3. The *FFNPRM* proposes to declare particular practices by voice service providers unjust and unreasonable under section 201(b) of the Communications Act. First, the *FFNPRM* proposes to affirmatively require all voice service providers to respond to traceback requests from the Commission, law enforcement, or the Traceback Consortium. Second, the *FFNPRM* proposes to require all voice service providers to take effective steps to mitigate illegal traffic when notified of that traffic by the Commission. Third, the *FFNPRM* proposes to require all voice service providers to take affirmative, effective measures to prevent new customers from using their network to originate illegal calls.

Legal Basis

4. The proposed and anticipated rules are authorized under the TRACED Act, 154(i), 201, 202, 227, 251(e), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 201, 202, 227, 251(e), 403, and section 7 of the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Public Law 116–105, 133 Stat. 3274.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

5. As indicated above, the *FFNPRM* seeks comment on proposed rules to: Implement the TRACED Act, place affirmative duties on originating and intermediate providers to better police their network, and require terminating providers that block on an opt-in or opt-out basis to provide a list of blocked calls to subscribers on request. Until these requirements are defined in full, it is not possible to predict with certainty whether the costs of compliance will be proportional between small and large voice service providers. In the *FFNPRM,* the Commission seeks to minimize the burden associated with reporting, recordkeeping, and other compliance requirements for the proposed rules, such as modifying software, developing procedures, and training staff.

6. First, under the proposed rules, the Commission tentatively concludes that originating and intermediate providers will need to retain call information in order to respond to traceback requests. They will also need to communicate with other intermediate and terminating providers regarding traceback requests and mitigation of illegal traffic. Additionally, they will need to

implement processes to prevent new customers from using their network to originate illegal calls.

7. Second, the Commission tentatively concludes that terminating providers will need to keep records of calls blocked by destination telephone number. In addition, terminating providers will need to provide this information to subscribers on request.

Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

8. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

9. The Commission's proposed rules allow originating, intermediate, and terminating providers, including small businesses, flexibility in how to comply. Small businesses may reduce compliance costs through their implementation choices. For example, our proposed requirement that blocking voice service providers offer, on demand of the subscriber, a list of calls intended for a particular number, allows for this list to provided in real-time or on demand, through whichever means is easiest for the terminating provider. In addition, the Commission anticipates that the proposed rules will reduce costs by reducing the amount of illegal traffic on the network, which will both free up network capacity for wanted calls and reduce customer service costs resulting from consumer complaints. However, the Commission intends to craft rules that encourage all carriers, including small businesses, to block such calls; the *FFNPRM,* therefore, seeks comment from small businesses on how to minimize costs associated with implementing the proposed rules. The *FFNPRM* includes specific requests for comment from small businesses regarding how the proposed rules would affect them and what could be done to minimize any disproportionate impact on small businesses.

10. The Commission expects to consider the economic impact on small entities, as identified in comments filed in response to the *FFNPRM* and the IRFA, in reaching its final conclusions and taking action in this proceeding.

Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

11. None.

List of Subjects

Communications common carriers, Reporting and recordkeeping requirements, Telecommunications, Telephone.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 part 64 as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

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

Authority: 47 U.S.C. 154, 201, 202, 217, 218, 220, 222, 225, 226, 227, 227b, 228, 251(a), 251(e), 254(k), 262, 403(b)(2)(B), (c), 616, 620, 1401–1473, unless otherwise noted; Pub. L. 115–141, Div. P, sec. 503, 132 Stat. 348, 1091.

■ 2. Amend § 64.1200 by revising paragraphs (k)(9) and (10) and by adding paragraph (n) to read as follows:

§ 64.1200 Delivery restrictions.

* * * * *

(k) * * *

(9) Any terminating voice service provider that blocks calls on an opt-out or opt-in basis must provide, at the request of the subscriber to a number, a list of calls to the number that were blocked.

(10) A provider may block calls consistent with paragraph (k)(3) of this section, but without giving consumers the opportunity to opt out, so long as:

(i) Those calls are highly likely to be illegal; and

(ii) The blocking is managed by the provider with sufficient human oversight and network monitoring to ensure that blocking is working as the provider intends.

* * * * *

(n) Voice service providers must:

(1) Respond to all traceback requests from the Commission, law enforcement, or the Traceback Consortium;

(2) Take effective steps to mitigate illegal traffic when the originating or intermediate provider receives actual notice of that traffic by the Commission; and

(3) Take affirmative, effective measures to prevent new and renewing customers from using their network to originate illegal calls.

[FR Doc. 2020–16463 Filed 7–30–20; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register
Vol. 85, No. 148
Friday, July 31, 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

Forest Service

South Central Idaho Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The South Central Idaho Resource Advisory Committee (RAC) will hold a virtual meeting. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act. RAC information can be found at the following website: *https://www.fs.usda.gov/main/sawtooth/workingtogether.*

DATES: The meeting will begin at 9:00 a.m. on Thursday, September 24, 2020.

All RAC meetings are subject to cancellation. For status of the meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meeting will be held with virtual attendance only. For virtual meeting information, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Jerine Office for the Sawtooth National Forest. Please call ahead at to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Julie Thomas, RAC Coordinator, by phone at 208–423–7500 or via email at *julie.thomas@usda.gov.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to:

1. Present project proposals, and
2. Discuss, recommend, and approve new Title II projects.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by September 11, 2020, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time for oral comments must be sent to Julie Thomas, RAC Coordinator, 370 American Avenue, Jerome, Idaho 83338; by email to *julie.thomas@usda.gov,* or via facsimile to 208–423–7510.

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation. For access to the proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case-by-case basis.

Dated: July 28, 2020.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2020–16655 Filed 7–30–20; 8:45 am]

BILLING CODE 3411–15–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Missouri Advisory Committee To Discuss the Pending Briefings on the State's Response to the Pandemic Caused by the Novel Corona Virus Known as COVID–19

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Missouri Advisory Committee (Committee) will hold a meeting on Thursday, July 30, 2020 at 12:00 p.m. (Central) for the purpose of discussing the proposal for the study on Covid-19 and voting preparations.

DATES: The meeting will be held on Thursday, July 30, 2020 at 12:00 p.m. (Central).

Public Call Information: Dial: 800–353–6461, Conference ID: 7139252.

FOR FURTHER INFORMATION CONTACT: David Barreras, DFO, at *dbarreras@usccr.gov* or 312–353–8311.

SUPPLEMENTARY INFORMATION: Members of the public can listen to the discussion. This meeting is available to the public through the following call-in number: 800–353–6461, conference ID: 7139252. Any interested member of the public may call this number and listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–977–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Midwestern Regional Office, U.S. Commission on Civil Rights, 230 S Dearborn Street, Suite 2120, Chicago, IL 60604. They may also be faxed to the Commission at (312) 353–8324 or emailed to David Barreras at *dbarreras@usccr.gov.* Persons who desire additional information may

contact the Midwestern Regional Office at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Midwestern Regional Office, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Missouri Advisory Committee link (*https://facadatabase.gov/committee/committee.aspx?cid=258&aid=17*). Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Midwestern Regional Office at the above email or street address.

Agenda

Welcome and Roll Call
Discussion of August 13, 2020 Briefing Next Steps
Public Comment
Adjournment

Dated: July 28, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–16610 Filed 7–30–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–557–809]

Stainless Steel Butt-Weld Pipe Fittings from Malaysia: Rescission of Antidumping Duty Administrative Review; 2019–2020

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 stainless steel butt-weld pipe fittings from Malaysia for the period February 1, 2019, through January 31, 2020.

DATES: Applicable July 31, 2020.

FOR FURTHER INFORMATION CONTACT: Preston N. Cox, 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) 482–5041.

SUPPLEMENTARY INFORMATION:

Background

On February 3, 2020, Commerce published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order on stainless steel butt-weld pipe fittings from Malaysia for the period February 1, 2019, through January 31, 2020.[1] On February 28, 2020, Commerce received a timely request from Core Pipe Products, Inc. and Taylor Forge Stainless, Inc. (the petitioners), domestic producers of stainless steel butt-weld pipe fittings, for administrative reviews of Pantech Stainless & Alloy Industries Sdn. Bhd. (Pantech) and TSS Pipes & Fittings Industry Sdn. Bhd. (TSS), exporters of stainless steel butt-weld pipe fittings.[2] On March 2, 2020, Pantech and TSS filed timely requests for review of their own respective companies.[3] These requests were in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.213(b).

On April 8, 2020, pursuant to these requests and in accordance with section 751(a) of the Act and 19 CFR 351.221(c)(1)(i), Commerce initiated an administrative review of Pantech and TSS.[4] On June 16, 2020, the petitioners timely withdrew the request for administrative review with respect to Pantech,[5] and Pantech timely withdrew its request for administrative review of itself.[6] On July 14, 2020, the petitioners timely withdrew the request for administrative review with respect to TSS.[7] On July 15, 2020, TSS timely withdrew its request for administrative review of itself.[8]

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 85 FR 5938 (February 3, 2020).

[2] *See* Petitioners' Letter, ''Stainless Steel Butt-Weld Pipe Fittings from Malaysia: Petitioners' Request for 2019/2020 Administrative Review,'' dated February 28, 2020.

[3] *See* Pantech's Letter, ''Pantech Request for Administrative Review of the Antidumping Duty Order on Stainless Steel Butt-Weld Pipe Fittings from Malaysia,'' dated March 2, 2020; and TSS's Letter, ''Stainless Steel Butt-Weld Pipe Fittings from Malaysia: Request for 2019/2020 Administrative Review,'' dated March 2, 2020.

[4] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 85 FR 19730 (April 8, 2020).

[5] *See* Petitioners' Letter, ''Stainless Steel Butt-Weld Pipe Fittings From Malaysia—Petitioners' Withdrawal of Review Request of Pantech Stainless & Alloy Industries Sdn. Bhd.,'' dated June 16, 2020.

[6] *See* Pantech's Letter, ''Withdrawal of Administrative Review Request & Request for Rescission of Administrative Review: Administrative Review of the Antidumping Duty Order on Stainless Steel Butt-Weld Pipe Fittings from Malaysia,'' dated June 16, 2020.

[7] *See* Petitioners' Letter, ''Stainless Steel Butt-Weld Pipe Fittings From Malaysia—Petitioners' Withdrawal of Review Request of TSS Pipes & Fittings Industry Sdn. Bhd.,'' dated July 14, 2020.

[8] *See* TSS's Letter, ''Stainless Steel Butt-Weld Pipe Fittings (SSBWPF) From Malaysia,'' dated July 15, 2020.

Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the parties which requested the review withdraw the request within 90 days of the date of publication of the notice of initiation of the requested review. On April 24, 2020, Commerce tolled all deadlines in administrative reviews by 50 days,[9] extending the 90-day deadline for withdrawing requests for review from July 7, 2020, to August 27, 2020. Therefore, all parties that requested an administrative review withdrew their requests for review for all companies within the applicable deadline. Accordingly, we are rescinding in its entirety the administrative review of the antidumping duty order on stainless steel butt-weld pipe fittings from Malaysia covering the period February 1, 2019, through January 31, 2020.

Assessment

Commerce will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries of stainless steel butt-weld pipe fittings from Malaysia. Antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue appropriate assessment instructions to CBP 15 days after the date of publication of this notice in the **Federal Register**.

Notification to Importers

This notice serves as a 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 antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Orders

This notice also serves as a final reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information

[9] *See* Memorandum, ''Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews in Response to Operational Adjustments Due to COVID–19,'' dated April 24, 2020.

disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: July 24, 2020.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2020–16691 Filed 7–30–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–092]

Mattresses From the People's Republic of China: Initiation of Antidumping Duty New Shipper Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) has determined that a request for a new shipper review (NSR) of the antidumping duty order on mattresses from the People's Republic of China (China) meets the statutory and regulatory requirements for initiation. The period of review (POR) for the NSR is June 4, 2019 through May 31, 2020.

DATES: Applicable July 31, 2020.

FOR FURTHER INFORMATION CONTACT: Jesse Montoya, 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) 482–8211.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the mattresses *Order* on December 16, 2019.[1] On June 29, 2020, pursuant to section 751(a)(2)(B)(i) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.214(c), Commerce received a timely NSR request from Shanghai Sunbeauty Trading Co., Ltd. (Sunbeauty).[2]

In its submission, Sunbeauty certified that it is the exporter of the subject merchandise upon which its request for a NSR is based.[3] Pursuant to section 751(a)(2)(B)(i)(I) of the Act and 19 CFR 351.214(b)(2)(ii)(A), Sunbeauty certified that it did not export mattresses to the United States during the period of investigation (POI).[4] Sunbeauty also provided in its submission, pursuant to 19 CFR 351.214(b)(2)(ii)(B), a certification from the company that produced or supplied the subject merchandise to Sunbeauty that the producer or supplier did not export the subject merchandise to the United States during the POI.[5] Additionally, pursuant to section 751(a)(2)(B)(i)(II) of the Act and 19 CFR 351.214(b)(2)(iii)(A), Sunbeauty certified that, since the initiation of the investigation, it has never been affiliated with any producer or exporter that exported mattresses to the United States during the POI, including those not individually examined during the investigation.[6] As required by 19 CFR 351.214(b)(2)(iii)(B), Sunbeauty also certified that its export activities are not controlled by the central government of China.[7] Further, Sunbeauty stated that it has not made subsequent shipments of subject merchandise during the POR.[8]

In addition to the certifications described above, pursuant to 19 CFR 351.214(b)(2)(iv), Sunbeauty submitted documentation establishing the following: (1) The date on which it first shipped subject merchandise for export to the United States and the date on which the merchandise was first entered, or withdrawn from warehouse, for consumption; (2) the volume of its first shipment; and (3) the date of its first sale to an unaffiliated customer in the United States.[9]

Commerce conducted a query of U.S. Customs and Border Protection (CBP) data and confirmed that Sunbeauty's subject merchandise entered the United States for consumption and that liquidation of such entries had been properly suspended for antidumping duties. The CBP data that Commerce examined are consistent with information provided by Sunbeauty in its NSR request. In particular, the CBP data confirm the price and quantity reported by Sunbeauty for the sale that forms that basis of its NSR request.[10]

Period of Review

Pursuant to 19 CFR 351.214(c), an exporter or producer may request an NSR within one year of the date on which its subject merchandise was first entered, or withdrawn from warehouse, for consumption, or shipped to the United States, as appropriate. Sunbeauty requested this NSR within one year of the date on which its merchandise first entered the United States, and made its request in June 2020, which is the first semiannual anniversary month of the *Order.*[11] In accordance with 19 CFR 351.214(g)(l)(ii)(B), the POR is June 4, 2019 through May 31, 2020.

Initiation of NSR

Pursuant to section 751(a)(2)(B) of the Act, 19 CFR 351.214(b), and based on the information on the record, we find that Sunbeauty's NSR request meets the threshold requirements for initiation of a NSR of its shipment(s) of mattresses to the United States.[12] However, if the information supplied by Sunbeauty is later found to be incorrect or insufficient during the course of this NSR, Commerce may rescind the review or apply adverse facts available, pursuant to section 776 of the Act, as appropriate. Pursuant to 19 CFR 351.221(c)(1)(i), Commerce will publish the notice of initiation of an NSR no later than the last day of the month following the anniversary or semiannual anniversary month of the order. Commerce intends to issue the preliminary results of this review no later than 180 days from the date of initiation, and the final results of this review no later than 90 days after the date the preliminary results are issued.[13]

It is Commerce's usual practice, in cases involving non-market economies, to require that a company seeking to establish eligibility for an antidumping duty rate separate from the country-wide rate (*i.e.,* separate rate) to provide evidence of *de jure* and *de facto* absence of government control over the company's export activities.[14] Accordingly, Commerce will issue questionnaires to Sunbeauty requesting, *inter alia,* information regarding its export activities for the purpose of

[1] *See Mattresses from the People's Republic of China: Antidumping Duty Order,* 84 FR 68395 (December 16, 2020) (*Order*).

[2] *See* Sunbeauty's Letter, ''Mattresses from the People's Republic of China: Request for New Shipper Review,'' dated June 29, 2020 (NSR Request).

[3] *Id.* at Exhibit 1.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* at 3.

[9] *Id.* at Exhibit 2.

[10] *Id.; see also* Memorandum, ''Initiation of Antidumping New Shipper Review of Mattresses from the People's Republic of China: Shanghai Sunbeauty Trading Co., Ltd. Initiation Checklist,'' dated concurrently with this notice.

[11] *See* NSR Request at Exhibit 2.

[12] *See generally* NSR Request.

[13] *See* section 751(a)(2)(B)(iii) of the Act.

[14] *See* Policy Bulletin 05.1, ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries,'' available at *http://ia.ita.doc.gov/policy/bull05-l.pdf.*

determining whether it is eligible for a separate rate. The review of the exporter will proceed if the response provides sufficient indication that the exporter is not subject to either *de jure* or *de facto* government control with respect to its exports of mattresses.

We intend to conduct this NSR in accordance with section 751(a)(2)(B) of the Act.[15] Because Sunbeauty certified that it exported subject merchandise, the sale of which is the basis for its NSR request, Commerce will instruct CBP to continue to suspend liquidation of all entries of subject merchandise exported by Sunbeauty. To assist in its analysis of the *bona fide* nature of Sunbeauty's sale(s), upon initiation of this NSR, Commerce will require Sunbeauty to submit, on an ongoing basis, complete transaction information concerning any sales of subject merchandise to the United States that were made subsequent to the POR.

Interested parties requiring access to proprietary information in this NSR should submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305 and 351.306. This initiation notice is published in accordance with section 751(a)(2)(B) of the Act and 19 CFR 351.214 and 351.221(c)(1)(i).

Dated: July 27, 2020.

Scot Fullerton,

Associate Deputy Assistant Secretary for AD/CVD Operations.

[FR Doc. 2020–16696 Filed 7–30–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Highly Migratory Species Dealer Reporting Family of Forms

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements, and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before September 29, 2020.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *Adrienne.thomas@noaa.gov.* Please reference OMB Control Number 0648–0040 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Dianne Stephan, Atlantic Highly Migratory Species Management Division, National Marine Fisheries Service, (978) 281–9260 or *Dianne.Stephan@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

Under the provisions of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*), the National Marine Fisheries Service (NMFS) is responsible for management of the Nation's marine fisheries. NMFS must also promulgate regulations, as necessary and appropriate, to carry out obligations the United States (U.S.) undertakes internationally regarding tuna management through the Atlantic Tunas Convention Act (ATCA, 16 U.S.C. 971 *et seq.*).

This collection serves as a family of forms for Atlantic highly migratory species (HMS) dealer reporting, including purchases of HMS from domestic fishermen, and the import, export, and/or re-export of HMS, including federally managed tunas, sharks, and swordfish.

Transactions covered under this collection include purchases of Atlantic HMS from domestic fishermen; and the import/export of all bluefin tuna, frozen bigeye tuna, southern bluefin tuna or swordfish under the HMS International Trade Program, regardless of geographic area of origin. This information is used to monitor the harvest of domestic fisheries, and/or track international trade of internationally managed species. We are currently revising this information collection to implement mandatory electronic, web-based reporting to replace the downloadable hard copy forms currently used for biweekly bluefin dealer reporting and international trade reporting of bluefin tuna, swordfish, and frozen bigeye tuna. No other changes in the reporting program are being implemented at this time, and no significant changes in the number of responses or burden estimates are anticipated aside from removal of postage costs for returning the completed forms by mail.

The domestic dealer reporting covered by this collection includes weekly electronic landing reports and negative reports (*i.e.,* reports of no activity) of Atlantic swordfish, sharks, bigeye tuna, albacore, yellowfin, and skipjack tunas (collectively referred to as BAYS tunas), and electronic biweekly and daily landing reports for bluefin tuna, including tagging of individual fish. Because of the individual bluefin quota (IBQ) management system (RIN 0648–BC09), electronic entry of IBQ-related landing data is required for Atlantic bluefin tuna purchased from Longline and Purse seine category vessels.

International trade tracking programs are required by both the International Commission for the Conservation of Atlantic Tunas (ICCAT) and the Inter-American Tropical Tuna Commission (IATTC) to account for all international trade of covered species. The United States is a member of ICCAT and IATTC and required by ATCA and the Tunas Convention Act (16 U.S.C. 951 *et. seq.,* consecutively) to promulgate regulations as necessary and appropriate to implement ICCAT and IATTC recommendations. These programs require that a statistical document or catch document accompany each export from and import to a member nation, and that a re-export certificate accompany each re-export. The international trade reporting requirements covered by this collection include implementation of catch documents, statistical documents, and re-export certificate trade tracking programs for bluefin tuna, frozen bigeye tuna, and swordfish. An electronic catch document program for bluefin tuna (EBCD) was recommended by ICCAT and implemented by the United States in 2016 (0648–BF17). United States regulations implementing ICCAT statistical document and catch document programs require statistical documents and catch documents for international transactions of the covered species from all ocean areas, so Pacific imports and exports must also be

[15] The Act was amended by the Trade Facilitation and Trade Enforcement Act of 2015 which removed from section 751(a)(2)(B) of the Act the provision directing Commerce to instruct CBP to allow an importer the option of posting a bond or security in lieu of a cash deposit during the pendency of an NSR.

accompanied by statistical documents and catch documents. Since there are statistical document programs in place under other international conventions (*e.g.,* the Indian Ocean Tuna Commission), a statistical document or catch document from another program may be used to satisfy the statistical document requirement for imports into the United States.

Dealers who internationally trade Southern bluefin tuna are required to participate in a trade tracking program to ensure that imported Atlantic and Pacific bluefin tuna will not be intentionally mislabeled as ''southern bluefin'' to circumvent reporting requirements. This action is authorized under ATCA, which provides for the promulgation of regulations as may be necessary and appropriate to carry out ICCAT recommendations.

In addition to statistical document, catch document, and re-export certificate requirements, this collection includes biweekly reports to complement trade tracking statistical documents by summarizing statistical document data and collecting additional economic information.

II. Method of Collection

Methods of submission include electronic, mail, fax, and tagging of fish.

III. Data

OMB Control Number: 0648–0040.

Form Number(s): None.

Type of Review: Regular submission [request for revision of a currently approved information collection].

Affected Public: Business or other for-profit organization.

Estimated Number of Respondents: 10,391.

Estimated Time per Response: 5 minutes each for catch document, statistical document, and re-export certificate; 15 minutes for catch document/statistical document/re-export certificate validation by government official; 120 minutes for authorization of non-governmental catch document/statistical document/re-export certificate validation; 2 minutes for daily Atlantic bluefin tuna landing reports; 3 minutes for daily Atlantic bluefin tuna landing reports from pelagic longline and purse seine vessels; 1 minute for Atlantic bluefin tuna tagging; 15 minutes for biweekly electronic Atlantic bluefin tuna dealer landing reports; 15 minutes for HMS international trade biweekly electronic reports; 15 minutes for weekly electronic HMS dealer landing reports (*e*-dealer); 5 minutes for negative weekly electronic HMS dealer landing reports (*e*-dealer); 15 minutes for voluntary fishing vessel and catch forms; 2 minutes for provision of HMS dealer email address.

Estimated Total Annual Burden Hours: 18,285.

Estimated Total Annual Cost to Public: $1,634.

Respondent's Obligation: Mandatory.

Legal Authority: Legal authority for these data collections are authorized under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*) and the Atlantic Tunas Convention Act (ATCA, 16 U.S.C. 971 *et seq.*).

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may 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.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–16630 Filed 7–30–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Observer Programs' Information That Can Be Gathered Only Through Questions

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection request must be received on or before September 29, 2020.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *Adrienne.thomas@noaa.gov.* Please reference OMB Control Number 0648–0593 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Lee Benaka, Acting National Observer Program Lead, NOAA, 1315 East-West Highway, Silver Spring, MD 20910, (301–427–8554), and *lee.benaka@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS) deploys fishery observers on United States (U.S.) commercial fishing vessels and to fish processing plants in order to collect biological and economic data. NMFS has at least one observer program in each of its five Regions. These observer programs provide the

most reliable and effective method for obtaining information that is critical for the conservation and management of living marine resources. Observer programs primarily obtain information through direct observations by employees or agents of NMFS; and such observations are not subject to the Paperwork Reduction Act (PRA). However, observer programs also collect the following information that requires clearance under the PRA: (1) Standardized questions of fishing vessel captains/crew or fish processing plant managers/staff, which include gear and performance questions, safety questions, and trip costs, crew size and other economic questions; (2) questions asked by observer program staff/contractors to plan observer deployments; (3) forms that are completed by observers and that fishing vessel captains are asked to review and sign; (4) questionnaires to evaluate observer performance; and (5) a form to certify that a fisherman is the permit holder when requesting observer data from the observer on the vessel. NMFS seeks to renew OMB PRA clearance for these information collections.

The information collected will be used to: (1) Monitor catch and bycatch in federally managed commercial fisheries; (2) understand the population status and trends of fish stocks and protected species, as well as the interactions between them; (3) determine the quantity and distribution of net benefits derived from living marine resources; (4) predict the biological, ecological, and economic impacts of existing management action and proposed management options; and (5) ensure that the observer programs can safely and efficiently collect the information required for the previous four uses. In particular, these biological and economic data collection programs contribute to legally mandated analyses required under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), the National Environmental Policy Act (NEPA), the Regulatory Flexibility Act (RFA), Executive Order 12866 (E.O. 12866), as well as a variety of state statutes. The confidentiality of the data will be protected as required by the MSA, Section 402(b).

On June 12, 2020, The Office of Management and Budget granted approval under the emergency approval provisions of the PRA for NOAA fishery observers to immediately begin collecting safety information related to the COVID–19 national pandemic. Six supplementary safety questions were added to the existing approved information collection request. The questions are necessary to ensure safety of observers and the safety of vessel crew and plant staff during the evolving COVID–19 pandemic as they provide information related to the presence of COVID–19 among vessel crew or plant staff, the availability of safety equipment, and the existence of communicable disease safety plans. Although responses to these questions are voluntary, we encourage industry to respond to facilitate assessment of COVID–19 risks that a deployment may present and any precautionary steps that may be necessary to mitigate such risks.

The approval granted by OMB is valid through December 31, 2020. The 6-month approval allows observers or observer providers to collect this information by a phone call to the operator of a fishing vessel or management of a fish processing plant prior to observer deployment. Currently, there is no way to anticipate an end to the impact of COVID–19 or other communicable diseases. Therefore, NOAA needs to be prepared for the possibility of collecting these data for an extended period of time. NOAA now seeks to extend this information collection request for an additional three years, and proposes to modify the COVID–19 supplemental questions slightly to address all communicable diseases. As with the COVID–19 questions approved by OMB, observers or observer providers would verbally ask these questions prior to deployment. The revised questions to add to the existing information collection request are:

1. In the past 2 weeks, have the captain and crew been following state mandates for travel, physical distancing, or any other restrictions and guidance in response to the current health crisis?

2. Do any crew members currently have two or more symptoms of COVID–19 (fever, chills, cough, shortness of breath, headache, sore throat, new loss of taste or smell) or symptoms of any other communicable disease, such as tuberculosis, Methicillin-resistant Staphylococcus aureus (MRSA), etc.?

3. In the past 2 weeks, have any of the crew tested positive for, or been exposed to, someone who has tested positive for COVID–19 or any other communicable disease, such as tuberculosis, MRSA, etc.?

4. Does the vessel have procedures in place to reduce their exposures to COVID–19 or any other communicable disease, such as tuberculosis, MRSA, etc.?

5. Is there a response plan in place, should someone show symptoms of COVID–19, or any other communicable disease, such as tuberculosis, MRSA, etc., during a trip?

6. Is there a supply of personal protection and sanitizing equipment, such as face coverings, hand sanitizer, etc., onboard the vessel for the crew?

II. Method of Collection

The information will be collected by (1) via telephone or mail survey by the observer program staff or contractor planning to deploy observers; (2) NMFS observers while they are deployed on a vessel to observe a particular fishing trip; questions will be asked in-person to the captain, crew and/or owner (if on board the vessel) during the course of the observed trip; (3) via mail through follow up surveys of economic information not available during the trip; or (4) via feedback questionnaires mailed to the vessel owners or captains to evaluate observer performance.

III. Data

OMB Control Number: 0648–0593.

Form Number(s): None.

Type of Review: Regular (Extension and revision of a current information collection request).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 19,606 observed annual fishing trips.

Estimated Time per Response: Northeast Fisheries Observer Program and At-Sea Monitors, 117 minutes; North Pacific Groundfish and Halibut Observer Program and Processing Plants, 56 minutes; Alaska Marine Mammal Observer Program, 15 minutes; West Coast Groundfish Observer Program, 58 minutes; Pacific Islands Region Observer Program, 86 minutes; Southeast Shark Fishery Observer Program, 75 minutes; Southeast Pelagic Observer Program, 85 minutes; Gulf of Mexico Reef Fish and Shrimp Observer Program, 110 minutes; West Coast Region Observer Program, 62 minutes; Gulf of Mexico Snapper-Grouper Observer Program, 110 minutes. Information will be collected for observed fishing trips and deployments to fish processing plants; therefore, there will be multiple responses for some respondents, but they will be counted as one response per trip or plant visit.

Estimated Total Annual Burden Hours: 28,420.

Estimated Total Annual Cost to Public: $717,594.

Respondent's Obligation: Voluntary.

Legal Authority: The primary authority for NMFS to place observers on fishing vessels is included in the Magnuson-Stevens Fishery

Conservation and Management Act (MSA), the Endangered Species Act (ESA), and the Marine Mammal Protection Act (MMPA).

IV. Request for Comments

We are soliciting public comments to permit NOAA to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Agency, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may 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.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–16632 Filed 7–30–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Vessel Monitoring System Requirements for the Pacific Islands Fisheries

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed and continuing information collections, which help us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on May 7, 2020, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic and Atmospheric Association (NOAA).

Title: Vessel Monitoring System Requirements for the Pacific Islands Fisheries.

OMB Control Number: 0648–0441.

Form Number(s): None.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 180.

Average Hours per Response: Observe initial installation—4 hours; Observe VMS replacement—2 hours; Observe VMS unit maintenance and repair—1.5 hours; Position reports—0 hours (automatic).

Total Annual Burden Hours: 170.

Needs and Uses: Owners of commercial fishing vessels in the Hawaii pelagic longline fishery, American Samoa pelagic longline fishery (only vessels longer than 50 feet), Northwestern Hawaiian Islands lobster fishery (currently inactive), and Northern Mariana Islands bottomfish fishery (only vessels longer than 40 feet) must allow the National Oceanic and Atmospheric Administration (NOAA) to install vessel monitoring system (VMS) units on their vessels when directed to do so by NOAA enforcement personnel. VMS units automatically send periodic reports on the position of the vessel. NOAA uses the reports to monitor the vessels' location and activities, primarily to enforce regulated fishing areas. NOAA pays for the units, installation, maintenance, and messaging. There is no public burden for the automatic messaging; however, the time required for VMS installation and annual maintenance are considered public burden.

Affected Public: Individuals or households; Business or other for-profit organizations.

Frequency: Hourly.

Respondent's Obligation: Mandatory.

Legal Authority: 50 CFR 665.16.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0648–0441.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2020–16631 Filed 7–30–20; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Deletions from the Procurement List.

SUMMARY: This action deletes products from the Procurement List that were furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Date deleted from the Procurement List:* August 30, 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: Michael R. Jurkowski, Telephone: (703) 603–2117, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Deletions

On 6/26/2020, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List. This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3.

After consideration of the relevant matter presented, the Committee has determined that the products listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities.

The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the products to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the products deleted from the Procurement List.

End of Certification

Accordingly, the following products are deleted from the Procurement List:

Product

NSN(s)—Product Name(s):
1670–01–235–0923—Deployment Bag, Parachute

Mandatory Source of Supply: Huntsville Rehabilitation Foundation, Huntsville, AL

Contracting Activity: DLA AVIATION, RICHMOND, VA

Michael R. Jurkowski,

Deputy Director, Business & PL Operations.

[FR Doc. 2020–16618 Filed 7–30–20; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE

Department of the Army, Army Corps of Engineers

Notice of Intent To Prepare a Draft Supplemental Environmental Impact Statement/Environmental Impact Report for the American River Common Features Project, American River Erosion Protection and Arden Pond Mitigation Components (Sacramento County, California), as Authorized Under the Water Resources Development Act of 2016

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: The U.S. Army Corps of Engineers (USACE), Sacramento District, the State of California, and Central Valley Flood Protection Board (CVFPB) are preparing a Draft Supplemental Environmental Impact Statement/Environmental Impact Report (Draft Supplemental EIS/EIR) for the American River Contract 2 (Proposed Action) of the American River Common Features (ARCF) Levee Improvement Project authorized by the Water Resources Development Act of 2016. This Draft Supplemental EIS/EIR supplements the ARCF General Reevaluation Report (GRR) Final EIS/EIR (May 2016). The Proposed Action includes constructing erosion protection measures at Lower American River (LAR) sites 2–2 (river mile 7.5 right bank), and 2–3 (river mile 5.9 right bank), transporting excavated materials from site 2–3 to the Arden Pond mitigation site for construction of shallow water fish habitat for juvenile salmon, construction of a berm to separate the restored Arden Pond from the adjacent bass pond, and planting of emergent and riparian vegetation to provide Shaded Riverine Aquatic (SRA) habitat. The Proposed Action is necessary to protect the levee from erosion damage that could reduce its reliability to protect against flooding, and to mitigate loss of fish and riparian habitat for the American River Common Features Project Endangered Species Act consultation requirements. Conceptual components of the Proposed Action were analyzed (erosion protection measures) in the ARCF GRR Final EIS/EIR, but some elements of the Proposed Action (Arden Pond and SRA habitat mitigation) were not analyzed in the ARCF GRR Final EIS/EIR because habitat mitigation locations and designs were still in formulation at the time the Final EIS/EIR was completed. The USACE has now developed levee erosion protection and habitat mitigation designs in sufficient detail to analyze their environmental effects.

DATES: Written comments regarding the scope of the environmental analysis should be received by August 31, 2020.

ADDRESSES: Written comments and suggestions concerning this Project and requests to be included on the Project mailing list may be submitted to Ms. Andrea Meier, U.S. Army Corps of Engineers, Sacramento District, Attn: Planning Division (CESPK–PDR), 1325 J Street, Sacramento, CA 95814.

FOR FURTHER INFORMATION CONTACT: Questions about the Proposed Action and draft Supplemental EIS/EIR may be addressed to Ms. Andrea Meier at (916) 557–7206, email at *Andrea.J.Meier@usace.army.mil,* or by mail at 1325 J Street, Sacramento, CA 95814 (see **ADDRESS**). Additional information will also be posted periodically on the internet under the American River Contract 2 web page at: *www.sacleveeupgrades.com.*

SUPPLEMENTARY INFORMATION:

1. *Proposed Action.* The USACE is preparing a Supplemental Environmental Impact Statement (SEIS)/Supplemental Environmental Impact Report (SEIR) to analyze environmental impacts of the authorized erosion protection and habitat mitigation components of the larger ARCF 2016 levee improvement project. The Proposed Action includes constructing erosion countermeasures at LAR sites 2–2 and 2–3, transporting excavated materials from site 2–3 to Arden Pond, and construction of the Arden Pond mitigation site. Bench excavation at LAR site 2–3 would provide fill material for the 18-acre Arden Pond mitigation site and fill material to construct a berm to separate the mitigation area from the remaining 8.3-acre bass pond. The project will be implemented as American River Contract 2.

2. *Alternatives.* Alternatives that may be considered include: (1) Construction of erosion protection measures at LAR site 2–2 and excavation of the bench at LAR 2–3; (2) habitat restoration at Arden Pond; and (3) the required No Action Alternative.

3. *Scoping Process.*

a. A public scoping meeting will be held in the form of a teleconference and/or webinar to present an overview of the American River Erosion Protection and Arden Pond Mitigation Projects, the Proposed Action and the alternatives that have been identified, and the Supplemental EIS/EIR process. Scoping will afford all interested parties an opportunity to comment on the scope of analysis in the draft document. The public scoping webinar will be held in August 2020. Exact date, time, registration details, additional information, and any schedule changes will be announced online at: *www.sacleveeupgrades.com.*

b. Potentially significant issues to be analyzed in depth in the Draft Supplemental EIS/EIR include: Impacts to water quality, air quality, climate change, special status species, terrestrial vegetation and wildlife, recreation, traffic and circulation, noise, aesthetic and visual resources, and cultural resources. The document will also evaluate the Proposed Action's anticipated cumulative effects.

c. The USACE will consult with the National Marine Fisheries Service and U.S. Fish and Wildlife Service to comply with the Endangered Species Act and the Fish and Wildlife Coordination Act. The USACE will also consult with the State Historic Preservation Officer and Native American Tribes to comply with the National Historic Preservation Act.

d. A 45-day public review period will be provided for individuals, interested parties, and agencies to review and comment on the Draft Supplemental EIS/EIR. All interested parties are encouraged to respond to this notice and provide a current address if they

wish to be notified of the Draft Supplemental EIS/EIR circulation.

4. *Availability.* The Draft Supplemental EIS/EIR is scheduled to be available for public review and comment during winter 2020–2021.

Paul E. Owen,

Brigadier General, U.S. Army Commanding.

[FR Doc. 2020–16598 Filed 7–30–20; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

[Docket ID ED–2020–OSERS–0042]

Privacy Act of 1974; System of Records

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended (Privacy Act), the U.S. Department of Education (the Department) publishes this notice of a modified system of records entitled ''Case Service Report (RSA–911)'' (18–16–02), last published in full in the **Federal Register** on April 8, 2004. The system contains information on individuals who are participating in or who have exited from the State Vocational Rehabilitation (VR) Services program, and the State Supported Employment (SE) Services program as applicable.

DATES: Submit your comments on or before August 31, 2020.

This modified system of records will become applicable upon publication in the **Federal Register** on July 31, 2020. New routine use disclosures (9) and (10), and significantly modified routine uses (3), (4), and (5), outlined in the ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES will become applicable on August 31, 2020, unless the modified system of records notice needs to be changed as a result of public comment. The Department will publish any significant changes resulting from public comment.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov*, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under the ''help'' tab.
- *Postal Mail, Commercial Delivery, or Hand Delivery:* If you mail or deliver your comments about this modified system of records, address them to: Chief, Data Collection & Analysis Unit, Rehabilitation Services Administration, Office of Special Education and Rehabilitative Services, U.S. Department of Education, 550 12th Street SW, Washington, DC 20202–2800.

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at *www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request, we will supply an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Christopher Pope, Chief, Data Collection & Analysis Unit, Rehabilitation Services Administration, Office of Special Education and Rehabilitative Services, U.S. Department of Education, 550 12th Street SW, Washington, DC 20202–2800. Telephone: (202) 245–7375.

If you use a telecommunications device for the deaf or text telephone, you may call the Federal Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The Department is updating the name of the system from ''RSA–911 Case Service Report'' to ''Case Service Report (RSA–911)'' and the section of the notice entitled ''SECURITY CLASSIFICATION'' by revising it from ''none'' to ''unclassified.''

In this modified system of records notice, the Department updates the sections entitled ''SYSTEM LOCATION'' and ''SYSTEM MANAGER(S)'' to reflect a revised organizational structure within the Rehabilitation Services Administration (RSA), which is housed within the Department's Office of Special Education and Rehabilitative Services. The update also reflects RSA's new address.

In this modified system of records notice, the Department updates the section entitled ''AUTHORITY FOR MAINTENANCE OF THE SYSTEM.'' Specifically, the Department adds references to sections 106 and 607 of the Rehabilitation Act of 1973 (the Act), as well as section 116 of the Workforce Innovation and Opportunity Act (WIOA), to reflect data collection and reporting requirement changes made by WIOA and its amendments to the Act. All data collected through the ''Case Service Report (RSA–911)'' are necessary to satisfy statutory requirements and programmatic purposes of the VR and SE programs.

The Department updates the section of this notice entitled ''PURPOSE(S) OF THE SYSTEM'' to reflect amendments to the Act made by WIOA. Specifically, the Department makes clear that the data collected and maintained by this system will be used for performance and accountability purposes in addition to program research and evaluation.

The Department updates the section of this notice entitled ''CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM'' to reflect statutory requirements made by amendments to the Act by WIOA. The system collects data on individuals who are participating in, as well as those who have exited from, the VR program, and the SE program as applicable, each program year. This means that the data collected is from both open service records, as well as from closed service records, from both of those programs. Under the former system of records, the Department used the system to collect data on only individuals who had exited the VR program.

The Department updates the section of this notice entitled ''CATEGORIES OF RECORDS IN THE SYSTEM'' by expanding the personal and demographic information collected in order to comply with statutory requirements imposed by WIOA and its amendments to the Act. Some of the additional demographic data collected include ex-offender status and other barriers to employment information, all of which are consistent with the data collection requirements of the Act and WIOA.

The Department updates the section of this modified system of records notice entitled ''RECORD SOURCE CATEGORIES'' to explain the source of the data reported by State VR agencies through the ''Case Service Report (RSA–

911).'' Specifically, we make clear that State VR agencies collect the data directly from individuals with disabilities, employers, educational institutions, and the State-level interagency exchange of data (*e.g.,* State Unemployment Insurance Agencies' wage records).

With respect to the section of this modified system of records notice entitled ''ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES,'' the Department updates routine uses (3), (4), and (5) permitting disclosures to contractors, disclosures in the course of litigation or alternative dispute resolution, and disclosures to researchers, respectively. Specifically, we clarify in routine uses (3) and (5) that contractors and researchers receiving data maintained in this system of records must agree to establish and maintain safeguards to protect the security and confidentiality of the disclosed records and that contractors must agree to do so as part of such a contract, rather than before entering into such a contract. In routine use (4) entitled ''Litigation and Alternative Dispute Resolution (ADR) Disclosure,'' the Department inserts the word ''person'' in place of the word ''individual'' to avoid public confusion that may have been caused by the Department's prior use of the word ''individual,'' given that this term is defined in the Privacy Act, and clarifies that references to ''litigation'' cover both judicial and administrative litigation.

The Department eliminates former routine use (8), entitled ''Disclosure for Use By Other Law Enforcement Agencies.'' The Department has determined that this routine use would not be compatible with purposes of this system of records.

The Department also eliminates former routine use (10) entitled ''Disclosure to the Veterans' Disability Benefits Commission.'' The Department has determined that this routine use is no longer needed for the data maintained in this system because the Department does not share data with this entity.

The Department adds two new routine uses numbered (9) entitled ''Disclosure in the Course of Responding to a Breach of Data'' and routine use (10) entitled ''Disclosure in Assisting Another Agency in Responding to a Breach of Data'' in accordance with the requirements set forth by the Office of Management and Budget (OMB) in OMB M–17–12 entitled ''Preparing for and Responding to a Breach of Personally Identifiable Information.''

The Department updates the section of this notice entitled ''POLICIES AND PRACTICES FOR STORAGE OF RECORDS'' to reflect that records are no longer maintained on a computer mainframe, in compact discs, or in printed reports that contain sensitive data produced by this system, but rather only in database servers. The Department no longer maintains hard copies of records.

The Department is updating the section of this notice entitled ''POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS'' to remove the statement that the National Archives and Records Administration (NARA) General Records Schedule 20, Item 1.c, applies to the records in this system; and, to indicate that the Department will submit a retention and disposition schedule that covers the records in the system to NARA for review, and will not destroy the records until such time as NARA approves said schedule. The Department also updates this section of this notice to remove the reference to hard-copy printouts created to monitor system usage because records are maintained solely in the database server.

The Department updates the section of this notice entitled ''ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS'' that protect the records in this system. Specifically, the Department updated the guidelines and procedures for protecting sensitive data and resources in this system by requiring two-factor authentication to access the Department of Education network and by prohibiting the copying of files to portable electronic media such as compact discs or USB drives.

The Department updates the sections entitled ''RECORD ACCESS PROCEDURES,'' ''CONTESTING RECORD PROCEDURES'' and ''NOTIFICATION PROCEDURES'' to define and discuss the ''necessary particulars'' needed to access, contest, and be notified of a record. Finally, the Department adds a new section to the system of records notice entitled ''HISTORY,'' in compliance with the requirements set forth in OMB Circular No. A–108, to explain that the last full system of records for the Case Service Report (RSA–911) was published in the **Federal Register** on April 8, 2004 (69 FR 18724).

The personal information maintained in this system of records entitled ''Case Service Report (RSA–911)'' includes, but is not limited to, the following: Social Security number (SSN), date of birth (DOB), gender, disability characteristics, demographic information including race and ethnicity, services and training received, health insurance, employment status, employment outcomes, earnings, ex-offender status, other barriers to employment, and other program data elements included in the RSA–911. The information covered by this system of records will be collected from State VR agencies. This information collection is mandated by the Act, as amended by title IV of WIOA, as well as by section 116 of WIOA. Specifically, sections 101(a)(10) and 106 of the Act contain data collection and reporting requirements under the VR program and section 607 of the Act contains relevant data collection requirements under the SE program. Furthermore, section 116 of WIOA requires the VR agencies to collect and report certain data for purposes of the common performance accountability system applicable to all six core programs of the workforce development system, including the VR program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.*

At this site, you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader which is available free at this site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Mark Schultz,

Commissioner, Rehabilitation Services Administration, Delegated the authority to perform the functions and duties of the Assistant Secretary for the Office of Special Education and Rehabilitative Services.

For the reasons discussed in the preamble, the Assistant Secretary for Special Education and Rehabilitative Services of the U.S. Department of Education publishes a notice of a

modified system of records to read as follows:

SYSTEM NAME AND NUMBER:

Case Service Report (RSA–911) (18–16–02).

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Data Collection & Analysis Unit, Rehabilitation Services Administration, Office of Special Education and Rehabilitative Services, U.S. Department of Education, 550 12th Street SW, Washington, DC 20202–2800.

SYSTEM MANAGER(S):

Chief, Data Collection & Analysis Unit, Rehabilitation Services Administration, Office of Special Education and Rehabilitative Services, U.S. Department of Education, 550 12th Street SW, Washington, DC 20202–2800.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Rehabilitation Act of 1973 (the Act), as amended by title IV of the Workforce Innovation and Opportunity Act (WIOA), as well as by section 116 of WIOA. Specifically, sections 101(a)(10) and 106 of the Act contain data collection and reporting requirements under the State Vocational Rehabilitation (VR) Services program, and section 607 of the Act contains relevant data collection requirements under the State Supported Employment (SE) Services program. Furthermore, section 116 of WIOA requires VR agencies to collect and report certain required data for purposes of the common performance accountability system applicable to all six core programs of the workforce development system, including the VR program.

PURPOSE(S) OF THE SYSTEM:

This system of records is maintained for program performance and accountability, and for research, monitoring, and evaluation purposes and is required by the Act and title I of WIOA.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The system contains records on individuals who are participating in or who have exited from the VR program, and the SE program as applicable, during each program year.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system of records contains records relating to individuals who are participating in or who have exited the VR program and SE program, as applicable, including, but not limited to the following: Social Security number (SSN), date of birth (DOB), gender, disability characteristics, demographic information including race and ethnicity, services and training, health insurance, employment status, employment outcomes, earnings, ex-offender status, other barriers to employment, and other program data elements noted in the RSA–911.

RECORD SOURCE CATEGORIES:

The information in this system is obtained from State VR agencies pursuant to Federal reporting requirements. These agencies collect data directly from individuals with disabilities, employers, educational institutions, and the State-level interagency exchange of data (*e.g.,* State Unemployment Insurance Agencies' wage records).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The Department may disclose information contained in a record in this system of records under the routine uses listed in this system of records without the consent of the individual if the disclosure is compatible with the purposes for which the record was collected. The Department may make these disclosures on a case-by-case basis or, if the Department has complied with the computer matching requirements of the Privacy Act of 1974, as amended (Privacy Act), under a computer matching agreement.

(1) *Freedom of Information Act (FOIA) and Privacy Act Advice Disclosure.* The Department may disclose records to the U.S. Department of Justice (DOJ) or the Office of Management and Budget (OMB) if the Department seeks advice regarding whether records maintained in the system of records must be released under the FOIA or the Privacy Act.

(2) *Disclosure to the DOJ.* The Department may disclose records to the DOJ to the extent necessary for obtaining DOJ advice on any matter relevant to an audit, inspection, or other inquiry related to the programs covered by this system.

(3) *Contract Disclosure.* If the Department contracts with an entity for the purposes of performing any function that requires disclosure of records in this system to employees of the contractor, the Department may disclose the records to those employees. As part of such a contract, the Department shall require the contractor to agree to establish and maintain safeguards to protect the security and confidentiality of the disclosed records.

(4) *Litigation and Alternative Dispute Resolution (ADR) Disclosure.*

(a) *Introduction.* In the event that one of the parties listed in sub-paragraphs (i) through (v) is involved in judicial or administrative litigation or ADR, or has an interest in litigation or ADR, the Department may disclose certain records to the parties described in paragraphs (b), (c), and (d) of this routine use under the conditions specified in those paragraphs:

(i) The Department, or any of its components;

(ii) Any Department employee in his or her official capacity;

(iii) Any Department employee in his or her individual capacity if the DOJ agrees or has been requested to provide or to arrange for representation of the employee;

(iv) Any Department employee in his or her individual capacity if the Department has agreed to represent the employee; or

(v) The United States if the Department determines that the litigation is likely to affect the Department or any of its components.

(b) *Disclosure to the DOJ.* If the Department determines that disclosure of certain records to the DOJ is relevant and necessary to judicial or administrative litigation or ADR and is compatible with the purpose for which the records were collected, the Department may disclose those records as a routine use to the DOJ.

(c) *Adjudicative Disclosure.* If the Department determines that it is relevant and necessary to the judicial or administrative litigation or ADR to disclose certain records to an adjudicative body before which the Department is authorized to appear, or to a person or an entity designated by the Department or otherwise empowered to resolve or mediate disputes, the Department may disclose those records as a routine use to the adjudicative body, person, or entity.

(d) *Disclosure to Parties, Counsel, Representatives, and Witnesses.* If the Department determines that disclosure of certain records to a party, counsel, representative, or witness is relevant and necessary to the judicial or administrative litigation or ADR, the Department may disclose those records as a routine use to the party, counsel, representative, or witness.

(5) *Research Disclosure.* The Department may disclose records to a researcher if an appropriate official of the Department determines that the individual or organization to which the disclosure would be made is qualified to carry out specific research related to functions or purposes of this system of

records. The official may disclose records from this system of records to that researcher solely for the purpose of carrying out that research related to the functions or purposes of this system of records. The researcher shall be required to agree to establish and maintain safeguards to protect the security and confidentiality of the disclosed records.

(6) *Congressional Member Disclosure.* The Department may disclose information to a Member of Congress from the record of an individual in response to an inquiry from the Member made at the written request of that individual. The Member's right to the information is no greater than the right of the individual who requested it.

(7) *Enforcement Disclosure.* If information in this system of records indicates, either on its face or in connection with other information, a violation or potential violation of any applicable statute, regulations, or order of a competent authority, the Department may disclose the relevant records to the appropriate agency, whether foreign, Federal, State, tribal, or local, charged with the responsibility of investigating or prosecuting that violation or charged with enforcing or implementing the statute, Executive order, rule, regulations, or order issued pursuant thereto.

(8) *Disclosure to Other Federal Agencies.* The Department may disclose records to other Federal agencies, including the Social Security Administration and the U.S. Department of Veterans Affairs, for program research and evaluation purposes.

(9) *Disclosure in the Course of Responding to a Breach of Data.* The Department may disclose records to appropriate agencies, entities, and persons when (a) the Department suspects or has confirmed that there has been a breach of the system of records; (b) the Department has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department (including its information systems, programs and operations), the Federal Government, or national security; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

(10) *Disclosure in Assisting Another Agency in Responding to a Breach of Data.* The Department may disclose records from this system to another Federal agency or Federal entity, when the Department determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (a) responding to a suspected or confirmed breach; or (b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

System records are maintained in database servers.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Each record in this system can be retrieved by any of the categories of information listed under the CATEGORIES OF RECORDS IN THE SYSTEM section in this notice.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

The Department shall submit a retention and disposition schedule that covers the records contained in this system to the National Archives and Records Administration (NARA) for review. The records will not be destroyed until such time as NARA approves said schedule.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Access to this system will require a unique user identification as well as a password to enter the system. Users will be required to change their passwords periodically, and they will not be allowed to repeat old passwords. Any individual attempting to log on who fails is locked out of the system after three attempts. Access after that time requires intervention by the system manager.

The computer system employed by the Department offers a high degree of resistance to tampering and circumvention. This security system limits data access to Department and contract staff on a ''need to know'' basis and controls individual users' ability to access and alter records within the system.

The location of the server includes safeguards and firewalls, including the physical security of the server room. In addition, the server is located in a secure room, with limited access only through a special pass. Further, all physical access to the site where the server is maintained is controlled and monitored by security personnel who check each individual entering the building for his or her employee or visitor badge.

In addition to these controls, the Department's policies and procedures require that computers are not left unattended when users access the database and require that sensitive information is placed out of sight if visitors are present.

The Department's policies and procedures ensure that shared output does not contain sensitive information and that aggregated data cannot be used to identify individuals.

In addition, the following guidelines and procedures have been implemented for protecting sensitive data and resources in this system:

- Users must use two-factor authentication to access the Department of Education network.
- Users are not permitted to copy files to portable electronic media such as compact discs or USB drives.

RECORD ACCESS PROCEDURES:

If you wish to gain access to your record in the system of records, contact the system manager at the address listed above. You must provide necessary particulars such as your name, DOB, SSN, and any other identifying information requested by the Department while processing the request to distinguish between individuals with the same name. Requests by an individual for access to a record must meet the requirements of the regulations in 34 CFR 5b.5, including proof of identity.

CONTESTING RECORD PROCEDURES:

If you wish to change the content of a record regarding you in this system of records, you must contact the system manager at the address listed above and provide your name, DOB, SSN and any other identifying information requested by the Department. Your request must also reasonably identify the record and provide a written justification for the change. Requests to amend a record must meet the regulations in 34 CFR 5b.7.

NOTIFICATION PROCEDURES:

If you wish to determine whether a record exists regarding you in the system of records, contact the system manager at the address listed above. You must provide necessary particulars such as your name, DOB, SSN, and any other identifying information requested by the Department while processing the request to distinguish between individuals with the same name. Requests must meet the requirements of the regulations in 34 CFR 5b.5.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

The system of records was originally published in the **Federal Register** on April 8, 2004 (69 FR 18724).

[FR Doc. 2020–16230 Filed 7–30–20; 8:45 am]

BILLING CODE 4000–01–P

ELECTION ASSISTANCE COMMISSION

Sunshine Act Meetings

AGENCY: U.S. Election Assistance Commission.

ACTION: Sunshine Act Notice; Notice of Public Meeting Agenda.

SUMMARY: Public Meeting: U.S. Election Assistance Commission Board of Advisors Executive Officers Elections Meeting.

DATES: August 17, 2020 2:00 p.m.–3:30 p.m. Eastern.

ADDRESSES: Virtual via Zoom.

The hearing is open to the public and will be livestreamed on the U.S. Election Assistance Commission YouTube Channel: *https://www.youtube.com/channel/UCpN6i0g2rlF4ITWhwvBwwZw.*

FOR FURTHER INFORMATION CONTACT: Kristen Muthig, Telephone: (202) 897–9285, Email: *kmuthig@eac.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: In accordance with the Government in the Sunshine Act (Sunshine Act), Public Law 94–409, as amended (5 U.S.C. 552b), the U.S. Election Assistance Commission (EAC) will conduct a virtual meeting of the Board of Advisors to elect new Executive Officers for the 2020–2021 term.

Agenda: The U.S. Election Assistance Commission (EAC) Board of Advisors will hold the 2020 Executive Officers Elections Meeting primarily to conduct elections for the offices of Chair, Vice Chair, and Secretary for the 2020–2021 term.

Background: The Board of Advisors Executive Committee consists of a Chair, Vice Chair, and Secretary. Pursuant to the Board of Advisors Bylaws, the elections for these offices are to take place each year during the Board of Advisors annual meeting. The Board of Advisors held the first part of the Annual Meeting on June 16, 2020, at which time the Board announced the Executive Officer nominating period was extended through July 16, 2020. The Board of Advisors membership will review the received nominations and vote for a new Chair, Vice Chair, and Secretary to serve the 2020–2021 term during this August 17, 2020 public meeting.

The full agenda will be posted in advance on the EAC website: *https://www.eac.gov.*

STATUS: This hearing will be open to the public.

Amanda Joiner,

Associate Counsel, U.S. Election Assistance Commission.

[FR Doc. 2020–16820 Filed 7–29–20; 4:15 pm]

BILLING CODE P

DEPARTMENT OF ENERGY

Request for Information Extension: Energy Storage Grand Challenge

AGENCY: Department of Energy.

ACTION: Request for information; extension of public comment period.

SUMMARY: On July 16, 2020, the U.S. Department of Energy (DOE) published a notice of Request for Information (RFI) to help support the Energy Storage Grand Challenge. The notice provided an opportunity for submitting electronic, written responses to the RFI by August 21, 2020. DOE is extending the public comment period for submitting comments to the RFI by 10 days to August 31, 2020.

DATES: The comment period for the RFI published on July 16, 2020 (85 FR 43232) is extended. DOE will accept responses regarding this request for information received no later than August 31, 2020.

ADDRESSES: Comments must be submitted electronically to *rticstorage@hq.doe.gov. Responses must be provided as a Microsoft Word (.doc) or (.docx) attachment to the email with no more than 10 pages in length for each section listed in the RFI. Only electronic responses will be accepted. Response Guidance:* Please identify your answers by responding to a specific question or topic if possible. Respondents may answer as many or as few questions as they wish.

FOR FURTHER INFORMATION CONTACT: Requests for additional information may be submitted electronically to Rima Oueid at *rticstorage@hq.doe.gov* at (202) 586–5000. Further instruction can be found in the RFI document posted on *https://eereexchange.energy.gov/.*

SUPPLEMENTARY INFORMATION: On July 16, 2020, DOE published a notice of RFI to support the Energy Storage Grand Challenge and to solicit feedback from industry, academia, research laboratories, government agencies, and other stakeholders on issues related to challenges and opportunities in the mobile and stationary energy storage industry. This RFI is solely for information and planning purposes and does not constitute a Request for Proposal (RFP). Information received may be used to assist the DOE in planning the scope of future technology studies, deployment, or technology commercialization efforts and may be shared with other federal agencies. The DOE may also use this RFI to gain public input on its efforts, expand and facilitate public access to the DOE's resources, and to mobilize investment in U.S. energy storage technologies as well as ancillary technologies and efforts that will enable commercialization and widespread adoption. The information collected may be used for internal DOE planning and decision-making to ensure that future activities maximize public benefit while advancing the Administration's goals for leading the world in building a competitive, clean energy economy; securing America's energy future; reducing carbon pollution; and creating domestic jobs.

DOE believes that extending the comment period to allow additional time for interested parties to submit comments is appropriate. Therefore, DOE is extending the deadline for response until August 31, 2020, to provide interested parties additional time to prepare and submit responses.

Signing Authority

This document of the Department of Energy was signed on July 27, 2020, by Conner Prochaska Chief, Commercialization Officer, Office of Technology Transitions; Alex Fitzsimmons Deputy Assistant Secretary for Energy Efficiency, Office of Energy Efficiency and Renewable Energy; and Michael Pesin, Deputy Assistant Secretary, Office of Electricity, 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 July 28, 2020.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2020–16606 Filed 7–30–20; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG20–219–000.
Applicants: SR Georgia Portfolio I MT, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of SR Georgia Portfolio I MT, LLC.
Filed Date: 7/24/20.
Accession Number: 20200724–5144.
Comments Due: 5 p.m. ET 8/14/20.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER19–1644–001.
Applicants: Richland-Stryker Generation LLC.
Description: Report Filing: Refund report to be effective N/A.
Filed Date: 7/27/20.
Accession Number: 20200727–5123.
Comments Due: 5 p.m. ET 8/17/20.
Docket Numbers: ER20–1970–000.
Applicants: Diamond Spring, LLC.
Description: Supplement to June 2, 2020 Diamond Spring, LLC tariff filing.
Filed Date: 7/24/20.
Accession Number: 20200724–5130.
Comments Due: 5 p.m. ET 8/3/20.
Docket Numbers: ER20–2101–001.
Applicants: Fern Solar LLC.
Description: Tariff Amendment: Amendment to 1 to be effective 7/15/2020.
Filed Date: 7/24/20.
Accession Number: 20200724–5143.
Comments Due: 5 p.m. ET 8/14/20.
Docket Numbers: ER20–2179–000; ER20–1907–000; ER20–1980–001; ER20–1985–000; ER20–1986–000; ER20–1987–000; ER20–1988–000; ER20–1991–000; ER20–2012–000; ER20–2019–000; ER20–2027–000; ER20–2049–000; ER20–2064–000; ER20–2069–000; ER20–2070–000; ER20–2153–000; ER20–2237–000; ER20–2380–000.
Applicants: Baldwin Wind Energy, LLC, Minco Wind I, LLC, Cedar Springs Wind, LLC, Northern Colorado Wind Energy Center, LLC, Day County Wind I, LLC, Cerro Gordo Wind, LLC, Northern Colorado Wind Energy Center II, LLC, Ponderosa Wind, LLC, Orbit Bloom Energy, LLC, Gray County Wind, LLC, Cedar Springs Transmission, LLC, Cedar Springs Wind III, LLC, High Majestic Wind I, LLC, Wheatridge Wind Energy, LLC, Wheatridge Wind Energy II, LLC, Sanford Airport Solar, LLC, Weatherford Wind, LLC, Saint Solar, LLC.
Description: Amendment to Applications for Authorization to Make Market-Based Power Sales, et al. of the NextEra Companies.
Filed Date: 7/24/20.
Accession Number: 20200724–5140.
Comments Due: 5 p.m. ET 8/3/20.
Docket Numbers: ER20–2507–000.
Applicants: Vermont Transco LLC.
Description: Notice of Cancellation of Original Rate Schedules 5 and 6 of Vermont Transco LLC.
Filed Date: 7/27/20.
Accession Number: 20200727–5087.
Comments Due: 5 p.m. ET 8/17/20.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by 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: July 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–16674 Filed 7–30–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RD20–7–000]

Commission Information Collection Activities (FERC–725G); Comment Request; Revision

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of revision of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the proposed changes to the information collection FERC–725G (Mandatory Reliability Standards for the Bulk-Power System: PRC Reliability Standards) and will be submitting the information collection to the Office of Management and Budget (OMB) for review.

DATES: Comments on the collection of information are due September 29, 2020.

ADDRESSES: Comments should be submitted to the Commission, in Docket No. RD20–7–000, by one of the following methods:

- *eFiling at Commission's Website: http://www.ferc.gov/docs-filing/efiling.asp.*
- *U.S. Postal Service Mail:* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.
- Effective 7/1/2020, delivery of filings other than by eFiling or the U.S. Postal Service should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at *http://www.ferc.gov.* For user assistance, contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free).

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov/docs-filing/docs-filing.asp.*

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov,* and telephone at (202) 502–8663.

SUPPLEMENTARY INFORMATION: *Title:* FERC–725G, Mandatory Reliability Standards for the Bulk-Power System: PRC Reliability Standards.

OMB Control No.: 1902–0252.

Type of Request: Revisions to FERC–725G information collection requirements, as discussed in Docket No. RD20–7.[1]

Abstract: The proposed Reliability Standard PRC–024–3 improves upon Reliability Standard PRC–024–2 by clarifying the voltage and frequency protection settings requirements, so that generating resources including inverter-based resources (IBR) continue to

[1] Note that Docket No. RD20–4 is pending and proposes changes to FERC–725G. Those proposed changes in Docket No. RD20–4 are separate and not addressed in this notice.

support grid stability during defined system voltage and frequency excursions. The proposed Reliability Standard PRC–024–3 includes modifications to the applicability including two new facilities: generator step-up transformer (GSU)/main power transformer (MPT for IBR) and unit auxiliary transformer (UAT).

On August 8, 2005, Congress enacted into law the Electricity Modernization Act of 2005, which is Title XII, Subtitle A, of the Energy Policy Act of 2005 (EPAct 2005).[2] EPAct 2005 added a new section 215 to the FPA, which required a Commission-certified Electric Reliability Organization (ERO) to develop mandatory and enforceable Reliability Standards, which are subject to Commission review and approval. Once approved, the Reliability Standard may be enforced by the ERO subject to Commission oversight, or the Commission can independently enforce Reliability Standards.[3]

On February 3, 2006, the Commission issued Order No. 672, implementing section 215 of the FPA.[4] Pursuant to Order No. 672, the Commission certified one organization, North American Electric Reliability Corporation (NERC), as the ERO.[5] The Reliability Standards developed by the ERO and approved by the Commission apply to users, owners and operators of the Bulk-Power System as set forth in each Reliability Standard.

On March 20, 2020, North American Electric Reliability Corporation (NERC) submitted for approval proposed Reliability Standard PRC–024–3 (Frequency and Voltage Protection Settings for Generating Resources.), as well as the proposed implementation plan, Violation Risk Factors, and Violation Severity Levels. NERC asserts that PRC–024–3 improves upon currently effective Reliability Standard PRC–024–2 by clarifying the voltage and frequency protection settings requirements so that generating resources including inverter-based resources (IBR) continue to support grid stability during defined system voltage and frequency excursions.

NERC's filed petition was noticed on March 26, 2020, with interventions, comments and protests due on or before April 20, 2020. This due date was extended to May 1, 2020, due to the COVID–19 pandemic. One motion to intervene and comment was filed by California Independent System Operator supporting approval of proposed Reliability Standard PRC–024–3 under Docket No. RD20–7.

Reliability Standard PRC–024–3 was approved by FERC on 7/9/2020 in a Delegated Letter Order (DLO).[6]

Type of Respondent: Generator Owner.

Estimate of Annual Burden:[7] Our estimate of the number of respondents affected is based on the NERC Compliance Registry as of June 1, 2020.[8] According to the Compliance Registry, NERC has registered 975 generator owners within the United States.

The burden estimates reflect the standards and the number of affected entities.

Estimates for the additional average annual burden and cost[9] due to Docket No. RD20–7–000 follow.

FERC–725G, MODIFICATIONS DUE TO DOCKET NO. RD20–7

[& PRC–024–3 (Generator Frequency and Voltage Protective Relay Settings)][10]

Function	Number of respondents	Number of annual responses per respondent	Total number of annual responses	Average burden hours & cost ($) per response	Total annual burden hours & total annual cost ($)
	(1)	(2)	(1) × (2) = (3)	(4)	(3) × (4) = (5)
Develop coordination and relay settings procedures (one-time implementation in Year 1)[11].	975 (GO)	1	975 (one-time) ...	8 hrs.; $669.36 ...	7,800 hrs. (one-time); $652,626.00.
Implement Relay Settings (one-time implementation in Year 1)[12].	975 (GO)	1	975 (one-time) ...	8 hrs.; $561.52 ...	7,800 hrs. (one-time); $547,482.00.
Evidence Retention (ongoing, starting in Year 1)[13]	975 (GO)	1	975	1 hr.; $41.03	975 hrs.; $40,004.25.
Total	.....	.....	.....	.....	16,575 hrs.; $1,240,112.25.

Comments: Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

[2] Energy Policy Act of 2005, Public Law 109–58, Title XII, Subtitle A, 119 Stat. 594, 941 (codified at 16 U.S.C. 824*o*).

[3] 16 U.S.C. 824*o*(e)(3).

[4] *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards,* Order No. 672, FERC Stats. & Regs. 31,204, *order on reh'g,* Order No. 672–A, FERC Stats. & Regs. 31,212 (2006).

[5] *North American Electric Reliability Corp.,* 116 FERC 61,062, *order on reh'g and compliance,* 117 FERC 61,126 (2006), *order on compliance,* 118 FERC 61,190, *order on reh'g,* 119 FERC 61,046 (2007), *aff'd sub nom. Alcoa Inc.* v. *FERC,* 564 F.3d 1342 (DC Cir. 2009).

[6] The DLO is posted in eLibrary at *https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15579259.*

[7] Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. See 5 CFR 1320 for additional information on the definition of information collection burden.

[8] NERC Compliance Registry (June 1, 2020), *available at https://www.nerc.com/pa/comp/Registration%20and%20Certification%20DL/NERC_Compliance_Registry_Matrix_Excel.xlsx.*

[9] The hourly cost estimates are based on wage data from the Bureau of Labor Statistics for May 2019 (at *https://www.bls.gov/oes/current/naics2_22.htm*) and benefits data for Dec. 2019 (issued March 2020, at *https://www.bls.gov/news.release/ecec.nr0.htm*). The hourly costs (for wages and benefits) are for: Electrical Engineer (Occupation code 17–2071), $70.91; Manager (Occupation code 11–0000), $97.15; and Information and Record Clerk (Occupation code 43–4199), $41.03.

[10] The Generator Owners will have one-time burden (*e.g.,* to develop setting procedures, a coordination process, and a process for implementing relay settings) as well as ongoing records retention requirements. The one-time burden is in Year 1; annual ongoing burden starts in Year 1.

[11] The hourly cost (for wages plus benefits) assumes equal amounts of time spent by the Electrical Engineer and Manager. The average hourly cost is $83.67 (($70.19 + $97.15)/2).

[12] The hourly cost (for wages plus benefits) is $70.19 for the Electrical Engineer.

[13] The hourly cost (for wages plus benefits) is $41.03 for the Information and Record Clerk.

Dated: July 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–16679 Filed 7–30–20; 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: RP20–1036–000.

Applicants: Greylock Pipeline, LLC.

Description: Tariff Cancellation: Full Tariff Cancellation to be effective 8/1/2020.

Filed Date: 7/24/20.

Accession Number: 20200724–5000.

Comments Due: 5 p.m. ET 8/5/20.

Docket Numbers: RP20–1037–000.

Applicants: Portland Natural Gas Transmission System.

Description: § 4(d) Rate Filing: PXP Ph II Agmt Shipper Name Change to be effective 7/24/2020.

Filed Date: 7/24/20.

Accession Number: 20200724–5027.

Comments Due: 5 p.m. ET 8/5/20.

Docket Numbers: RP20–1039–000.

Applicants: Greylock Shawville Pipeline, LLC.

Description: § 4(d) Rate Filing: Normal filing Change in name to be effective 8/1/2020.

Filed Date: 7/24/20.

Accession Number: 20200724–5072.

Comments Due: 5 p.m. ET 8/5/20.

Docket Numbers: RP20–1040–000.

Applicants: Enable Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Negotiated Rate Filing—July 24 2020 Tenaska to be effective 7/24/2020.

Filed Date: 7/24/20.

Accession Number: 20200724–5111.

Comments Due: 5 p.m. ET 8/5/20.

Docket Numbers: RP20–1041–000.

Applicants: Greylock Pipeline, LLC.

Description: § 4(d) Rate Filing: base line new to be effective 8/1/2020.

Filed Date: 7/24/20.

Accession Number: 20200724–5133.

Comments Due: 5 p.m. ET 8/5/20.

Docket Numbers: RP20–1042–000.

Applicants: Northern Natural Gas Company.

Description: Compliance filing 20200724 2019 Operational Purchases and Sales Report to be effective N/A.

Filed Date: 7/24/20.

Accession Number: 20200724–5159.

Comments Due: 5 p.m. ET 8/5/20.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by 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: July 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–16673 Filed 7–30–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–2505–000]

Triple H Wind Project, 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 Triple H Wind Project, 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 August 17, 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: July 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–16675 Filed 7–30–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER20–2506–000]

Dakota Range III, 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 Dakota Range III, 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 August 17, 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: July 27, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–16678 Filed 7–30–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Central Valley Project—Rate Order No. WAPA–194

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of proposed formula rates for Energy Imbalance Market services, Sale of Surplus Products, and revisions to existing Energy Imbalance and Generator Imbalance rate schedules.

SUMMARY: Western Area Power Administration (WAPA) proposes new formula rates and revisions to the existing Energy Imbalance (EI) and Generator Imbalance (GI) rate schedules for the Central Valley Project (CVP). The new rates are associated with two events: Participation in the California Independent System Operator's (CAISO) Energy Imbalance Market (EIM) and aligning CVP's Sale of Surplus Products (SSP) with other WAPA regions.

DATES: A consultation and comment period will begin July 31, 2020 and end October 29, 2020. WAPA will present a detailed explanation of the proposed formula rates and other modifications at a public information forum that will be held on August 17, 2020, from 9 a.m. to 12 p.m. PDT. WAPA also will host a public comment forum on August 17, 2020, starting at 1 p.m. which will remain open until all comments are acknowledged, or no later than 4 p.m. PDT. WAPA will conduct both the public information forum and public comment forum via WebEx. Instructions for participating in the forums via WebEx will be posted on WAPA's website at least 14 days prior to the public information and comment forums at *https://www.wapa.gov/regions/SN/rates/Pages/Rate-Case-2021-WAPA-194.aspx.* WAPA will accept written comments any time during the consultation and comment period.

ADDRESSES: Written comments and requests to be informed of Federal Energy Regulatory Commission (FERC) actions concerning the proposed formula rates and other changes submitted by WAPA to FERC for approval should be sent to: Ms. Sonja Anderson, Regional Manager, Sierra Nevada Region, Western Area Power Administration, 114 Parkshore Drive, Folsom, California 95630, or email: *SNR-RateCase@wapa.gov.* WAPA will post information about the proposed formula rates, other changes and written comments received to its website at: *https://www.wapa.gov/regions/SN/rates/Pages/Rate-Case-2021-WAPA-194.aspx.*

FOR FURTHER INFORMATION CONTACT: Ms. Autumn Wolfe, Rates Manager, Sierra Nevada Region, Western Area Power Administration, (916) 353–4686 or email: *SNR-RateCase@wapa.gov.*

SUPPLEMENTARY INFORMATION: To accommodate WAPA's participation in EIM as a Transmission Provider within the Balancing Authority of Northern California (BANC) Balancing Authority Area (BAA), WAPA is proposing new formula rate schedules for: (1) EIM Administrative Service (CV–EIM1S), (2) EIM EI Service (CV–EIM4S), and (3) EIM GI Service (CV–EIM9S). WAPA is planning to participate in the EIM through BANC as the Balancing Authority and EIM Entity for the WAPA Sub-Balancing Authority Area (Sub-BAA). EIM settles EI and GI services differently than WAPA's existing rate schedules for similar services. In EIM, CAISO economically dispatches energy under its EIM Tariff to meet the imbalances for loads and resources over multiple BAAs. CAISO provides a centralized, automated, and region-wide dispatch for imbalances. The proposed new EIM Administrative Services formula rate would allow WAPA to pass through administrative costs incurred by WAPA resulting from its participation in EIM as a Transmission Provider. The proposed new formula rates and cost allocation for Administrative, EI and GI services would be in effect when WAPA is participating in the EIM, and to the extent WAPA incurs associated settlements during market suspension or contingency.

In no relation to EIM, WAPA proposes revising existing rate schedules for EI services (CV–EID4) and GI services (CV–GID1). WAPA proposes to settle EI services financially rather than with energy. The proposed component one modification to both EI and GI schedules is: ''[EI service/GI service] is applied to deviations as follows unless otherwise dictated by contract or policy: (1) Deviations within the bandwidth will be tracked and settled financially, at the greater of the California Independent System Operator market price, or WAPA's actual cost.'' The GI schedule further adds to component one: ''to the extent that an entity incorporates intermittent resources, deviations will be charged as follows unless otherwise dictated by contract or

policy: (1) Deviations within the bandwidth will be tracked and settled financially at the greater of the California Independent System Operator market price or WAPA's actual cost.'' The revised EI services (CV–EID5) and GI services (CV–GID2) rate schedules would remain in effect when the EIM has been suspended.

In addition to the changes to accommodate EIM, WAPA Sierra Nevada Region (SN) is proposing a new rate schedule for the sale of surplus products (CV–SSP1) to make its practices consistent with other WAPA regions. This new formula rate would be for the sale of surplus energy and capacity products such as: Energy, regulation, reserves, frequency response, and resource sufficiency.

The proposed rates will provide WAPA with sufficient revenue to recover annual Operation, Maintenance and Replacement (OM&R) expenses, interest expense, aid to irrigation, and capital repayment requirements while ensuring repayment of the project within the cost recovery criteria set forth in Department of Energy (DOE) Order Resource Application 6120.2.

WAPA's proposed formula rates would go into effect on April 1, 2021 and remain in effect until December 31, 2024, or until WAPA changes the formula rates through another public rate process pursuant to 10 CFR part 903, whichever occurs first.

EIM Administrative Service Charge

WAPA proposes a new rate schedule, CV–EIM1S. This rate would apply under Schedule 1S of the WAPA Tariff. Rates under CV–EIM1S would apply when WAPA, as Transmission Provider, is participating in EIM and when EIM has not been suspended. EIM Administrative service and associated rates would apply in addition to the services provided under Schedule 1 of the WAPA Tariff, which are incorporated in existing WAPA transmission service rates. To the extent WAPA incurs EIM Administrative service related charges during periods of market suspension or contingency, as described in Section 11 of Attachment S to the WAPA Tariff, Schedule 1S and CV–EIM1S shall also apply to ensure that WAPA, as Transmission Provider, remains revenue-neutral for its participation in EIM.

EIM Administrative service recovers the administrative costs for participating in the EIM by WAPA as a Transmission Provider including, but not limited to, such administrative charges as may be incurred by WAPA from the EIM Market Operator (MO) and those MO charges passed through by the EIM Entity.

Unless such charges are allocated to the Transmission Customer directly by the EIM Entity, all Transmission Customers purchasing Long-Term Firm Point-to-Point Transmission Service, Short-Term Firm Point-to-Point Transmission Service, Non-Firm Point-to-Point Transmission Service, or Network Integration Transmission Service from WAPA would be required to acquire EIM Administrative Service from WAPA.

Under the proposal, the EIM MO's administrative service charge, as defined in the MO Tariff, would be included in this rate. This rate also includes administrative charges assessed to WAPA by the EIM Entity based on net energy load within the WAPA Sub-BAA. The new proposed formula rate for EIM Administrative Service Charge would be sub-allocated to WAPA's Transmission Customers based on load ratio share for the time period in which WAPA incurs EIM administrative costs.

WAPA's costs for EIM start up, including software, hardware, or other features, to implement EIM, would not be included as administrative costs under this schedule. WAPA proposes to treat its startup costs for EIM under the cost allocations procedures discussed under the Energy Imbalance Market Cost Allocation heading below.

EIM Energy Imbalance (EI) Service

WAPA proposes a new rate schedule, CV–EIM4S. This rate would apply under Schedule 4S of the WAPA Tariff. Rates under CV–EIM4S would apply when WAPA, as Transmission Provider, is participating in EIM and when EIM has not been suspended. In accordance with Section 11 of Attachment S to the WAPA Tariff, Schedule 4 of the WAPA Tariff would apply when WAPA is not participating in EIM or when EIM has been suspended. To the extent WAPA incurs EIM EI service related charges from the EIM Entity during periods of market suspension or contingency, as described in Section 11 of Attachment S to the WAPA Tariff, Schedule 4S and CV–EIM4S would also apply to ensure that WAPA, as Transmission Provider, remains revenue-neutral for its participation in the EIM.

EI service is provided when a difference occurs between the scheduled and the actual delivery of energy to a load located within the WAPA Sub-BAA. WAPA offers this service when transmission service is used to serve load within the WAPA Sub-BAA.

Unless subsequently imposed by the MO as part of the MO Tariff and promulgated by WAPA through rate proceedings, there would be no incremental transmission charge assessed for transmission use related to EIM EI service. Transmission Customers must have transmission service rights, as set forth in Attachment S of WAPA's Open Access Transmission Tariff (OATT).

The formula rate for EI service is the deviation of the Transmission Customer's metered load compared to the load component of the Base Schedule settled as Uninstructed Imbalance Energy (UIE) for the period of the deviation at the applicable Load Aggregation Point (LAP) price where the load is located.

Unless such charges are allocated to the Transmission Customer directly by the EIM Entity, a Transmission Customer would be responsible for any pass-through charges/credits associated with applicable EI service charges allocated to WAPA, as Transmission Provider, for its participation in the EIM, in accordance with this rate schedule. WAPA would sub-allocate load charges based on a Transmission Customer's load ratio share.

EIM Generator Imbalance (GI) Service

WAPA proposes new rate schedule, CV–EIM9S. This rate would apply under Schedule 9S of the WAPA Tariff. Rates under CV–EIM9S would apply when WAPA, as Transmission Provider, is participating in EIM and when EIM has not been suspended. In accordance with Section 11 of Attachment S to the WAPA Tariff, Schedule 9 of the WAPA Tariff would apply when WAPA is not participating in the EIM and when the EIM has been suspended. To the extent WAPA incurs EIM GI Service related charges from the EIM Entity during periods of market suspension or contingency, as described in Section 11 of Attachment S to the WAPA Tariff, Schedule 9S and CV–EIM9S would also apply to ensure WAPA, as Transmission Provider, remains revenue neutral for its participation in EIM.

GI service is provided when a difference occurs between the output of a generator that is not an EIM Participating Resource located in the WAPA Sub-BAA, as reflected in the resource component of the Transmission Customer Base Schedule, and the delivery schedule from that generator to (1) another BAA, (2) the BANC BAA, or (3) a load within the WAPA Sub-BAA.

Unless subsequently imposed by the MO as part of the MO Tariff and promulgated by WAPA through rate proceedings, there would be no incremental transmission charge assessed for transmission use related to

EIM GI service. Transmission Customers must have transmission service rights, as set forth in Attachment S of WAPA's OATT.

WAPA's formula rate for GI services does not have a direct rate component for GI services for Non-Participating Resources. WAPA expects all Participating Resources to directly settle with CAISO. However, if charges are allocated to the Transmission Provider by the EIM Entity, a Transmission Customer would be responsible for any pass-through charges/credits associated with applicable GI Service charges allocated to WAPA, as Transmission Provider, for its participation in EIM, in accordance with this rate schedule. Such charges may include those due to operational adjustments of any affected Interchange. WAPA would direct assign charges and/or sub-allocate charges based on the Transmission Customer's load ratio share. The EIM Entity does not allow Non-Participating Resources. In the event the EIM Entity modifies it procedures to allow Non-Participating Resources, WAPA may update this rate.

Sale of Surplus Products (SSP)

WAPA–SN has traditionally marketed surplus products such as energy, regulation, and reserves through negotiated rates and under bilateral contracts. WAPA is proposing to add a new rate schedule, CV–SSP1, to make WAPA–SN's practices consistent with other WAPA regions. This proposed rate would be for the sale of surplus energy and/or capacity products. This includes: (1) Energy, (2) Frequency Response, (3) Regulation, (4) Reserves, and (5) Resource Sufficiency. If any surplus products are available, WAPA could make the product(s) available for sale, provided entities enter into separate agreement(s) which would specify the terms of sale(s).

WAPA would determine the charge for each product at the time of sale to be the greater of WAPA's cost or market rates to include transmission charges. WAPA would use a separate agreement(s) to specify the terms of sale(s). The customer would be responsible for acquiring additional transmission service necessary to deliver the product(s), for which a separate charge may be incurred from the transmission provider.

WAPA proposes to include two new products for sale: Frequency Response Reserve (FRR) and Resource Sufficiency. FRR is a new product requirement based on Reliability Standard BAL–003–1.1, as approved by North American Electric Reliability Corporation. FRR is used to serve load immediately in the event of a system contingency. Generating units that are on-line and generating at less than maximum output provide these reserves. FRR supplies capacity that is available immediately to serve load and is synchronized with the power system. BANC is implementing this requirement in April 2021, and WAPA therefore proposes inclusion of FRR in this proposed rate.

Resource Sufficiency product supplies capacity for EIM balancing resources and load. WAPA bids energy into the EIM market for immediate dispatch. Resource Sufficiency is not a spin or regulation product. It is a new product available to BANC EIM members as a balancing product. WAPA's Merchant is responsible for and handles the supply of the product; as a result, WAPA proposes adjustments to the EIM base schedule market submission.

Energy Imbalance Market Cost Allocation

WAPA is proposing a cost allocation methodology for EIM implementation costs and net EIM ongoing charges and/or benefits to flow through to the CVP Power Revenue Requirement (PRR). WAPA proposes BANC, WAPA, and Reclamation EIM implementation costs be recovered over a period not to exceed three years. WAPA has identified four separate categories to allocate ongoing charges and/or benefits: (1) Conforming loads; (2) non-conforming loads; (3) small loads; and (4) statutory loads.

A conforming load is a type of load generally associated with a weather-based element, which is somewhat predictable based on given conditions. For conforming loads, WAPA proposes to allocate the net EIM ongoing cost and/or net benefits to the CVP PRR.

A non-conforming load changes abnormally—such as a factory that consumes high demand intermittently. For non-conforming loads, WAPA proposes to allocate the net EIM ongoing charges and/or benefits directly to the customer(s) with the non-conforming load(s), in accordance with WAPA's applicable business practice posted on its Open Access Same-time Information System (OASIS), or at *http://www.oasis.oati.com/wasn/index.html.*

For customers with loads less than one megawatt and are too small to identify, WAPA proposes to allocate EIM implementation costs and net ongoing charges and/or benefits to the CVP PRR. WAPA proposes to assign load charges and/or benefits for those customers with statutory obligations, such as Project Use, to the CVP PRR. Under this proposal, customers with small loads or with statutory obligations will not directly pay nor benefit from EIM charges.

Legal Authority

Existing DOE procedures for public participation in power and transmission rate adjustments (10 CFR part 903) were published on September 18, 1985, and February 21, 2019.[1] The proposed action constitutes a minor rate adjustment, as defined by 10 CFR 903.2(e). In accordance with 10 CFR 903.15(a) and 10 CFR 903.16(a), WAPA will hold public information and public comment forums for this rate adjustment. WAPA will review and consider all timely public comments at the conclusion of the consultation and comment period and make amendments or adjustments to the proposal as appropriate.

WAPA is establishing the formula rates for CVP in accordance with section 302 of the DOE Organization Act (42 U.S.C. 7152). This Act transferred to, and vested in, the Secretary of Energy the power marketing functions of the Secretary of the Department of the Interior and the Bureau of Reclamation (Reclamation) under the Reclamation Act of 1902 (ch. 1093, 32 Stat. 388), as amended and supplemented by subsequent laws, particularly section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)); and other acts that specifically apply to the project involved.

By Delegation Order No. 00–037.00B, effective November 19, 2016, the Secretary of Energy delegated: (1) The authority to develop power and transmission rates to WAPA's Administrator; (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy; and (3) the authority to confirm, approve, and place into effect on a final basis, or to remand or disapprove such rates, to FERC. By Delegation Order No. 00–002.00S, effective January 15, 2020, the Secretary of Energy also delegated the authority to confirm, approve, and place such rates into effect on an interim basis to the Under Secretary of Energy. By Redelegation Order No. 00–002.10E, effective February 14, 2020, the Under Secretary of Energy further delegated the authority to confirm, approve, and place such rates into effect on an interim basis to the Assistant Secretary for Electricity. By Redelegation Order No. 00–002.10–5, effective July 8, 2020, the Assistant Secretary for Electricity further delegated the authority to confirm, approve, and place such rates

[1] 50 FR 37835 (Sept. 18, 1985) and 84 FR 5347 (Feb. 21, 2019).

into effect on an interim basis to WAPA's Administrator. This rate action is issued under Redelegation Order No. 00–002.10–05 and Department of Energy (DOE) procedures for public participation in rate adjustments set forth at 10 CFR part 903.

Availability of Information

All brochures, studies, comments, letters, memorandums, or other documents that WAPA initiates or uses to develop the proposed formula rates are available on WAPA's website at *https://www.wapa.gov/regions/SN/rates/Pages/Rate-Case-2021-WAPA-194.aspx.*

Ratemaking Procedure Requirements

Environmental Compliance

WAPA is in the process of determining whether an environmental assessment or an environmental impact statement should be prepared, or if this action can be categorically excluded from those requirements.[2]

Determination Under Executive Order 12866

WAPA has an exemption from centralized regulatory review under Executive Order 12866; Accordingly, no clearance of this notice by the Office of Management and Budget is required.

Signing Authority

This document of the Department of Energy was signed on July 24, 2020, by Mark A. Gabriel, Administrator, Western Area Power Administration, 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 July 28, 2020.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2020–16683 Filed 7–30–20; 8:45 am]

BILLING CODE 6450–01–P

[2] In compliance with the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321–4347); the Council on Environmental Quality Regulations for implementing NEPA (40 CFR parts 1500–1508); and DOE NEPA Implementing Procedures and Guidelines (10 CFR part 1021).

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2006–0369; FRL–10013–08–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; National Estuary Program (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), National Estuary Program (EPA ICR Number 1500.10, OMB Control Number 2040–0138) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through September 30, 2020. Public comments were previously requested via the **Federal Register** on December 26, 2019 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. 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: Additional comments may be submitted on or before August 31, 2020.

ADDRESSES: Submit your comments to EPA, referencing Docket ID No. EPA–HQ–OW–2006–0369, online using *www.regulations.gov* (our preferred method), by email to *OW-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. 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.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Vince Bacalan, Oceans, Wetlands, and Communities Division; Office of Wetlands, Oceans, and Watersheds, Mail Code 4504T, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–566–0930; fax number: 202–566–1336; email address: *bacalan.vince@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain 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 *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: The National Estuary Program (NEP) involves collecting information from the state or local agency or nongovernmental organizations that receive funds under Sec. 320 of the Clean Water Act (CWA). The regulation requiring this information is found at 40 CFR part 35.

Prospective grant recipients seek funding to develop or oversee and coordinate implementation of Comprehensive Conservation Management Plans (CCMPs) for estuaries of national significance. In order to receive funds, grantees must submit an annual workplan to EPA which are used to track performance of each of the 28 estuary programs currently in the NEP. EPA provides funding to NEPs to support long-term implementation of CCMPs if such programs pass a program evaluation process. The primary purpose of the program evaluation process is to help EPA determine whether the 28 programs included in the National Estuary Program (NEP) are making adequate progress implementing their CCMPs and therefore merit continued funding under Sec. 320 of the Clean Water Act. EPA also requests that each of the 28 NEPs receiving Sec. 320 funds report information that can be used in the GPRA reporting process. This reporting is done on an annual basis and is used to show environmental results that are being achieved within the overall National Estuary Program. This information is ultimately submitted to Congress along with GPRA information from other EPA programs.

Form Numbers: None.

Respondents/affected entities: State or local agencies or nongovernmental

organizations in the National Estuary Program (NEP) that receive grants under Section 320 of the Clean Water Act.

Respondent's obligation to respond: Required to obtain or retain a benefit (Section 320 of the Clean Water Act).

Estimated number of respondents: 28 (total).

Frequency of response: Annual.

Total estimated burden: 5,360 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $319,724 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is a decrease of 240 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This decrease is due to program evaluations taking place for two out of the next three years, according to the evaluation cycle schedule in the current Program Evaluation Guidance.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2020–16575 Filed 7–30–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2013–0303; FRL–10013–12–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NSPS for Equipment Leaks of VOC in Petroleum Refineries (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency has submitted an information collection request (ICR), NSPS for Equipment Leaks of VOC in Petroleum Refineries (EPA ICR Number 0983.16, OMB Control Number 2060–0067), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through September 30, 2020. Public comments were previously requested, via the **Federal Register**, on May 6, 2019 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may neither conduct nor sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before August 31, 2020.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OECA–2013–0303 to EPA online using *www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460; and (2) OMB via email to *oira_submission@omb.eop.gov.*

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.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Patrick Yellin, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–2970; fax number: (202) 564–0050; email address: *yellin.patrick@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain 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 *www.regulations.gov,* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit: *http://www.epa.gov/dockets.*

Abstract: The New Source Performance Standards (NSPS) for Equipment Leaks of VOC in Petroleum Refineries (40 CFR part 60, subpart GGG) were proposed on January 4, 1983; promulgated on May 30, 1984; amended on November 16, 2007 (to add the regulations published at 40 CFR part 60, subpart GGGa); and most-recently amended on June 2, 2008. The standards at Subpart GGG apply to compressors, valves, pumps, pressure relief devices, sampling connection systems, open-ended valves or lines, and flanges or other connectors in VOC service at petroleum refineries that commenced construction, reconstruction, or modification after January 4, 1983, and on or before November 7, 2006. The standards at Subpart GGGa apply to compressors, valves, pumps, pressure relief devices, sampling connection systems, open-ended valves or lines, and flanges or other connectors in VOC service at petroleum refineries that commence construction, reconstruction, or modification after November 7, 2006. This information is being collected to assure compliance with 40 CFR part 60, subparts GGG and GGGa.

In general, all NSPS standards require initial notifications, performance tests, and periodic reports by the owners/operators of the affected facilities. They are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance, and are required of all affected facilities subject to NSPS.

Form Numbers: None.

Respondents/affected entities: Petroleum refineries.

Respondent's obligation to respond: Mandatory (40 CFR part 60, subparts GGG and GGGa).

Estimated number of respondents: 116 (total) are subject to Subpart GGG and 46 of these respondents are also subject to Subpart GGGa.

Frequency of response: Initially, semiannually.

Total estimated burden: 183,700 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $21,200,000 (per year), which includes $0 in annualized capital/startup and/or operation & maintenance costs.

Changes in the Estimates: There is a small increase in burden from the most-recently approved ICR as currently identified in the OMB Inventory of Approved Burdens. This increase is not due to any program changes, or any increase in the number of sources subject to this regulation, or any change in the capital/startup or operation and maintenance (O&M) costs.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2020–16574 Filed 7–30–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2011–0742; FRL–10013–150–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Air Pollution Regulations for Outer Continental Shelf (OCS) Activities (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Air Pollution Regulations for Outer Continental Shelf (OCS) Activities (EPA ICR Number 1601.09, OMB Control Number 2060–0249) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through September 30, 2020. Public comments were previously requested via the **Federal Register** on January 15, 2020, during a 60-day comment period. This notice allows for 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. 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: Additional comments may be submitted on or before August 31, 2020.

ADDRESSES: Submit your comments to EPA, referencing Docket ID No. EPA–HQ–OAR–2011–0724, online using *www.regulations.gov* (our preferred method) or by email at *a-and-r-docket@epa.gov.* 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.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Ben Garwood, Air Quality Policy Division, Office of Air Quality Planning and Standards, C504–03, U.S. Environmental Protection Agency, Research Triangle Park, NC 27709; telephone number: (919) 541–1358; fax number: (919) 541–4028; email address: *garwood.ben@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain 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 *www.regulations.gov.* The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: Section 328 of the Clean Air Act (CAA) gives the EPA responsibility for regulating air pollution from Outer Continental Shelf (OCS) sources located offshore of the states along the Atlantic and Pacific Coasts, and along the eastern Gulf of Mexico coast (off the coast of Florida). In general, OCS sources must obtain OCS permits complying with the EPA's preconstruction permit program (usually Prevention of Significant Deterioration (PSD) requirements) and title V operating permit program and then maintain ongoing compliance with their permit conditions. Industry respondents (OCS permit applicants) include owners or operators of existing and new or modified OCS sources. These owners or operators submit permit applications to the EPA or other delegated reviewing authority. After the EPA or delegated reviewing authority reviews and approves a permit, the owners or operators are required to conduct testing, monitoring, recordkeeping and reporting that will allow the EPA to determine whether these sources are or are not, meeting all applicable standards.

The EPA has delegated the authority to implement and enforce the OCS regulations for sources located off the coast of California to four local air pollution control agencies, although only three of these agencies currently have jurisdiction over OCS sources. The EPA has delegated the authority to implement and enforce the OCS regulations for sources located off a portion of the Atlantic Coast to three state agencies and anticipates approving such delegation to a fourth state in the near future. Delegated authorities review sources' permit applications and reports, issue permits, observe performance tests and conduct inspections to ensure that the sources are meeting all the applicable requirements. Section 176(c) of the CAA (42 U.S.C. 7401 *et seq.*) requires that all federal actions conform with the State Implementation Plans to attain and maintain the National Ambient Air Quality Standards.

The type and quantity of information required under the OCS program will depend on the circumstances surrounding the permit's application. First, the applicant and reviewing authority must determine if the new or modified source requires an OCS permit and, if so, which permit programs need to be addressed (such as PSD, major source nonattainment New Source Review (NSR), minor source NSR and/or the title V operating permit program). If the source is located within 25 miles of the state's seaward boundary (as established in the regulations) the requirements are the same as those that would be applicable in the corresponding onshore area. Sources locating beyond 25 nautical miles from the state seaward boundary are subject to federal air quality requirements including those outlined in the EPA's PSD preconstruction permit program, Part 71 title V operating permit program, New Source Performance Standards and some standards for Hazardous Air Pollutants promulgated under section 112 of the CAA. Where the EPA is the reviewing authority, state and local air pollution control agencies are usually requested to provide information concerning regulation of offshore sources and are provided opportunities to comment on the proposed determinations. The public is also provided an opportunity to comment on the proposed determinations.

Form numbers: None.

Respondents/affected entities: Entities that must apply for and obtain an OCS permit pursuant the OCS permit program as well as state and local agencies that have been delegated authority to implement and enforce the OCS permit program.

Respondent's obligation to respond: Mandatory *(*40 CFR part 55).

Estimated number of respondents: 29 industrial facilities and 7 state and local permitting agencies (total).

Frequency of response: On occasion, as necessary.

Total estimated burden: 20,223 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $1,876,567 (per year), includes $21,496 annualized capital or operation & maintenance costs.

Changes in estimates: There is a decrease of 6,707 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This decrease is primarily due to

a decrease in the projected number of OCS sources subject to the program.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2020–16576 Filed 7–30–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2016–0009; FRL–10013–11–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NESHAP for Group IV Polymers and Resins (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), NESHAP for Group IV Polymers and Resins (EPA ICR Number 2457.04, OMB Control Number 2060–0682), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through September 30, 2020. Public comments were previously requested, via the **Federal Register,** on May 6, 2019 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may neither conduct nor sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before August 31, 2020.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OECA–2016–0009, to EPA online using *www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

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.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Patrick Yellin, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–2970; fax number: (202) 564–0050; email address: *yellin.patrick@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain 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 *www.regulations.gov,* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit: *http://www.epa.gov/dockets.*

Abstract: The National Emission Standards for Hazardous Air Pollutants (NESHAP) for Group IV Polymers and Resins (40 CFR part 63, subpart JJJ) were proposed on March 29, 1995; promulgated on September 12, 1996; and most-recently amended on March 27, 2014. These regulations apply to each new and existing thermoplastic product process units (TPPU) and associated equipment that produce the subset of polymers and resins known as ''Group IV Polymers and Resins'' that is a major source of organic hazardous air pollutants (HAPs). Group IV polymers and resins include the following source categories: Acrylonitrile Butadiene Styrene (ABS), Methyl Methacrylate Acrylonitrile Butadiene Styrene (MABS), Methyl Methacrylate Butadiene Styrene (MABS), Nitrile Resin, Polyethylene Terephthalate (PET), Polystyrene (PS), and Styrene Acrylonitrile (SAN). The following processes are excluded from this rule: Research and development facilities; polymerization processes occurring in a mold; processes which manufacture binder systems containing thermoplastic product for paints, coatings, or adhesives; finishing processes including equipment such as compounding units, spinning units, drawing units, extruding units, and other finishing steps; and solid state polymerization processes. New facilities include those that commenced construction or reconstruction after the date of proposal and meets the new source definitions at § 63.1310(i). This information is being collected to assure compliance with 40 CFR part 63, subpart JJJ.

In general, all NESHAP standards require initial notifications, performance tests, and periodic reports by the owners/operators of the affected facilities. They are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance, and are required of all affected facilities subject to NESHAP.

Form Numbers: None.

Respondents/affected entities: Each new and existing thermoplastic product process unit (TPPU) and associated equipment that produces the subset of polymers and resins known as ''Group IV Polymers and Resins'' that is a major source of organic hazardous air pollutants (HAPs).

Respondent's obligation to respond: Mandatory (40 CFR part 63, subpart JJJ).

Estimated number of respondents: 24 (total).

Frequency of response: Initially, occasionally, semiannually, and quarterly.

Total estimated burden: 141,000 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $23,700,000 (per year), which includes $7,430,000 in annualized capital/startup and/or operation & maintenance costs.

Changes in the Estimates: There is a decrease in burden from the most-recently approved ICR as currently identified in the OMB Inventory of Approved Burdens. This decrease is not due to any program changes. The decrease in burden is due to a decrease in the number of respondents. This decrease was determined based on data collected as part of other recent EPA rulemakings, including a review of chemical manufacturing facilities identified as subject to Subpart JJJ through review of facility air permits and EPA's ECHO and ICIS databases. Due to the decrease in the number of identified facilities, we assume there is zero or negative industry growth over the next three years. Therefore, the total respondent labor burden and operation

and maintenance (O&M) costs have decreased in this ICR.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2020–16579 Filed 7–30–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2014–0034; FRL–10013–10–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NSPS for Kraft Pulp Mill Affected Sources for Which Construction, Reconstruction, or Modification Commenced After May 23, 2013 (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), NSPS for Kraft Pulp Mill Affected Sources for which Construction, Reconstruction, or Modification Commenced After May 23, 2013 (EPA ICR Number 2485.04, OMB Control Number 2060–0690), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through September 30, 2020. Public comments were previously requested, via the **Federal Register**, on May 6, 2019 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may neither conduct nor sponsor, and a person is not required to respond to a collection of information, unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before August 31, 2020.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OECA–2014–0034, to: (1) EPA online using *www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

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.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Patrick Yellin, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–2970; fax number: (202) 564–0050; email address: *yellin.patrick@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain 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 *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit: *http://www.epa.gov/dockets.*

Abstract: The New Source Performance Standards (NSPS) for Kraft Pulp Mill Affected Sources for Which Construction, Reconstruction, or Modification Commenced After May 23, 2013 (40 CFR part 60, subpart BBa) were proposed on May 23, 2013, and promulgated on April 4, 2014. These regulations apply to emissions of particulate matter (PM) and total reduced sulfur (TRS) at recovery furnaces, smelt dissolving tanks (SDTs), lime kilns, digester systems, brown stock washer (BSW) systems, multiple effect evaporator systems and condensate stripper systems at kraft pulp mills that commenced construction, modification or reconstruction after May 23, 2013. At pulp mills, where kraft pulping is combined with neutral sulfite semi-chemical pulping, the provisions of this subpart are applicable when any portion of the material charged to an affected source is produced by the kraft pulping operation. This subpart includes provisions specifying that sources complying with the TRS standard for digester systems, BSW systems, evaporator systems and condensate stripper systems by venting to a control device must collect the gases in a closed-vent system subject to the provisions of 40 CFR part 63, subpart S. Facilities may be exempt from the TRS standard in the NSPS if the facility can demonstrate that TRS emissions from a brown stock washer cannot feasibly be controlled either technically or economically. New facilities include those that commenced construction, modification or reconstruction after the date of proposal. This information is being collected to assure compliance with 40 CFR part 60, subpart BBa.

In general, all NSPS standards require initial notifications, performance tests, and periodic reports by the owners/operators of the affected facilities. They are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance, and are required of all affected facilities subject to NSPS.

Form Numbers: None.

Respondents/affected entities: Kraft pulp mills.

Respondent's obligation to respond: Mandatory (40 CFR part 60, subpart BBa).

Estimated number of respondents: 14 (total).

Frequency of response: Initially, occasionally, and semiannually.

Total estimated burden: 5,250 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $1,580,000 (per year), which includes $976,000 in annualized capital/startup and/or operation & maintenance costs.

Changes in the Estimates: There is an adjustment increase in the total estimated burden as currently identified in the OMB Inventory of Approved Burdens. This increase is not due to any program changes or changes in regulatory requirements. The change in the burden and cost estimates is due primarily to an increase in the number of new or modified sources. The number of sources subject to the regulation has increased in the past three years, based on the continued assumption that an average of two existing mills (previously subject to 40 CFR part 60, subpart BB) per year will replace aging emission units with new emission units subject to

Subpart BBa. This has led to an increase in O&M costs.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2020–16580 Filed 7–30–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA HQ–OPPT–2020–0078; FRL–10012–06–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Toxic Chemical Release Reporting (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Toxic Chemical Release Reporting (EPA ICR Number 2613.02, OMB Control Number 2070–0212) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through July 31, 2020. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. 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: Additional comments may be submitted on or before August 31, 2020.

ADDRESSES: Submit your comments to EPA, referencing Docket ID No. EPA–HQ–OPPT–2020–0078, online using *www.regulations.gov* (our preferred method), by email to *oppt.ncic@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. 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.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Cassandra Vail, Toxic Release Inventory Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–566–0753; email address: *vail.cassandra@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain 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 *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: Pursuant to section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA, 42 U.S.C. 11001 *et seq.*), certain facilities that manufacture, process, or otherwise use specified toxic chemicals in amounts above reporting threshold levels as provided in 40 CFR 372.25 must submit annually to EPA and to their designated state or Indian country officials toxic chemical release forms containing information specified by EPA; see 42 U.S.C. 11023. In addition, pursuant to section 6607 of the Pollution Prevention Act (PPA, 42 U.S.C. 13101 *et seq.*), facilities reporting under section 313 of EPCRA must also report pollution prevention and waste management data, including recycling information, for such chemicals; see 42 U.S.C. 13106. EPA compiles and stores these reports in a publicly accessible database known as the Toxics Release Inventory (TRI). Regulations at 40 CFR part 372, subpart B, require facilities that meet the above criteria to report annually.

This ICR consolidates the ICR for TRI Reporting currently approved by OMB under OMB Control No. 2025–0009, with the currently approved version of this ICR covering the TRI Reporting of additional chemicals. Upon OMB approval of this ICR, EPA intends to discontinue OMB Control No. 2025–0009.

Form Numbers: EPA Form 9350–1, EPA Form 9350–2, and EPA Form 9350–3.

Respondents/Affected Entities: Regulations at 40 CFR part 372, subpart B, require facilities that meet all the following criteria to report:

1. The facility has 10 or more full-time employee equivalents (*i.e.,* a total of 20,000 hours worked per year or greater; see 40 CFR 372.3); and

2. The facility is included in a North American Industry Classification System (NAICS) Code listed at 40 CFR 372.23 or under Executive Order 13148, Federal facilities regardless of their industry classification; and

3. The facility manufactures (defined to include importing), processes, or otherwise uses any EPCRA section 313 (TRI) chemical in quantities greater than the established thresholds for the specific chemical in the course of a calendar year.

Respondent's obligation to respond: Mandatory (40 CFR 372).

Estimated number respondents: 76,534.

Frequency of response: Annual.

Total estimated burden: 3,615,128 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $200,205,764 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is an increase of 3,597,275 hours. This ICR submittal merges the existing ICR (2025–0009, approved by OMB on October 15, 2018) into this ICR number (2070–0212), created to cover the expanded list of toxic chemicals subject to reporting under the NDAA for Fiscal Year 2020, to provide for a single control number. The burden levels already approved under the collections being consolidated in this ICR remain unchanged.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2020–16581 Filed 7–30–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2004–0015; FRL–10013–17–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Clean Water State Revolving Fund Program (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency (EPA) has submitted an information collection request (ICR),

Clean Water State Revolving Fund Program (EPA ICR Number 1391.12, OMB Control Number 2040–0118) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA). This is a proposed extension of the ICR, which is currently approved through September 30, 2020. Public comments were previously requested via the **Federal Register** on January 13, 2020, during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given in this renewal notice, including its estimated burden and cost to the public. 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 31, 2020.

ADDRESSES: Submit your comments to EPA, referencing Docket ID No. EPA–HQ–OW–2006–0369, online using *www.regulations.gov* (our preferred method), by email to *OW-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. 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. Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Mark Mylin, Water Infrastructure Division, Office of Wastewater Management, 4204M, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–564–0607; email address: *mylin.mark@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain 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 *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: The Clean Water State Revolving Funds (CWSRF) were established by the 1987 amendments to the Clean Water Act (CWA) as a financial assistance program for a wide range of wastewater infrastructure and other water quality projects. The 1987 amendments added Title VI to the CWA, enabling EPA to provide grants to all 50 states and Puerto Rico to capitalize CWSRFs. The CWSRFs can provide loans and other forms of assistance for a wide array of projects, including construction of wastewater treatments facilities, green infrastructure projects, agricultural best management practices, and water and energy efficiency improvements. In 2014, Title VI of the CWA was amended by the Water Resources Reform and Development Act (WRRDA). Additional information about the CWSRFs is available at *http://www.epa.gov/cwsrf/learn-about-clean-water-state-revolving-fund-cwsrf.*

Capitalization Grant Agreement/Intended Use Plan—The Capitalization Grant Agreement is the principal instrument by which a CWSRF commits to manage its revolving fund program in conformity with the requirements of the Clean Water Act. The grant agreement contains or incorporates by reference the intended use plan, application materials and CWSRF administrative budget, required certifications, and other documentation required by EPA. The intended use plan describes how a CWSRF program intends to use its funds for the upcoming year to meet the CWA objectives.

Annual Report—The annual report indicates how the CWSRF has met its goals and objectives of the previous state fiscal year as stated in the grant agreement and, more specifically, in the intended use plan. The report provides information on loan recipients, loan amounts, loan terms, project categories of eligible costs, and similar data on other forms of assistance.

Annual Audit—The CWA requires a CWSRF to undergo an annual audit. Though an audit conducted under the Single Audit Act meets this requirement, EPA still recommends that a CWSRF also undergo a separate independent audit as a best management practice. The audit must contain an opinion on the financial condition of the CWSRF program, a report on its internal controls, and a report on compliance with applicable laws and the CWA.

Clean Water National Information Management System (CWNIMS) and CWSRF Benefits Reporting (CBR)—States must enter financial data, including project disbursements, into the CWNIMS database on an annual basis. This publicly available information is used by EPA to assess compliance with the CWSRFs' mandate to use all funds in an ''expeditious and timely'' manner and achieve the objectives of the CWA.

Public Awareness Policy—Per EPA Grants Policy Issuance (GPI) 14–02: Enhancing Public Awareness of EPA Assistance Agreements, CWSRF borrowers must publicize EPA's involvement in project funding only up to the funding amount in each year's capitalization grant.

Form Numbers: None.

Respondents/affected entities: State environmental departments, and/or finance agencies responsible for operating the CWSRFs and eligible CWSRF borrowers.

Respondent's obligation to respond: Required to obtain or retain a benefit per Title VI of CWA as amended by WRRDA.

Estimated number of respondents: 51 state environmental departments and/or finance agencies (per year); 320 eligible CWSRF borrowers (per year).

Frequency of response: Varies by requirement (*i.e.,* quarterly, semi-annually and annually).

Total estimated burden: 57,230 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $6,013,420 (per year), includes $2,928,100 annualized capital or operation & maintenance costs.

Changes in Estimates: There is a decrease of 530,156 hours (per year) in the total estimated respondent burden compared with the ICR currently approved by OMB. This large reduction is in response to additional OMB guidance recommending that the burden associated with the CWSRF applications be removed as part of this ICR renewal since (1): States have a significant degree of discretion in what information they solicit through the CWSRF applications and (2): CWSRF applications are not subject to EPA approval.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2020–16590 Filed 7–30–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2013–0350; FRL–10013–13–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; The Consolidated Air Rule (CAR) for the Synthetic Organic Chemical Manufacturing Industry (SOCMI) (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), The Consolidated Air Rule (CAR) for the Synthetic Organic Chemical Manufacturing Industry (SOCMI) (EPA ICR Number 1854.11, OMB Control Number 2060–0443), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through September 30, 2020. Public comments were previously requested via the **Federal Register** on May 6, 2019 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may neither conduct nor sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before August 31, 2020.

ADDRESSES: Submit your comments to EPA, referencing Docket ID No. EPA–HQ–OECA–2013–0350, online using *www.regulations.gov* (our preferred method), *docket.oeca@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. 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.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Patrick Yellin, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–2970; fax number: (202) 564–0050; email address: *yellin.patrick@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain 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 *www.regulations.gov,* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit: *http://www.epa.gov/dockets.*

Abstract: The synthetic organic chemical manufacturing industry (SOCMI) is regulated by both New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) standards. The affected entities are subject to the General Provisions of the NSPS (40 CFR part 60, subpart A), and any changes or additions to the Provisions specified at 40 CFR part 60, subparts Ka, Kb, VV, VVa, DDD, III, NNN and RRR. The affected entities are also subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the Provisions specified at 40 CFR part 63, subparts BB, Y, V, F, G, H and I. As an alternative, SOCMI sources may choose to comply with the above standards under the consolidated air rule (CAR) at 40 CFR part 65 as promulgated December 14, 2000. Synthetic organic chemical manufacturing facilities subject to NSPS requirements must notify EPA of construction, modification, startups, shutdowns, date and results of initial performance test and excess emissions. Semiannual reports are also required. Synthetic organic chemical manufacturing facilities subject to NESHAP requirements must submit one-time only reports of any physical or operational changes and the results of initial performance tests. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Periodic reports are also required semiannually at a minimum. These reports are used by EPA to determine compliance with these standards.

Form Numbers: None.

Respondents/affected entities: Synthetic organic chemical manufacturing facilities.

Respondent's obligation to respond: Mandatory (40 CFR part 65).

Estimated number of respondents: 1,356 (total).

Frequency of response: Initially, occasionally, semiannually and annually.

Total estimated burden: 1,100,000 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $192,000,000 (per year), which includes $64,000,000 in annualized capital/startup and/or operation & maintenance costs.

Changes in the Estimates: There is a decrease of 1,109,999 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This decrease is not due to any program changes. The decrease is due to a reduction in the numbers of new and existing respondents for many of the Subparts. These estimates reflect a significant decrease in the number of respondents for the referencing subparts and the CAR from the prior ICR, which listed approximately 5,198 respondents. These estimates are based on the EPA's recent reevaluation of the source category inventories for the referencing subparts 40 CFR part 60, subparts Ka, Kb, VV, VVa, DDD, III, NNN, and RRR, and 40 CFR part 63, subparts F, G, H, and I.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2020–16577 Filed 7–30–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2013–0353; FRL–10013–06–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; NSPS for Stationary Spark Ignition Internal Combustion Engines (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an

information collection request (ICR), NSPS for Stationary Spark Ignition Internal Combustion Engines (EPA ICR Number 2227.06, OMB Control Number 2060–0610), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through September 30, 2020. Public comments were previously requested, via the **Federal Register**, on May 6, 2019 during a 60-day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. An agency may neither conduct nor sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

DATES: Additional comments may be submitted on or before August 31, 2020.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OECA–2013–0353, to EPA online using *www.regulations.gov* (our preferred method), or by email to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

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.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Patrick Yellin, Monitoring, Assistance, and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–2970; fax number: (202) 564–0050; email address: *yellin.patrick@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain 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 *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit: *http://www.epa.gov/dockets.*

Abstract: The New Source Performance Standards (NSPS) for Stationary Spark Ignition Internal Combustion Engines (40 CFR part 60, subpart JJJJ) were proposed on June 12, 2006; promulgated on January 18, 2008; and most-recently amended on February 27, 2014. These regulations apply to existing and new manufacturers, owners, and operators of stationary spark ignition (SI) internal combustion engines (ICE) that commenced construction, modification, or reconstruction either on or after the dates specified at 40 CFR 60.4230(a)(1)–(6). New facilities include those that commenced construction, modification or reconstruction after the date of proposal. This information is being collected to assure compliance with 40 CFR part 60, subpart JJJJ.

In general, all NSPS standards require initial notifications, performance tests, and periodic reports by the owners/operators of the affected facilities. They are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance, and are required of all affected facilities subject to NSPS.

Form Numbers: None.

Respondents/affected entities: Manufacturers, owners, and operators of stationary spark ignition internal combustion engines (SI ICE).

Respondent's obligation to respond: Mandatory (40 CFR part 60, subpart JJJJ).

Estimated number of respondents: 19,329 (total).

Frequency of response: Annually.

Total estimated burden: 36,600 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $6,860,000 (per year), which includes $2,570,000 in annualized capital/startup and/or operation & maintenance costs.

Changes in the Estimates: There is an increase in the total estimated burden as currently identified in the OMB Inventory of Approved Burdens. This increase is not due to any program changes or changes in regulatory requirements. The change in the burden and cost estimates is due primarily to an increase in the number of existing sources subject to rule requirements. This increase is based on the growth rate from the prior ICR and assumes continued growth in the manufacture and use of SI ICE. This has led to an increase in O&M costs, as well as for recordkeeping and reporting costs.

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2020–16578 Filed 7–30–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9052–1]

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 July 20, 2020, 10 a.m. EST

Through July 27, 2020, 10 a.m. EST

Pursuant to 40 CFR 1506.9.

Notice

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. 20200149, Final, BLM, WY, Converse County Oil and Gas Project, Review Period Ends: 08/31/2020, Contact: Mike Robinson 307–261–7520.

EIS No. 20200150, Draft, BR, ID, Boise River Basin Feasibility Study, Comment Period Ends: 09/14/2020, Contact: Selena Morre 208–383–2207.

EIS No. 20200151, Final Supplement, USACE, MO, ADOPTION—Little Otter Creek Watershed Plan Final Supplemental Environmental Impact Statement, Contact: Matt Sailor 816–389–3197.

The Army Corps of Engineers (USACE) has adopted the Natural Resource Conservation Service Final Supplemental EIS No. 20200001, filed 12/23/2019 with EPA. USACE was a cooperating agency on this project. Therefore, recirculation of the document is not necessary under Section 1506.3(c) of the CEQ regulations.

EIS No. 20200152, Final, DOC, NAT, Summer Flounder Commercial Issues and Goals and Objectives Amendment: Amendment 21 to the Summer Flounder, Scup, and Black

Sea Bass Fishery Management Plan, Review Period Ends: 08/31/2020, Contact: Emily Keiley 978–281–9116.

EIS No. 20200153, Final Supplement, FHWA, MI, I–94 Modernization Project in Detroit, MI from I–96 to Conner Avenue Combined FSEIS and Record of Decision and Final Section 4(f) Evaluation, Contact: Ruth Hepfer 517–702–1847.

Under 23 U.S.C. 139(n)(2), FHWA has issued a single document that consists of a final supplemental environmental impact statement and record of decision. Therefore, the 30-day wait/review period under NEPA does not apply to this action.

EIS No. 20200154, Draft Supplement, USACE, CA, American River Watershed Common Features, Water Resources Development Act of 2016 Project—Sacramento Weir Widening, Comment Period Ends: 09/14/2020, Contact: Robert Chase 916–557–7630.

EIS No. 20200155, Draft, USACE, FL, Collier County Coastal Storm Risk Management Draft Integrated Feasibility Study and Environmental Impact Statement, Comment Period Ends: 09/14/2020, Contact: Zachary Martin 757–201–7320.

EIS No. 20200156, Draft, BLM, NV, Thacker Pass Lithium Mine Project, Comment Period Ends: 09/14/2020, Contact: Ken Loda 775–623–1500.

EIS No. 20200157, Final, USFWS, CA, Proposed Habitat Conservation Plan and Incidental Take Permit Sierra Pacific Industries, Review Period Ends: 08/31/2020, Contact: Kim Turner 916–414–6606.

EIS No. 20200158, Final, BPA, BR, USACE, OR, Columbia River System Operations, Review Period Ends: 08/31/2020, Contact: Rebecca Weiss 800–290–5033.

Dated: July 27, 2020.

Cindy S. Barger,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2020–16626 Filed 7–30–20; 8:45 am]

BILLING CODE 6560–50–P

FARM CREDIT ADMINISTRATION

Privacy Act of 1974; System of Records

AGENCY: Farm Credit Administration.

ACTION: Notice of a modified system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended, notice is hereby given that the Farm Credit Administration (FCA or Agency) is amending an existing system of records, FCA–3—Property Accountability Records—FCA.

DATES: You may send written comments on or before August 31, 2020. FCA filed an amended System Report with Congress and the Office of Management and Budget on June 16, 2020. This notice will become effective without further publication on September 9, 2020 unless modified by a subsequent notice to incorporate comments received from the public.

ADDRESSES: We offer a variety of methods for you to submit your comments. For accuracy and efficiency, commenters are encouraged to submit comments by email or through the FCA's website. As facsimiles (fax) are difficult for us to process and achieve compliance with section 508 of the Rehabilitation Act, we are no longer accepting comments submitted by fax. Regardless of the method you use, please do not submit your comment multiple times via different methods. You may submit comments by any of the following methods:

- *Email:* Send us an email at *reg-comm@fca.gov.*
- *FCA Website: http://www.fca.gov.* Click inside the ''I want to . . . '' field, near the top of the page; select ''comment on a pending regulation'' from the dropdown menu; and click ''Go.'' This takes you to an electronic public comment form.
- Mail: David Grahn, Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

You may review copies of comments we receive at our office in McLean, Virginia, or from our website at *http://www.fca.gov.* Once you are in the website, click inside the ''I want to . . . '' field, near the top of the page; select ''find comments on a pending regulation'' from the dropdown menu; and click ''Go.'' This will take you to the Comment Letters page, where you can select the SORN for which you would like to read public comments. The comments will be posted as submitted but, for technical reasons, items such as logos and special characters may be omitted. Identifying information that you provide, such as phone numbers and addresses, will be publicly available. However, we will attempt to remove email addresses to help reduce internet spam.

FOR FURTHER INFORMATION CONTACT: Autumn R. Agans, Privacy Act Officer, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4020, TTY (703) 883–4019.

SUPPLEMENTARY INFORMATION: This publication satisfies the requirement of the Privacy Act of 1974 that agencies publish a system of records notice in the **Federal Register** when there is a revision, change, or addition to the system of records.

The Property Accountability Records—FCA system is used to maintain control over accountable property. The Agency is updating the notice to reflect changes to the categories of individuals, and to make administrative updates as well as non-substantive changes to conform to the SORN template requirements prescribed in the Office of Management and Budget (OMB) Circular No. A–108. The substantive changes and modifications to the currently published version of FCA–3—Property Accountability Records—FCA include:

1. Identifying the records in the system as unclassified.
2. Updating the system location to reflect the system's current location.
3. Updating the system managers to reflect the system's current owner.
4. Updating the authorities to align with the latest statutory provisions related to property management.
5. Expanding and clarifying how records may be stored and retrieved.
6. Revising the retention and disposal section to reflect updated guidance from the National Archives and Records Administration.
7. Revising the safeguards section to reflect updated cybersecurity guidance and practices.

Additionally, non-substantive changes have been made to the notice to align with the latest guidance from OMB.

The amended system of records is: FCA–3—Property Accountability Records—FCA. As required by 5 U.S.C. 552a(r) of the Privacy Act, as amended, FCA sent notice of this proposed system of records to the Office of Management and Budget, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate. The notice is published in its entirety below.

SYSTEM NAME AND NUMBER:

FCA–3—Property Accountability Records—FCA.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Office of Agency Services, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

SYSTEM MANAGER:

Property Management Officer, Office of Agency Services, Farm Credit

Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Federal Property Management Reform Act of 2016, 40. U.S.C. 621; 12 U.S.C. 2243, 2252.

PURPOSES OF THE SYSTEM:

We use information in this system of records to maintain control over accountable property.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former FCA employees.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains records identifying accountable property issued for official use. It includes the manufacturer's model and serial number of the accountable property, record number, unique bar code number, acquisition document identifier (purchase order or contract number), vendor's name, acquisition cost, in-service date, classification (by type of accountable property) number, employee to whom assigned, and employee's location.

RECORD SOURCE CATEGORIES:

Information in this system of records comes from the person to whom property is issued.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

See the ''General Statement of Routine Uses'' (64 FR 8175). Disclosure to consumer reporting agencies: None.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are maintained electronically in a computerized database.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by name, assigned property number, or some combination thereof.

POLICIES AND PROCEDURES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are retained in accordance with the National Archives and Records Administration's General Records Schedule requirements for storing accounting files, and with the FCA Comprehensive Records Schedule.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

FCA implements multiple layers of security to ensure access to records is limited to those with a need-to-know in support of their official duties. Records are physically safeguarded in a secured environment using locked file rooms, file cabinets, or locked offices and other physical safeguards. Computerized records are safeguarded through use of user roles, passwords, firewalls, encryption, and other information technology security measures. Only personnel with a need-to-know in support of their duties have access to the records.

RECORD ACCESS PROCEDURES:

To obtain a record, contact: Privacy Act Officer, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, as provided in 12 CFR part 603.

CONTESTING RECORD PROCEDURES:

Direct requests for amendments to a record to: Privacy Act Officer, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, as provided in 12 CFR part 603.

NOTIFICATION PROCEDURE:

Address inquiries about this system of records to: Privacy Act Officer, Farm Credit Administration, McLean, VA 22102–5090.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Federal Register Vol. 64, No. 100/ Tuesday, May 25, 1999, page 21875
Vol. 70, No. 183/Thursday, September 22, 2005, page 55621

Dated: July 28, 2020.

Dale Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2020–16616 Filed 7–30–20; 8:45 am]

BILLING CODE 6705–01–P

FARM CREDIT ADMINISTRATION

Privacy Act of 1974; System of Records

AGENCY: Farm Credit Administration.

ACTION: Notice of a modified system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended, notice is hereby given that the Farm Credit Administration (FCA or Agency) is amending an existing system of records, FCA–15—Employee Training—FCA.

DATES: You may send written comments on or before August 31, 2020. FCA filed an amended System Report with Congress and the Office of Management and Budget on June 8, 2020. This notice will become effective without further publication on September 9, 2020 unless modified by a subsequent notice to incorporate comments received from the public.

ADDRESSES: We offer a variety of methods for you to submit your comments. For accuracy and efficiency reasons, commenters are encouraged to submit comments by email or through the FCA's website. As facsimiles (fax) are difficult for us to process and achieve compliance with section 508 of the Rehabilitation Act, we are no longer accepting comments submitted by fax. Regardless of the method you use, please do not submit your comment multiple times via different methods. You may submit comments by any of the following methods:

- *Email:* Send us an email at *reg-comm@fca.gov.*
- *FCA Website: http://www.fca.gov.* Click inside the ''I want to. . .'' field, near the top of the page; select ''comment on a pending regulation'' from the dropdown menu; and click ''Go.'' This takes you to an electronic public comment form.
- *Mail:* David Grahn, Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

You may review copies of comments we receive at our office in McLean, Virginia, or from our website at *http://www.fca.gov.* Once you are in the website, click inside the ''I want to . . .'' field, near the top of the page; select ''find comments on a pending regulation'' from the dropdown menu; and click ''Go.'' This will take you to the Comment Letters page, where you can select the SORN for which you would like to read public comments. The comments will be posted as submitted but, for technical reasons, items such as logos and special characters may be omitted. Identifying information that you provide, such as phone numbers and addresses, will be publicly available. However, we will attempt to remove email addresses to help reduce internet spam.

FOR FURTHER INFORMATION CONTACT: Autumn R. Agans, Privacy Act Officer, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4020, TTY (703) 883–4019.

SUPPLEMENTARY INFORMATION: This publication satisfies the requirement of the Privacy Act of 1974 that agencies publish a system of records notice in the **Federal Register** when there is a revision, change, or addition to the system of records.

The Employee Training—FCA system is used to track an employee's professional training. The Agency is updating the notice to expand the system purpose to include training

provided to contractors and Farm Credit System Insurance Corporation (FCSIC) employees, and to update the categories of individuals and categories of records to align with the modified purpose. Additionally, FCA is making administrative updates and non-substantive changes to conform to the SORN template requirements prescribed in the Office of Management and Budget (OMB) Circular No. A–108. The substantive changes and modifications to the currently published version of FCA–15—Employee Training—FCA include:

1. Updating the name of the system to reflect the expanded purpose—FCA–15—General Training Records—FCA.
2. Identifying the records in the system as unclassified.
3. Updating the system location to reflect the system's current location.
4. Updating the system managers to reflect the system's current owner.
5. Expanding the system purpose to include FCA-provided training for FCSIC employees and contractors.
6. Updating the categories of records and categories of individuals to ensure they are consistent with the intended purpose.
7. Expanding the record source categories to include contractors.
8. Expanding and clarifying how records may be stored and retrieved.
9. Revising the retention and disposal section to reflect updated guidance from the National Archives and Records Administration.
10. Revising the safeguards section to reflect updated cybersecurity guidance and practices.

Additionally, non-substantive changes have been made to the notice to align with the latest guidance from OMB.

The amended system of records is: FCA–15—General Training Records—FCA. As required by 5 U.S.C. 552a(r) of the Privacy Act, as amended, FCA sent notice of this proposed system of records to the Office of Management and Budget, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate. The notice is published in its entirety below.

SYSTEM NAME AND NUMBER:

FCA–15—General Training Records—FCA.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Office of Agency Services, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

SYSTEM MANAGER:

Director, Office of Agency Services, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

12 U.S.C. 2243, 2252.

PURPOSES OF THE SYSTEM:

FCA uses information in this system of records to document and track (a) training provided by FCA to employees and contractors; and (b) external professional training and education provided to FCA and FCSIC employees while employed by the Agency. The system provides FCA with a means to track the training or education provided, identify trends and needs, monitor and track the expenditure on training and education programs and related travel, schedule training classes and programs, schedule instructors, assess the effectiveness of training, identify patterns, respond to requests for information related to the training of FCA and FCSIC employees and contractors, and facilitate the compilation of statistical information about training.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former FCA and FCSIC employees, interns, and contractors.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains training and education information for FCA and FCSIC employees and interns while employed by FCA and FCSIC and training records for FCA-provided training to contractors. Records include: (a) Name, title or position, and business contact information including phone number, office location and number, email address and telephone number; (b) documentation related to training and education including registration forms, course rosters, sign-in sheets, follow-up surveys, and course and instructor critiques; (c) instructor lists and schedules; (d) payment records, including travel, per diem, and related expenditures; and (e) educational records for FCA, FCSIC, and contractor employees, including schools of attendance, courses completed or in which enrolled, dates of attendance, tuition and expenses, and related per diem and travel expenses.

RECORD SOURCE CATEGORIES:

FCA and FCSIC employee, intern, or contractor that is the subject of the record and the training and education institution(s).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

See the ''General Statement of Routine Uses'' (64FR 8175).

Disclosure to consumer reporting agencies:

None.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are maintained in files folders and electronically in a computerized database.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

We retrieve records by name, email address, or by some combination thereof.

POLICIES AND PROCEDURES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are retained in accordance with the National Archives and Records Administration's General Records Schedule requirements, and with the FCA Comprehensive Records Schedule.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

FCA implements multiple layers of security to ensure access to records is limited to those with a need-to-know in support of their official duties. Paper records are physically safeguarded in a secured environment using locked file rooms, file cabinets, or locked offices and other physical safeguards. Computerized records are safeguarded through use of user roles, passwords, firewalls, encryption, and other information technology security measures.

RECORD ACCESS PROCEDURES:

To obtain a record, contact: Privacy Act Officer, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, as provided in 12 CFR part 603.

CONTESTING RECORD PROCEDURES:

Direct requests for amendments to a record to: Privacy Act Officer, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, as provided in 12 CFR part 603.

NOTIFICATION PROCEDURE:

Address inquiries about this system of records to: Privacy Act Officer, Farm Credit Administration, McLean, VA 22102–5090.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Federal Register Vol. 64, No. 100/ Tuesday, May 25, 1999 page 21875.

Vol. 70, No. 183/Thursday, September 22, 2005, page 55621.

Dated: July 28, 2020.

Dale Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2020–16617 Filed 7–30–20; 8:45 am]

BILLING CODE 6705–01–P

FARM CREDIT ADMINISTRATION

Privacy Act of 1974; System of Records

AGENCY: Farm Credit Administration.

ACTION: Notice of a modified system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended, notice is hereby given that the Farm Credit Administration (FCA or Agency) is amending an existing system of records, FCA–4—Biographical Files—FCA.

DATES: You may send written comments on or before August 31, 2020. FCA filed an amended System Report with Congress and the Office of Management and Budget on June 8, 2020. This notice will become effective without further publication on September 9, 2020 unless modified by a subsequent notice to incorporate comments received from the public.

ADDRESSES: We offer a variety of methods for you to submit your comments. For accuracy and efficiency, commenters are encouraged to submit comments by email or through the FCA's website. As facsimiles (fax) are difficult for us to process and achieve compliance with section 508 of the Rehabilitation Act, we are no longer accepting comments submitted by fax. Regardless of the method you use, please do not submit your comment multiple times via different methods. You may submit comments by any of the following methods:

- *Email:* Send us an email at *reg-comm@fca.gov.*
- *FCA website: http://www.fca.gov.* Click inside the ''I want to. . .'' field, near the top of the page; select ''comment on a pending regulation'' from the dropdown menu; and click ''Go.'' This takes you to an electronic public comment form.
- *Mail:* David Grahn, Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

You may review copies of comments we receive at our office in McLean, Virginia, or from our website at *http://www.fca.gov.* Once you are in the website, click inside the ''I want to. . .'' field, near the top of the page; select ''find comments on a pending regulation'' from the dropdown menu; and click ''Go.'' This will take you to the Comment Letters page, where you can select the SORN for which you would like to read public comments. The comments will be posted as submitted but, for technical reasons, items such as logos and special characters may be omitted. Identifying information that you provide, such as phone numbers and addresses, will be publicly available. However, we will attempt to remove email addresses to help reduce internet spam.

FOR FURTHER INFORMATION CONTACT: Autumn R. Agans, Privacy Act Officer, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4020, TTY (703) 883–4019.

SUPPLEMENTARY INFORMATION: This publication satisfies the requirement of the Privacy Act of 1974 that agencies publish a system of records notice in the **Federal Register** when there is a revision, change, or addition to the system of records.

The Biographical Files—FCA system is used to inform the public about the background of FCA officials and other employees. The Agency is updating the notice to reflect changes to the system purpose, the categories of individuals and records, to add a new routine use, to include more details, and to make administrative updates and non-substantive changes to conform to the SORN template requirements prescribed in the Office of Management and Budget (OMB) Circular No. A–108. The substantive changes and modifications to the currently published version of FCA–4—Biographical Files—FCA include:

1. Identifying the records in the system as unclassified.

2. Updating the system location to reflect the system's current location.

3. Expanding and clarifying the categories of individuals and categories of records in the system to ensure they are consistent with the purpose for which the records are collected.

4. Updating and clarifying the purpose for which the records are collected.

5. Clarifying the routine uses for which information in the system may be disclosed and adding a routine use for the disclosure of certain information, provided by employees voluntarily, as part of the Agency's public affairs initiatives.

6. Revising and clarifying how records may be stored and retrieved.

7. Revising the retention and disposal section to reflect updated guidance from the National Archives and Records Administration.

8. Revising the safeguards section to reflect updated cybersecurity guidance and practices.

Additionally, non-substantive changes have been made to the notice to align with the latest guidance from OMB.

The amended system of records is: FCA–4—Biographical Files—FCA. As required by 5 U.S.C. 552a(r) of the Privacy Act, as amended, FCA sent notice of this proposed system of records to the Office of Management and Budget, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate. The notice is published in its entirety below.

SYSTEM NAME AND NUMBER:

FCA–4—Biographical Files—FCA.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Office of Congressional and Public Affairs, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

SYSTEM MANAGER:

Director, Office of Congressional and Public Affairs, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

12 U.S.C. 2243, 2252.

PURPOSES OF THE SYSTEM:

FCA uses information in this system of records to develop informational materials about Agency employees. Information may also be used, with the consent of persons to whom the information pertains, in support of Agency public affairs initiatives, such as for recruitment and retention.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former FCA employees and FCA Board members.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains biographical information and photographs for disclosure to the media and the public, which are provided voluntarily by employees and Board members. Information includes, but is not limited to: (a) Name and biographical information, such as place of birth or hometown; (b)employment information, such as official title(s) or position(s), previous positions or titles held or

previous employers, work history and experience; (c) photographs, video images, and voice recordings; (d) education, including degrees held, areas of study, and schools attended; (e) military experience, if applicable; (f) civic duties and previous awards; and (g) hobbies and personal interests.

RECORD SOURCE CATEGORIES:

FCA employee on whom the record is maintained.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

See the ''General Statement of Routine Uses'' (64 FR 8175).

The information collected in the system will be used in a manner that is compatible with the purposes for which the information has been collected and, in addition to the applicable general routine uses, may be disclosed for the following purposes:

1) We may disclose certain information in this system of records to the public by (a) posting copies of such records on FCA's website, *www.fca.gov,* authorized FCA social media accounts, or by other electronic or non-electronic means; (b) to the news media; or (c) to audiences attending a particular event, conference, or meeting when the biographies of speakers are used as background in introductions or included in other informational material. Such disclosures would be limited to those for which there is a legitimate public interest in the disclosure of the information, the disclosure would not constitute an unwarranted invasion of personal privacy, or when explicit consent is granted by the person to whom the disclosed information pertains.

Disclosure to consumer reporting agencies: None.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are maintained in file folders and electronically in a computerized database.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by name.

POLICIES AND PROCEDURES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are retained in accordance with the National Archives and Records Administration's General Records Schedule requirements, and with the FCA Comprehensive Records Schedule.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

FCA implements multiple layers of security to ensure access to records is limited to those with a need-to-know in support of their official duties. Physical records are safeguarded in a secured environment using locked file rooms, file cabinets, or locked offices and other physical safeguards. Computerized records are safeguarded through use of user roles, passwords, firewalls, encryption, and other information technology security measures.

RECORD ACCESS PROCEDURES:

To obtain a record, contact: Privacy Act Officer, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, as provided in 12 CFR part 603.

CONTESTING RECORD PROCEDURES:

Direct requests for amendments to a record to: Privacy Act Officer, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, as provided in 12 CFR part 603.

NOTIFICATION PROCEDURE:

Address inquiries about this system of records to: Privacy Act Officer, Farm Credit Administration, McLean, VA 22102–5090.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Federal Register Vol. 64, No. 100/ Tuesday, May 25, 1999 page 21875
Vol. 70, No. 183/Thursday, September 22, 2005, page 55621

Dated: July 28, 2020.

Dale Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2020–16602 Filed 7–30–20; 8:45 am]

BILLING CODE 6705–01–P

FARM CREDIT ADMINISTRATION

Privacy Act of 1974; System of Records

AGENCY: Farm Credit Administration.

ACTION: Notice of a modified system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended, notice is hereby given that the Farm Credit Administration (FCA or Agency) is amending an existing system of records, FCA–16—Examiner Training and Education Records—FCA.

DATES: You may send written comments on or before August 31, 2020. FCA filed an amended System Report with Congress and the Office of Management and Budget on June 8, 2020. This notice will become effective without further publication on September 9, 2020 unless modified by a subsequent notice to incorporate comments received from the public.

ADDRESSES: We offer a variety of methods for you to submit your comments. For accuracy and efficiency reasons, commenters are encouraged to submit comments by email or through the FCA's website. As facsimiles (fax) are difficult for us to process and achieve compliance with section 508 of the Rehabilitation Act, we are no longer accepting comments submitted by fax. Regardless of the method you use, please do not submit your comment multiple times via different methods. You may submit comments by any of the following methods:

- *Email:* Send us an email at *reg-comm@fca.gov.*
- *FCA Website: http://www.fca.gov.* Click inside the ''I want to. . .'' field, near the top of the page; select ''comment on a pending regulation'' from the dropdown menu; and click ''Go.'' This takes you to an electronic public comment form.
- *Mail:* David Grahn, Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

You may review copies of comments we receive at our office in McLean, Virginia, or from our website at *http://www.fca.gov.* Once you are in the website, click inside the ''I want to. . .'' field, near the top of the page; select ''find comments on a pending regulation'' from the dropdown menu; and click ''Go.'' This will take you to the Comment Letters page, where you can select the SORN for which you would like to read public comments. The comments will be posted as submitted but, for technical reasons, items such as logos and special characters may be omitted. Identifying information that you provide, such as phone numbers and addresses, will be publicly available. However, we will attempt to remove email addresses to help reduce internet spam.

FOR FURTHER INFORMATION CONTACT: Autumn R. Agans, Privacy Act Officer, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4020, TTY (703) 883–4019.

SUPPLEMENTARY INFORMATION: This publication satisfies the requirement of the Privacy Act of 1974 that agencies publish a system of records notice in the **Federal Register** when there is a revision, change, or addition to the system of records.

The Examiner Training and Education Records—FCA system is used to track pre-commissioned examiners' training and progression towards becoming

commissioned examiners. The Agency is updating the notice to include more details, to make administrative updates, to make non-substantive changes, and to conform to the SORN template requirements prescribed in the Office of Management and Budget (OMB) Circular No. A–108. The substantive changes and modifications to the currently published version of FCA–16—Examiner Training and Education Records—FCA include:

1. Identifying the records in the system as unclassified.
2. Updating the system location to reflect the system's current location.
3. Updating the system managers to reflect the system's current owner.
4. Clarifying the categories of records to ensure they are consistent with the intended purpose.
5. Expanding and clarifying how records may be stored and retrieved.
6. Revising the retention and disposal section to reflect updated guidance from the National Archives and Records Administration.
7. Revising the safeguards section to reflect updated cybersecurity guidance and practices.

Additionally, non-substantive changes have been made to the notice to align with the latest guidance from OMB.

The amended system of records is: FCA–16—Examiner Training and Education Records—FCA. As required by 5 U.S.C. 552a(r) of the Privacy Act, as amended, FCA sent notice of this proposed system of records to the Office of Management and Budget, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate. The notice is published in its entirety below.

SYSTEM NAME AND NUMBER:

FCA–16—Examiner Training and Education Records—FCA.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Office of Examination, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

SYSTEM MANAGER:

Director, Office of Examination, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

12 U.S.C. 2243, 2252.

PURPOSES OF THE SYSTEM:

FCA uses information in this system of records to track pre-commissioned examiners' training and progression towards becoming commissioned examiners.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former FCA examiners.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains the educational history and progression of FCA examiners toward becoming commissioned. Records include: Name, skills inventory form, training program record, formal training record, and results of commissioning test. Certain records included in an examiner's file are considered copies and are accounted for in OPM's government-wide system of records notice, OPM/GOVT–1—General Personnel Records.

RECORD SOURCE CATEGORIES:

FCA examiner that is the subject of the record, the examiner's supervisor, and members of the examiner's supervisory panel.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

See the ''General Statement of Routine Uses'' (64 FR 8175).

Disclosure to consumer reporting agencies: None.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are maintained in file folders and electronically in a computerized database.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by name.

POLICIES AND PROCEDURES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are retained in accordance with the National Archives and Records Administration's General Records Schedule requirements, and with the FCA Comprehensive Records Schedule.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

FCA implements multiple layers of security to ensure access to records is limited to those with a need-to-know in support of their official duties. Records are physically safeguarded in a secured environment using locked file rooms, file cabinets, or locked offices and other physical safeguards. Computerized records are safeguarded through use of user roles, passwords, firewalls, encryption, and other information technology security measures.

RECORD ACCESS PROCEDURES:

To obtain a record, contact: Privacy Act Officer, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, as provided in 12 CFR part 603.

CONTESTING RECORD PROCEDURES:

Direct requests for amendments to a record to: Privacy Act Officer, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, as provided in 12 CFR part 603.

NOTIFICATION PROCEDURE:

Address inquiries about this system of records to: Privacy Act Officer, Farm Credit Administration, McLean, VA 22102–5090.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Federal Register Vol. 64, No. 100/Tuesday, May 25, 1999 page 21875
Vol. 70, No. 183/Thursday, September 22, 2005, page 55621

Dated: July 28, 2020.

Dale Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2020–16621 Filed 7–30–20; 8:45 am]

BILLING CODE 6705–01–P

FARM CREDIT ADMINISTRATION

Privacy Act of 1974; System of Records

AGENCY: Farm Credit Administration.

ACTION: Notice of a modified system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended, notice is hereby given that the Farm Credit Administration (FCA or Agency) is amending an existing system of records, FCA–17—Organization Locator and Personnel Roster System—FCA.

DATES: You may send written comments on or before August 31, 2020. FCA filed an amended System Report with Congress and the Office of Management and Budget on June 8, 2020. This notice will become effective without further publication on September 9, 2020 unless modified by a subsequent notice to incorporate comments received from the public.

ADDRESSES: We offer a variety of methods for you to submit your comments. For accuracy and efficiency reasons, commenters are encouraged to submit comments by email or through the FCA's website. As facsimiles (fax) are difficult for us to process and achieve compliance with section 508 of the Rehabilitation Act, we are no longer accepting comments submitted by fax. Regardless of the method you use,

please do not submit your comment multiple times via different methods. You may submit comments by any of the following methods:

- *Email:* Send us an email at *reg-comm@fca.gov.*
- *FCA website: http://www.fca.gov.* Click inside the ''I want to . . .'' field, near the top of the page; select ''comment on a pending regulation'' from the dropdown menu; and click ''Go.'' This takes you to an electronic public comment form.
- *Mail:* David Grahn, Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

You may review copies of comments we receive at our office in McLean, Virginia, or from our website at *http://www.fca.gov.* Once you are in the website, click inside the ''I want to . . .'' field, near the top of the page; select ''find comments on a pending regulation'' from the dropdown menu; and click ''Go.'' This will take you to the Comment Letters page, where you can select the SORN for which you would like to read public comments. The comments will be posted as submitted but, for technical reasons, items such as logos and special characters may be omitted. Identifying information that you provide, such as phone numbers and addresses, will be publicly available. However, we will attempt to remove email addresses to help reduce internet spam.

FOR FURTHER INFORMATION CONTACT: Autumn R. Agans, Privacy Act Officer, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4020, TTY (703) 883–4019.

SUPPLEMENTARY INFORMATION: This publication satisfies the requirement of the Privacy Act of 1974 that agencies publish a system of records notice in the **Federal Register** when there is a revision, change, or addition to the system of records.

The Organization Locator and Personnel Roster System—FCA system is used to identify, contact, and recall personnel when required; locate personnel for routine and emergency matters; provide mail distribution and forwarding addresses; compile a social roster for official and non-official functions; send personal greetings and invitations; establish building security; and locate individuals during medical emergencies, facility evacuations, and similar threat situations. The Agency is updating the notice to reflect changes to the categories of individuals, to include more details, make administrative updates and non-substantive changes, and to conform to the SORN template requirements prescribed in the Office of Management and Budget (OMB) Circular No. A–108. The substantive changes and modifications to the currently published version of FCA–17—Organization Locator and Personnel Roster System—FCA include:

1. Identifying the records in the system as unclassified.
2. Updating the system location to reflect the system's current location.
3. Updating the system managers to reflect the system's current owner.
4. Expanding and clarifying the categories of individuals and categories of records in the system to ensure they are consistent with the purpose for which the records are collected.
5. Clarifying how records may be stored and retrieved.
6. Revising the retention and disposal section to reflect updated guidance from the National Archives and Records Administration.
7. Revising the safeguards section to reflect updated cybersecurity guidance and practices.

Additionally, non-substantive changes have been made to the notice to align with the latest guidance from OMB.

The amended system of records is: FCA–17—Organization Locator and Personnel Roster System—FCA. As required by 5 U.S.C. 552a(r) of the Privacy Act, as amended, FCA sent notice of this proposed system of records to the Office of Management and Budget, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate. The notice is published in its entirety below.

SYSTEM NAME AND NUMBER:

FCA–17—Organization Locator and Personnel Roster System—FCA.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Office of Agency Services, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

SYSTEM MANAGER:

Director, Office of Agency Services, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

12 U.S.C. 2243, 2252.

PURPOSES OF THE SYSTEM:

To identify, contact, and recall personnel when required; locate personnel for routine and emergency matters; provide mail distribution and forwarding addresses; compile a social roster for official and non-official functions; send personal greetings and invitations; establish building security; and locate individuals during medical emergencies, facility evacuations, and similar threat situations.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current FCA and FCSIC employees, contractors, detailees, and their identified emergency point(s) of contact.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information in the system includes names and contact information for FCA and FCSIC employees, contractors, detailees, and their identified emergency points of contact. Information includes but is not limited to: home and work addresses; home and work telephone numbers; cell phone numbers; personal and work email addresses; official titles or positions and organizations; photographs; building security zones; and other information associated with identifying and contacting personnel.

RECORD SOURCE CATEGORIES:

Information in this system of records either comes from the individual to whom it applies or comes from information supplied by Agency officials.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

See the ''General Statement of Routine Uses'' (64 FR 8175). Disclosure to consumer reporting agencies: None.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are maintained in files folders as well as electronically in a computerized database.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by name, email address, phone number, or some combination thereof.

POLICIES AND PROCEDURES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are retained in accordance with the National Archives and Records Administration's General Records Schedule requirements, and with the FCA Comprehensive Records Schedule.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

FCA implements multiple layers of security to ensure access to records is limited to those with a need-to-know in support of their official duties. Records are physically safeguarded in a secured

environment using locked file rooms, file cabinets, or locked offices and other physical safeguards. Computerized records are safeguarded through use of user roles, passwords, firewalls, encryption, and other information technology security measures.

RECORD ACCESS PROCEDURES:

To obtain a record, contact: Privacy Act Officer, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, as provided in 12 CFR part 603.

CONTESTING RECORD PROCEDURES:

Direct requests for amendments to a record to: Privacy Act Officer, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, as provided in 12 CFR part 603.

NOTIFICATION PROCEDURE:

Address inquiries about this system of records to: Privacy Act Officer, Farm Credit Administration, McLean, VA 22102–5090.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Federal Register Vol. 64, No. 100/ Tuesday, May 25, 1999 page 21875
Vol. 70, No. 183/Thursday, September 22, 2005, page 55621

Dated: July 28, 2020.

Dale Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2020–16620 Filed 7–30–20; 8:45 am]

BILLING CODE 6705–01–P

FEDERAL HOUSING FINANCE AGENCY

[No. 2020–N–13]

Proposed Collection; Comment Request

AGENCY: Federal Housing Finance Agency.

ACTION: Contractor Workforce Inclusion Good Faith Efforts—30-day notice of submission of information collection for approval from Office of Management and Budget.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the Federal Housing Finance Agency (FHFA or the Agency) is seeking public comments concerning an information collection known as ''Contractor Workforce Inclusion Good Faith Efforts,'' which has been assigned control number 2590–0016 by the Office of Management and Budget (OMB). FHFA intends to submit the information collection to OMB for review and approval of a three-year extension of the control number, which is due to expire on July 31, 2020.

DATES: Interested persons may submit comments on or before August 31, 2020.

ADDRESSES: Submit comments to the Office of Information and Regulatory Affairs of the Office of Management and Budget, Attention: Desk Officer for the Federal Housing Finance Agency, Washington, DC 20503, Fax: (202) 395–3047, Email: *OIRA_submission@omb.eop.gov.* Please also submit comments to FHFA, identified by ''Proposed Collection; Comment Request: 'Contractor Workforce Inclusion Good Faith Efforts, (No. 2020–N–13)''' by any of the following methods:

- *Agency website: www.fhfa.gov/open-for-comment-or-input.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the *Federal eRulemaking Portal,* please also send it by *email* to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by the agency.
- *Mail/Hand Delivery:* Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW, Washington, DC 20219, ATTENTION: Proposed Collection; Comment Request: ''Contractor Workforce Inclusion Good Faith Efforts, (No. 2020–N–13).''

We will post all public comments we receive without change, including any personal information you provide, such as your name and address, email address, and telephone number, on the FHFA website at *http://www.fhfa.gov.* In addition, copies of all comments received will be available for examination by the public through the electronic comment docket for this PRA Notice also located on the FHFA website.

FOR FURTHER INFORMATION CONTACT: Kenneth Hunter, Office of Minority and Women Inclusion, *Kenneth.Hunter@fhfa.gov,* (202) 649–3127; Karen Lambert, Associate General Counsel, *Karen.Lambert@fhfa.gov,* (202) 649–3094; or Angela Supervielle, Counsel, *Angela.Supervielle@fhfa.gov,* (202) 649–3973 (these are not toll-free numbers); Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. The Telecommunications Device for the Deaf is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

A. Background

Section 342(a)(1)(A) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act) requires FHFA and certain other Federal agencies each to establish an Office of Minority and Women Inclusion (OMWI) responsible for all matters of the agency relating to diversity in management, employment, and business activities.[1] Section 342(c)(1) requires the OMWI Director at each agency to develop and implement standards and procedures to ensure, to the maximum extent possible, the fair inclusion and utilization of minorities, women, and minority- and women-owned businesses in all business and activities of the agency at all levels, including in procurement, insurance, and all types of contracts. Section 342(c)(2) requires that the OMWI Director include in the agency's procedures for evaluating contract proposals and hiring service providers a component that gives consideration to the diversity of an applicant, to the extent consistent with applicable law. That statutory provision also requires that each agency's procedures include a written statement that a contractor shall ensure, to the maximum extent possible, the fair inclusion of women and minorities in the workforce of the contractor and, as applicable, subcontractors.

Further, section 342(c)(3)(A) of the Dodd-Frank Act requires that each agency's standards and procedures include a procedure for determining whether an agency contractor or subcontractor has failed to make a good faith effort to include minorities and women in its workforce. If the OMWI Director determines that a contractor or subcontractor has failed to make such a good faith effort, section 342(c)(3)(B)(i) provides that the OMWI Director shall recommend to the agency administrator that the contract be terminated. Section 342(c)(3)(B)(ii) provides that, upon receipt of such a recommendation, the agency administrator may either terminate the contract, make a referral to the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor, or take other appropriate action.

As a means of implementing the requirements of section 342(c) of the Dodd-Frank Act, FHFA developed a Minority and Women Inclusion Clause (MWI Clause) that it includes in Agency contracts with a dollar value greater than the ''simplified acquisition threshold'' established in the Federal Acquisition Regulation (FAR).[2] The

[1] 12 U.S.C. 5452.

[2] *See* FAR 2.101. The FAR appears at 48 CFR chapter 1. Although the FAR has not yet been updated, Congress increased the simplified

MWI Clause requires a contractor to confirm its commitment to equal opportunity in employment and contracting, and to implement that commitment by ensuring, to the maximum extent possible consistent with applicable law, the fair inclusion of minorities and women in its workforce. The MWI Clause also requires that a contractor include the substance of the MWI Clause in all subcontracts with a dollar value greater than $150,000 awarded under the contract. (Hereinafter, contractors that are subject to the MWI Clause and subcontractors that are subject to a similar clause required to be included in a subcontract are referred to as ''covered'' contractors and subcontractors.)

Finally, the MWI Clause requires a contractor to provide, when requested by FHFA, documentation demonstrating that the contractor, as well as any covered subcontractor has made a good faith effort to ensure the fair inclusion of minorities and women in its workforce. The MWI Clause provides that such documentation may include, but is not limited to: (1) The contractor's total number of employees, and the number of minority and women employees, by race, ethnicity, and gender (*e.g.,* an EEO–1 Employer Information Report (Form EEO–1)); (2) a list of the subcontracts the contractor awarded including the dollar amount, date of the award, and the ownership status of the subcontractor by race, ethnicity, and/or gender; (3) information similar to that required under the first item above for each subcontractor; and (4) the contractor's plan to ensure that minorities and women have appropriate opportunities to enter and advance within its workforce, including outreach efforts (hereinafter, a ''workforce inclusion plan''). A request for documentation by FHFA pursuant to this provision of the MWI Clause constitutes a ''collection of information'' within the meaning of the PRA.

On March 9, 2018, FHFA finalized its ''Policy Establishing Procedures to Determine Compliance by Contractors with the Minority and Women Inclusion Contract Clause'' (Good Faith Efforts Policy (GFEP)), which establishes a process to determine whether covered contractors or subcontractors are making good faith efforts to ensure the fair inclusion of minorities and women in their respective workforces. The GFEP ensures transparency, clarity, and consistency in the good faith effort review process. Covered contractors agree to provide documentation of the good faith effort they have made in support of this commitment within 10 business days after a request from FHFA. According to the GFEP, ''OMWI will rely on the conclusions of a prior GFE review if OMWI conducted that review within the past two fiscal years.''

FHFA's OMWI implemented the GFEP by conducting its first round of reviews of 20 covered contractors in May 2018. OMWI initiated another round of reviews in December 2018. The contractors' sizes ranged from small companies to large corporations. In March 2019, OMWI provided a summary of its reviews of 32 covered contractors. OMWI's GFEP review found that all the selected contractors had submitted satisfactory information to show compliance with their GFE contractual obligation. OMWI also considered developing new tools to capture and display information from GFE reviews to streamline the current process.

B. Need For and Use of the Information Collection

The purpose of this information collection is to fulfill the requirements of section 342(c) of the Dodd-Frank Act. The collected information allows FHFA's OMWI Director to determine whether covered contractors and subcontractors have complied with their contractual obligations to make good faith efforts to ensure, to the maximum extent possible consistent with applicable law, the fair inclusion of minorities and women in their respective workforces.

The OMB number for the information collection is 2590–0016, which is due to expire on July 31, 2020. The likely respondents are entities that contract with FHFA and their subcontractors.

C. Burden Estimate

FHFA estimates that the average annual burden imposed on all respondents by this information collection over the next three years will be 172 hours.

Because, as explained below, the amount of burden imposed upon a contractor by this information collection will differ depending upon whether the contractor has 50 or more employees, FHFA has based its total burden estimate on two separate sets of calculations—(1) one for contractors and subcontractors with 50 or more employees (16 hours); and (2) another for contractors and subcontractors with fewer than 50 employees (156 hours).

FHFA includes the MWI Clause in Agency contracts with a dollar value greater than $150,000. Under the MWI Clause, FHFA may also request information about covered subcontractors' ownership status, workforce demographics, and workforce inclusion plans. Contractors would request this information from their covered subcontractors, who, because the substance of the MWI Clause would be included in their subcontracts, would have a contractual obligation to keep records and report data as required under the MWI Clause.

FHFA data on the dollar value of contracts awarded by the Agency from the beginning of fiscal year 2016 through the third quarter of fiscal year 2019 shows that 61 contractors were subject to the MWI Clause. FHFA believes that 44 of those contractors have 50 or more employees, while 17 contractors have fewer than 50 employees. FHFA estimates that no more than two subcontracts with a dollar value of $150,000 or more were awarded by Agency contractors during that same time period. Both of those subcontractors have 50 or more employees each. Thus, over the preceding three years, a total of 63 contractors and subcontractors were subject to the MWI Clause—46 of which have 50 or more employees and 17 of which have fewer than 50 employees.

Based on these figures, FHFA estimates that, on average over the next three years, 48 contractors and subcontractors with 50 or more employees and 18 contractors or subcontractors with fewer than 50 employees will be subject to the MWI Clause at any given time. As mentioned above, the GFEP provides that OMWI will rely on the conclusions of a prior GFE review if OMWI conducted that review within the past two fiscal years. Accordingly, a covered contractor or subcontractor is required to submit new information only once within any three year period.

(1) Documentation Submitted by Contractors With 50 or More Employees

FHFA estimates that the average annual burden on contractors with 50 or more employees will be 16 hours (0 recordkeeping hours + 16 reporting hours).

Because Federal contractors with 50 or more employees are already required to maintain the same types of records that may be requested pursuant to the MWI Clause under regulations

acquisition threshold to $250,000 in 2017. *See* National Defense Authorization Act for Fiscal Year 2018, Public Law 115–91, section 805, 131 Stat. 1283, 1456 (2017), *codified at* 41 U.S.C. 134. The Civilian Agency Acquisition Council Memorandum for Civilian Agencies dated February 16, 2018 provides instructions to agencies that desire to issue a class deviation prior to this change being incorporated in the FAR. To date, FHFA has not issued such a deviation to increase the simplified acquisition threshold.

implementing Title VII of the Civil Rights Act of 1964 [3] and Executive Order 11246 (E.O. 11246),[4] this information collection does not impose additional recordkeeping burdens on such contractors and subcontractors. FAR 52.222–26, Equal Opportunity, requires that such contractors' contracts and subcontracts include a clause implementing E.O. 11246. OFCCP regulations require each contractor with 50 or more employees and a Federal contract or subcontract of $50,000 or more to maintain records on the race, ethnicity, gender, and EEO–1 job category of each employee.[5] OFCCP regulations also require each such contractor to: (1) Demonstrate that it has made a good faith effort to remove identified barriers, expand employment opportunities, and produce measurable results; [6] and (2) develop and maintain a written program summary describing the policies, practices, and procedures that the contractor uses to ensure that applicants and employees received equal opportunities for employment and advancement.[7] In lieu of creating and maintaining a separate workforce inclusion plan to submit in satisfaction of the MWI Clause, a contractor or subcontractor with 50 or more employees could submit the written program summary that it is already required to maintain under the OFCCP regulations to demonstrate its good faith efforts to ensure the fair inclusion of minorities and women in its workforce.

With respect to reporting burden, FHFA estimates that it will take each contractor or subcontractor with 50 or more employees approximately one hour to retrieve, review, and submit the documentation specified in the MWI Clause. Thus, the estimate of the triennial burden upon contractors or subcontractors with 50 or more employees associated with reporting requirements under this information collection is 48 hours (48 respondents × 1 hour per respondent) and the annual burden is 16 hours.

(2) Documentation Submitted by Contractors With Fewer Than 50 Employees

FHFA estimates that the average annual burden on contractors and subcontractors with fewer than 50 employees will be 156 hours (150 recordkeeping hours + 6 reporting hours).

OFCCP regulations require contractors with fewer than 50 employees to maintain records on the race, ethnicity, and gender of each employee.[8] FHFA believes that such contractors also keep EEO–1 job category information in the normal course of business, despite the fact that they are not required by law to do so. However, contractors or subcontractors with fewer than 50 employees may not have the type of written program summary that is required of larger contractors under the OFCCP regulations or any similar document that could be submitted as a workforce inclusion plan under the MWI Clause. Accordingly, such contractors or subcontractors may need to create a workforce inclusion plan to comply with the MWI Clause.

In order to estimate the burden associated with creating a workforce inclusion plan, FHFA considered the OFCCP's burden estimates for the time needed to develop the written program summaries required under its regulations.[9] In its OMB Supporting Statement, the OFCCP estimated that a contractor with 50 to 100 employees would take approximately 73 hours to create an initial written program summary. While the OFCCP regulations require contractors to perform time-consuming quantitative analyses when developing their written program summaries, such analyses would not be required in connection with the creation of a workforce inclusion plan. For this reason, FHFA believes that a contractor could develop a workforce inclusion plan in about one-third of the time that it would take to develop the written program summary required under the OFCCP regulations.

FHFA estimates that a contractor or subcontractor with fewer than 50 employees would spend approximately 25 hours creating a workforce inclusion plan for the first time. It is likely that, going forward, many small contractors and subcontractors will simply submit updated versions of workforce inclusion plans that they have submitted previously. For purposes of this burden estimate, however, FHFA has assumed that all small contractors and subcontractors will need to create a new plan every time they are required to submit information under the MWI clause. This results in an estimated average triennial recordkeeping burden on all contractors and subcontractors with fewer than 50 employees over the next three years of 450 hours (18 respondents × 25 hours per respondent), with an annual burden of 150 hours.

As with larger entities, FHFA estimates that it will take each contractor and subcontractor with fewer than 50 employees approximately one hour to retrieve, review, and submit the documentation specified in the MWI Clause. Thus, FHFA estimates that the average triennial reporting burden on all contractors and subcontractors with fewer than 50 employees will be 18 hours (18 respondents × 1 hour per respondent), with an annual burden of 6 hours.

D. Comment Request

In accordance with the requirements of 5 CFR 1320.8(d), FHFA published an initial notice and request for public comments regarding this information collection in the **Federal Register** on May 27, 2020.[10] The 60-day comment period closed on July 27, 2020. FHFA received no comments.

FHFA requests written comments on the following: (1) Whether the collection of information is necessary for the proper performance of FHFA functions, including whether the information has practical utility; (2) the accuracy of FHFA's estimates of the burdens of the collection of information; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) 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.

Robert Winkler,

Chief Information Officer, Federal Housing Finance Agency.

[FR Doc. 2020–16599 Filed 7–30–20; 8:45 am]

BILLING CODE 8070–01–P

FEDERAL HOUSING FINANCE AGENCY

[No. 2020–N–14]

Proposed Collection; Comment Request

AGENCY: Federal Housing Finance Agency.

ACTION: National Survey of Mortgage Originations—30-day Notice of Submission of Information Collection for Approval for Emergency Clearance from Office of Management and Budget.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the

[3] 42 U.S.C. 2000e, *et seq.*

[4] E.O. 11246, 30 FR 12319 (Sept. 28, 1965).

[5] *See* 41 CFR 60–1.7.

[6] *See* 41 CFR 60–2.17.

[7] *See* 41 CFR 60–2.31.

[8] *See* 41 CFR 60–3.4.

[9] *See* PRA Supporting Statement for the OFCCP Recordkeeping and Requirements-Supply and Service Program, OMB Control No. 1250–0003, at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201906-1250-001.*

[10] *See* 85 FR 31777 (May 27, 2020).

Federal Housing Finance Agency (FHFA) is seeking public comments concerning an information collection known as the ''American Survey of Mortgage Borrowers (ASMB),'' which has been assigned control number 2590–0015 by the Office of Management and Budget (OMB). FHFA intends to submit the information collection to OMB for review and approval of an emergency six month renewal of the control number, which expired on July 31, 2019.

DATES: Interested persons may submit comments on or before August 31, 2020.

ADDRESSES: Submit comments to the Office of Information and Regulatory Affairs of the Office of Management and Budget, Attention: Desk Officer for the Federal Housing Finance Agency, Washington, DC 20503, Fax: (202) 395–3047, Email: *OIRA_submission@omb.eop.gov.* Please also submit comments to FHFA, identified by ''Proposed Collection; Comment Request: 'American Survey of Mortgage Borrowers, (No. 2020–N–14)' '' by any of the following methods:

- *Agency website: www.fhfa.gov/open-for-comment-or-input.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the *Federal eRulemaking Portal,* please also send it by *email* to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by the agency.
- *Mail/Hand Delivery:* Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW, Washington, DC 20219, ATTENTION: Proposed Collection; Comment Request: ''American Survey of Mortgage Borrowers, (No. 2020–N–14).'' Please note that all mail sent to FHFA via U.S. Mail is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.

We will post all public comments we receive without change, including any personal information you provide, such as your name and address, email address, and telephone number, on the FHFA website at *http://www.fhfa.gov.* In addition, copies of all comments received will be available for examination by the public through the electronic comment docket for this PRA Notice also located on the FHFA website.

FOR FURTHER INFORMATION CONTACT: Saty Patrabansh, Manager, National Mortgage Database Program, *Saty.Patrabansh@fhfa.gov,* (202) 649–3213; or Angela Supervielle, Counsel, *Angela.Supervielle@fhfa.gov,* (202) 649–3973, (these are not toll-free numbers), Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. The Telecommunications Device for the Hearing Impaired is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

A. Background

The ASMB is a component of the ''National Mortgage Database'' (NMDB®) Program, which is a joint effort of FHFA and the Consumer Financial Protection Bureau (CFPB) (jointly, ''the agencies''). The NMDB Program is designed to satisfy the Congressionally-mandated requirements of section 1324(c) of the Federal Housing Enterprises Financial Safety and Soundness Act.[1] Section 1324(c) requires that FHFA conduct a monthly survey to collect data on the characteristics of individual prime and subprime mortgages, and on the borrowers and properties associated with those mortgages, in order to enable it to prepare a detailed annual report on the mortgage market activities of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) for review by the appropriate Congressional oversight committees. Section 1324(c) also authorizes and requires FHFA to compile a database of otherwise unavailable residential mortgage market information and to make that information available to the public in a timely fashion.

As a means of fulfilling those and other statutory requirements, as well as to support policymaking and research regarding the residential mortgage markets, FHFA and CFPB jointly established the NMDB Program in 2012. The Program is designed to provide comprehensive information about the U.S. mortgage market and has three primary components: (1) The NMDB; (2) the quarterly National Survey of Mortgage Originations (NSMO); and (3) the ASMB.

The NMDB is a de-identified loan-level database of closed-end first-lien residential mortgage loans that is representative of the market as a whole, contains detailed loan-level information on the terms and performance of the mortgages and the characteristics of the associated borrowers and properties, is continually updated, has an historical component dating back to 1998, and provides a sampling frame for surveys to collect additional information. The core data in the NMDB are drawn from a random 1-in-20 sample of all closed-end first-lien mortgages outstanding at any time between January 1998 and the present in the files of Experian, one of the three national credit repositories. A random 1-in-20 sample of mortgages newly-reported to Experian is added each quarter.

The NMDB draws additional information on mortgages in the NMDB datasets from other existing sources, including Home Mortgage Disclosure Act (HMDA) data that are maintained by the Federal Financial Institutions Examination Council (FFIEC), property valuation models, and administrative data files maintained by Fannie Mae and Freddie Mac and by federal agencies. FHFA also obtains data from the two surveys conducted as part of the project—the NSMO and the ASMB. The NSMO is a quarterly survey that provides critical and timely information on newly-originated mortgages and those borrowing that are not available from other sources, including: the range of nontraditional and subprime mortgage products being offered, the methods by which these mortgages are being marketed, and the characteristics of borrowers for these types of loans.[2]

While the NSMO provides information on newly-originated mortgages, the ASMB focuses on borrowers' experience with maintaining their existing mortgages. This includes their experience maintaining mortgages under financial stress, their experience in soliciting financial assistance, their success in accessing federally sponsored programs designed to assist them, and, where applicable, any challenges they may have had in terminating a mortgage loan. In short, the ASMB is designed to collect information necessary to allow empirical analysis of two questions of vital importance to residential mortgage market policymakers and stakeholders: (1) What factors explain or predict which borrowers will become delinquent on their mortgages?; and (2) Once a borrower becomes delinquent, what factors explain or predict whether the borrower will (a) become current on the loan, (b) decide they cannot afford the mortgage and sell the property or modify the mortgage, or (c) remain delinquent and enter into foreclosure?

From 2016 through 2018, the ASMB questionnaire was sent once annually to a stratified random sample of 10,000 borrowers with mortgages in the NMDB. In 2018, the ASMB had an 18.7 percent overall response rate, which yielded 1,793 survey responses. FHFA did not undertake the ASMB during 2019, but

[1] 12 U.S.C. 4544(c).

[2] OMB has cleared the NSMO under the PRA and assigned it control no. 2590–0012, which expires on June 30, 2023.

intends to send out the survey again in the Fall of 2020.[3] The 2018 and 2020 survey questionnaires are substantially similar, except in that a number of questions specifically relating to the COVID–19 pandemic and its effects have been added to the 2020 questionnaire. Eight new questions have been added regarding expanded mortgage payment forbearance options that may have been offered to borrowers. Two other new questions address the effect of the COVID–19 pandemic on borrowers' homeownership and employment. Because of the elimination of several questions, as well as the combination of some other questions, the total number of questions has actually decreased from 93 on the 2018 survey questionnaire to 92 on the 2020 questionnaire.

Each of the 92 questions on the 2020 survey questionnaire is designed to elicit one or more of five different categories of information that are not available in the administrative data and that are needed either to properly analyze the issues described above or to validate the survey responses. These categories are: (1) Information needed to validate that the survey reached the correct borrower and that the borrower is providing answers about the correct loan; (2) information about the mortgage loan that does not exist in sufficient detail in the administrative data; (3) information about the borrower's economic circumstances that does not exist, or exists in insufficient detail, in the administrative data; (4) information about the borrower's attitudes regarding his or her mortgage, property, interactions with lenders and servicers, and life circumstances; and (5) information needed to determine the ultimate outcome of the borrower's delinquency and the interim steps that led to that outcome.

B. Need For and Use of the Information Collection

FHFA views the NMDB Program as a whole, including the ASMB, as the monthly ''survey'' required by section 1324(c) of the Safety and Soundness Act. Core inputs to the NMDB, such as a regular refresh of the credit repository data, occur monthly, though the actual surveys conducted under the NMDB Project do not. The information collected through the ASMB is used, in combination with information obtained from existing sources in the NMDB, to assist FHFA in understanding how the performance of existing mortgages is influencing the residential mortgage market, what different borrower groups are discussing with their servicers when they are under financial stress, and consumers' opinions of federally-sponsored programs designed to assist them. This important, but otherwise unavailable, information assists FHFA in the supervision of its regulated entities (Fannie Mae, Freddie Mac, and the Federal Home Loan Banks) and in the development and implementation of appropriate and effective policies and programs. The information may also be used for research and analysis by CFPB and other federal agencies that have regulatory and supervisory responsibilities and mandates related to mortgage markets and to provide a resource for research and analysis by academics and other interested parties outside of the government.

As discussed above, the agencies have added to the 2020 ASMB survey questionnaire a number of questions relating to the effect of the COVID–19 pandemic on home mortgage borrowers. FHFA and CFPB are actively engaged in developing policies in response to the COVID–19 pandemic and in support of the recently-enacted CARES Act,[4] which addresses various ramifications of the pandemic, including its effects on the residential mortgage market. It is critical for both agencies to have timely access to this information to assist in evidenced-based policymaking in these areas.

FHFA is also seeking OMB approval to continue to conduct cognitive pre-testing of the survey materials. The Agency uses information collected through that process to assist in drafting and modifying the survey questions and instructions, as well as the related communications, to read in the way that will be most readily understood by the survey respondents and that will be most likely to elicit usable responses. Such information is also used to help the Agency decide on how best to organize and format the survey questionnaires.

C. Reason for Emergency Clearance Request

In accordance with the requirements of 5 CFR 1320.8(d), FHFA published a request for public comments regarding this information collection in the **Federal Register** on May 29, 2019, prior to the expiration of the control number.[5] The 60-day comment period closed on July 29, 2019. FHFA received no comments.

After publication of that 60-day Notice, FHFA and CFPB decided not to conduct the survey in 2019 and, instead, to wait until 2020 to conduct the next wave. In light of that decision, FHFA decided to allow the PRA clearance for the ASMB to expire on July 31, 2019 and to continue with the clearance process in early 2020. At the time the Agency was preparing to publish the 30-day PRA Notice in the Spring of 2020, the wide effect of the COVID–19 pandemic on the nation's mortgage markets and overall economy was becoming evident, and the agencies decided to revise the 2020 survey questionnaire to add the questions related to COVID–19 that are discussed above. The addition of those questions has made the survey questionnaire materially different from the version that was published with the 60-day Notice in May 2019 and OMB has informed FHFA that it cannot move forward with the normal clearance process without first publishing a new 60-day Notice attaching the revised survey.

If FHFA were to begin the clearance process anew, it is unlikely that it will have received OMB approval for the revised collection in time to send out the survey in the fall of 2020 as is needed to provide the agencies with timely and critical information on the effects of the pandemic on the residential mortgage market. Therefore, with the approval of OMB, FHFA is moving forward with this 30-day notice, after which it will request an emergency six-month clearance for this collection to facilitate the rapid collection of the pandemic-related information. At the appropriate time, FHFA will then initiate a full clearance process to cover future waves of the survey.

D. Burden Estimate

This information collection consists of two components: (1) The survey; and (2) the pre-testing of the survey questionnaire and related materials through the use of focus groups. FHFA conducted the ASMB annually from 2016 through 2018, but did not conduct the survey in 2019. The Agency currently plans to conduct the survey next in the Fall of 2020. The decision as to whether to conduct the survey on an annual or a biennial basis going forward will depend upon the availability of funding and on the agencies' assessments as to the need for the type of data collected through the survey. In order to preserve the ability to conduct the survey annually, FHFA assumes, for purposes of these burden estimates, that it will conduct the survey once annually over the next

[3] A copy of the draft 2020 survey questionnaire appears at the end of this notice.

[4] Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136 (2020).

[5] *See* 84 FR 24783 (May 29, 2019).

three years. The estimates assume that the Agency will conduct two rounds of pre-testing on each set of survey materials.

FHFA has analyzed the total hour burden on members of the public associated with conducting the survey (5,000 hours) and with pre-testing the survey materials (24 hours) and estimates the total annual hour burden imposed on the public by this information collection to be 5,024 hours. The estimate for each phase of the collection was calculated as follows:

(1) Conducting the Survey

FHFA estimates that the ASMB questionnaire will be sent to 10,000 recipients each time it is conducted. Although it expects that only about 1,800 of those surveys will be returned, FHFA has calculated the burden estimates below as if all of the surveys will be returned. Based on the reported experience of respondents to earlier ASMB questionnaires, FHFA estimates that it will take each respondent 30 minutes to complete each survey, including the gathering of necessary materials to respond to the questions. This results in a total annual burden estimate of 5,000 hours for the survey phase of this collection (1 survey per year × 10,000 respondents per survey × 30 minutes per respondent = 5,000 hours).

(2) Pre-Testing the Materials

FHFA estimates that it will sponsor two focus groups prior to conducting each annual survey, with 12 participants in each focus group, for a total of 24 focus group participants. It estimates the participation time for each focus group participant to be one hour, resulting in a total annual burden estimate of 24 hours for the pre-testing phase of the collection (2 focus groups per year × 12 participants in each group × 1 hour per participant = 24 hours).

E. Comment Request

FHFA requests written comments on the following: (1) Whether the collection of information is necessary for the proper performance of FHFA functions, including whether the information has practical utility; (2) the accuracy of FHFA's estimates of the burdens of the collection of information; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) 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.

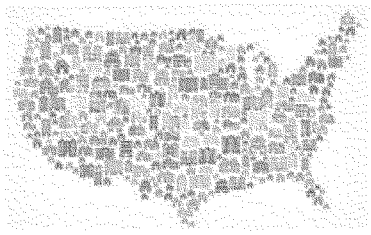
Robert Winkler,

Chief Information Officer, Federal Housing Finance Agency.

BILLING CODE 8070–01–P

What happened with your mortgage over the last year?

Covid-19 pandemic and your mortgage



The most effective way to understand the benefits and problems with mortgages and owning a home is to ask you about your experiences. It is especially important today as many people faced difficult financial situations because of the Covid-19 pandemic.

You can complete this paper copy or complete the survey online. The online version may be easier to complete because it skips questions that do not apply to you. Online responses are also processed more quickly making it less likely that you will receive reminders to complete this survey. The online questionnaire can be completed in either English or Spanish as explained below.

To complete the survey online

Go to **www.ASMBsurvey.com**

LOG IN with the **unique PIN #** provided in the letter.

Esta encuesta está disponible en español en línea

Visite al sitio web ***www.ASMBsurvey.com***

Inicie la sesión con su número PIN único de la encuesta que se encuentra en la carta adjunta.

ABOUT THE SPONSORS: The **Federal Housing Finance Agency** and the **Consumer Financial Protection Bureau** are working together to sponsor this survey. We are doing this because the agencies are concerned with improve the mortgage process for future homeowners. Your experience will help us understand mortgages today and the issues facing borrowers. Thank you for helping us assist future borrowers.

You can find more information on our websites - fhfa.gov and consumerfinance.gov

Thank you for sharing your experience with us.

We look forward to hearing from you.

Privacy Act Notice: In accordance with the Privacy Act, as amended (5 U.S.C. § 552a), the following notice is provided. The information requested on this survey is collected pursuant to 12 U.S.C. 4544 for the purposes of gathering information for the National Mortgage Database. Routine uses which may be made of the collected information can be found in the Federal Housing Finance Agency's System of Records Notice (SORN) FHFA-21 National Mortgage Database. Providing the requested information is voluntary. Submission of the survey authorizes FHFA to collect the information provided and to disclose it as set forth in the referenced SORN.

Paperwork Reduction Act Statement: Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

OMB No. 2590-0015
Expires TBD

1. At any time in 2020 did you have a mortgage loan?

- ☐ Yes, I had (or still have) at least one mortgage loan
- ☐ No, I did not have a mortgage loan on any property → **Go to 64 on page 6**

2. Which one of these reasons best describes why you took out this mortgage? *If you had more than one mortgage during that time, please refer to your experiences with the mortgage you took out the earliest as you complete this survey.*

- ☐ To buy a property
- ☐ To refinance or modify an earlier mortgage
- ☐ To add/remove a co-borrower
- ☐ To finance a construction loan
- ☐ To take out a new loan on a mortgage-free property
- ☐ Some other purpose (specify) _____

3. When did you take out this mortgage?

_____/_____
month year

4. When you took out this mortgage, what was the dollar amount you borrowed?

$_____ .00

☐ Don't know

5. What was the monthly payment, including the amount paid to escrow for taxes and insurance?

$_____ .00

☐ Don't know

6. What was the interest rate on this mortgage?

_____%

☐ Don't know

7. Who signed or co-signed for this mortgage? *Mark all that apply*

- ☐ I signed
- ☐ Spouse/partner including a former spouse/partner
- ☐ Parents
- ☐ Children
- ☐ Other relatives
- ☐ Other (e.g. friend, business partner)

8. Did/does this mortgage have...

	Yes	No	Don't Know
A prepayment penalty *(fee if the mortgage is paid off early)*	☐	☐	☐
An escrow account for taxes and/or homeowner insurance	☐	☐	☐
An adjustable rate *(one that can change over the life of the loan)*	☐	☐	☐
A balloon payment	☐	☐	☐
Interest-only monthly payments	☐	☐	☐
Private mortgage insurance	☐	☐	☐

9. When you took out this mortgage, how satisfied were you with the...

	Very	Somewhat	Not At All
Mortgage lender/broker you used	☐	☐	☐
Application process	☐	☐	☐
Documentation process required for the loan	☐	☐	☐
Loan closing process	☐	☐	☐
Information in mortgage disclosure documents	☐	☐	☐
Timeliness of mortgage disclosure documents	☐	☐	☐
Settlement agent	☐	☐	☐

10. At the time you took out this mortgage, how satisfied were you that it was the one with the...

	Very	Somewhat	Not At All
Best terms to fit your needs	☐	☐	☐
Lowest interest rate you could qualify for	☐	☐	☐
Lowest closing cost	☐	☐	☐

The Property

11. When did you first become the owner of this property?

_____/_____
month year

12. Which one of the following best describes this property?

- ☐ Single-family detached house
- ☐ Mobile home or manufactured home
- ☐ Townhouse, row house, or villa
- ☐ 2-unit, 3-unit, or 4-unit dwelling
- ☐ Apartment (or condo/co-op) in apartment building
- ☐ Unit in a partly commercial structure
- ☐ Other (specify) _____

13. What was the purchase price of this property, or if you built it, how much did the construction and land cost?

$_____. 00 ☐ Don't know

14. About how much do you think this property is worth in terms of what could it sell for now or the sale price if you sold it?

$_____. 00 ☐ Don't know

15. Did the Covid-19 pandemic affect your assessment of the worth of this property?

- ☐ No affect
- ☐ Yes, worth is higher because of the pandemic
- ☐ Yes, worth is somewhat lower because of the pandemic
- ☐ Yes, worth is a lot lower because of the pandemic

16. Which of the following best describes how you use this property today?

- ☐ Primary residence *(where you spent the majority of your time)*
- ☐ Seasonal or second home
- ☐ Home for other relatives
- ☐ Rental or investment property
- ☐ Vacant
- ☐ No longer have the property
- ☐ Other (specify)_____

17. Did we mail this survey to the address of the property you financed with this mortgage?

☐ Yes ☐ No

18. What do you think will happen to the prices of homes in this neighborhood over the next couple of years?

- ☐ Increase a lot
- ☐ Increase a little
- ☐ Remain about the same
- ☐ Decrease a little
- ☐ Decrease a lot

19. In the next couple of years, how do you expect the overall desirability of living in this neighborhood to change?

- ☐ Become more desirable
- ☐ Stay about the same
- ☐ Become less desirable

Mortgage Forbearance

20. Earlier this year, in response to the Covid-19 pandemic, many borrowers were able to obtain a forbearance (a temporary suspension, reduction, or pause in making mortgage payments). **Did you get a forbearance?**

- ☐ Yes
- ☐ No

21. Were any of the following a reason you did not or could not get a forbearance?

	Yes	No
Did not know about it	☐	☐
Did not think I needed it	☐	☐
Uncertain about how the delayed payments would be repaid	☐	☐
Concerned all delayed payments had to be paid in full at the end of forbearance	☐	☐
Concerned about the effect on my credit score	☐	☐
Received another form of mortgage relief	☐	☐
I did not qualify	☐	☐
Other (specify)_____	☐	☐

→ **Skip to 29**

22. How did you apply for forbearance?

	Yes	No
On the phone with a live person	☐	☐
Automated phone system	☐	☐
Online portal	☐	☐
Other (specify)_____	☐	☐

23. What was the time period of your initial forbearance?

- ☐ 3 months
- ☐ 6 months
- ☐ Other_____months

24. When you got your forbearance, did your lender or mortgage servicer, the company that sends you your mortgage statements...

	Yes	No
Offer only one time period option	☐	☐
Make it clear what would happen at the end of the forbearance period and how to repay suspended payments	☐	☐
Provide you with a written forbearance agreement	☐	☐

25. What is the current status of your forbearance?

- ☐ Took forbearance, but continued to make regular payments → **Skip to 29**
- ☐ Still in initial forbearance period
- ☐ In an extended forbearance period
- ☐ Out of forbearance

26. When your forbearance period ends or has ended, which of the following best describes how your deferred or reduced payments will be repaid?

- ☐ Paid or will pay the deferred amount due at the end of forbearance
- ☐ Set up or plan to set up a repayment plan
- ☐ Already have or plan to get a loan modification
- ☐ Paid or will pay off the deferred amount with a refinance, home sale or when loan is paid off
- ☐ Unsure/Don't know

27. How confident are you that you will be able to repay the deferred payments?

☐ Very ☐ Somewhat ☐ Not at all ☐ Already paid off

28. How satisfied were you with the process of getting and working through the forbearance?

☐ Very ☐ Somewhat ☐ Not at all

Difficulty Making Mortgage Payments

29. Did you have any concerns or face any difficulties making your mortgage payments in 2020? *If you would have had difficulties making your payment without forbearance, please answer yes.*

- ☐ Yes – had concerns or difficulties
- ☐ Yes – would have had concerns without forbearance
- ☐ No → **Skip to 45**

30. When did you start having concerns or difficulties making the mortgage payments?

- ☐ 2019 or earlier
- ☐ Jan – March 2020
- ☐ April – June 2020
- ☐ July 2020 or later

31. When you had concerns or faced difficulties in 2020, what happened to the mortgage payments?

- ☐ Made all payments on time
- ☐ Made partial payments (in forbearance)
- ☐ Made all payments, but made one or more late payments
- ☐ Did not make all my payments

32. Did any of the following raise concerns or make it difficult to make your mortgage payments?

	Yes	No
Layoff, unemployment, or reduced hours of work	☐	☐
Retirement	☐	☐
Business failure	☐	☐
Separation, divorce or partner left	☐	☐
Illness, disability or death of someone in your household	☐	☐
Disaster affecting this property	☐	☐
Increase in required mortgage payments	☐	☐
Payments for other mortgages (e.g. HELOC, 2nd mortgage)	☐	☐
Payments for other large debts	☐	☐
Covid-19 (coronavirus) pandemic	☐	☐
Other unexpected expenses not listed above (specify)_____	☐	☐
Other loss of income not listed above (specify)_____	☐	☐

33. Did you do any of the following to address your concerns or difficulties paying this mortgage?

	Yes	No
Borrowed money from family or friend	☐	☐
Borrowed from or cashed out a retirement account	☐	☐
Took out a home equity loan/line of credit	☐	☐
Borrowed money somewhere else	☐	☐
Rented out part of the property or added roommates	☐	☐
Put the property up for sale	☐	☐
Sold other assets	☐	☐
Delayed making any major purchases	☐	☐
Negotiated lower or delayed payments on expenses/debts (not your mortgage)	☐	☐
Reduced other expenses/purchases	☐	☐
Increased work hours	☐	☐
Started a second job	☐	☐
Started a new or better paying job	☐	☐
Received unemployment benefits	☐	☐

34. Other than discussions about forbearance, did you have any other contact or talk with your lender/servicer related to your concerns or payment difficulties?

☐ Yes
☐ No → **Skip to 39**

35. Did you discuss any of the following with your lender/servicer to address your concerns or payment difficulties?

	Yes	No	Don't Know
A loan modification	☐	☐	☐
Refinancing your mortgage	☐	☐	☐
Available government programs	☐	☐	☐
Financial counseling	☐	☐	☐
Debt consolidation	☐	☐	☐
A way to get caught up on missed payments	☐	☐	☐
Selling or giving up the property	☐	☐	☐
Other (specify)_____	☐	☐	☐

36. Did the lender/servicer offer you…

	Yes	No	Don't Know
A repayment plan to make up missed payments	☐	☐	☐
A pre-approved plan to modify your mortgage payment permanently	☐	☐	☐
A way for you to apply to modify your mortgage payment permanently	☐	☐	☐
A way to sell the property to satisfy the mortgage	☐	☐	☐
A way to give the property to the lender to satisfy the mortgage	☐	☐	☐

37. Overall, how satisfied were you with your interactions with your lender/servicer?

☐ Very ☐ Somewhat ☐ Not at all

38. Were any of the following a challenge to you in getting help to address your concerns or payment difficulties?

	Yes	No
Not knowing how or where to apply for programs	☐	☐
The application process for programs was too much trouble	☐	☐
Did not think I qualified for any program	☐	☐
Did not feel comfortable talking with the loan servicer	☐	☐
Was told I did not qualify for a program	☐	☐
Turned down for the programs I applied to	☐	☐
Difficulty getting the correct documents submitted in a timely fashion	☐	☐
Loan servicer was unable or unwilling to help me	☐	☐
Difficulty in reaching or communicating with loan servicer	☐	☐
Loan servicer gave inconsistent or conflicting information	☐	☐
Other problem (specify)_____	☐	☐

Counseling/Other Services

39. When you were having concerns or difficulties, did you talk to a professional housing counselor or take a course about managing your finances from an expert?

☐ Yes
☐ No → **Skip to 45**

40. Was your counseling or course…

	Yes	No
In person, one-on one	☐	☐
In person, in a group	☐	☐
Over the phone	☐	☐
Online	☐	☐
Required	☐	☐

41. How many hours was your counseling or course?

☐ Less than 3 hours
☐ 3 – 6 hours
☐ 7 – 12 hours
☐ More than 12 hours

42. Overall, how helpful was your counseling or course?

☐ Very ☐ Somewhat ☐ Not at all

43. Did you seek input about possible steps to address your payment difficulties from...

	Yes	No
A real estate agent	☐	☐
Family or friends	☐	☐
Lawyer	☐	☐
Financial planner	☐	☐
Bank or credit union	☐	☐
Government/private agency	☐	☐
Other (specify) _____	☐	☐

44. Did you pay someone who promised to resolve your difficulties, but they did not?

☐ Yes ☐ No

The Property/Mortgage Today

45. Compared to January 2020, how would you describe your situation today?

☐ Still own property and have a mortgage
☐ Still own property but no mortgage } **Skip to 55**
☐ In the process of foreclosure now
☐ No longer own the property } **Skip to 56**
☐ Other _____

46. Did you ever consider selling this property?

☐ Yes → **Skip to 48**
☐ No

47. Were any of the following a reason you did not consider selling this property?

	Yes	No
Not enough equity in the property	☐	☐
Selling is too much trouble, very stressful	☐	☐
Problems were not yet severe enough to warrant selling	☐	☐
Wanted to stay as long as I could/try to work out problems	☐	☐

48. Compared to January 2020, how would you describe the loan terms and lender on this mortgage? *If you got a forbearance, do not consider this a change in the terms of your loan.*

☐ Same terms, same lender
☐ Same terms, different lender
☐ Different terms, same lender } **Skip to 52**
☐ Different terms, different lender

49. At any time in 2020, did you ever consider changing the loan terms or lender on this mortgage?

☐ Yes
☐ No → **Skip to 55**

50. Did you take any specific action to change the loan terms or lender?

☐ Shopped around for rates, information, etc.
☐ Talked with a lender/servicer and was told I did not qualify
☐ Applied but withdrew the application
☐ Applied but was rejected by the lender/servicer
☐ Applied, was accepted, but decided not to change
☐ Did not take any action

51. Were any of the following a reason you did not or could not change the loan terms or lender?

	Yes	No
Not enough income to qualify	☐	☐
Low credit score, credit issues	☐	☐
Too much other debt	☐	☐
Savings not worth the cost or hassle	☐	☐
New loan not better than what I had	☐	☐
Low appraisal/home value	☐	☐
Other (specify) _____	☐	☐

→ **Skip to 55**

Changed Lender/Loan Terms

52. When did you change the loan terms and/or lender?

_____ / _____
Month / Year

53. How does the new loan compare to the old loan?

	Higher	Same	Lower
Monthly payment	☐	☐	☐
Principal balance	☐	☐	☐
Interest rate	☐	☐	☐
Remaining years/months on loan	☐	☐	☐

54. Did you change the loan terms and/or lender for any of the following reasons?

	Yes	No
Could not afford to make the payments	☐	☐
Divorce, separation, or partner left	☐	☐
Death of a household member	☐	☐
Illness or disability	☐	☐
Job loss	☐	☐
Avoid foreclosure	☐	☐
Other (specify)_____	☐	☐

Still Own The Property

55. How likely is it that in the next year or two you will…?

	Very	Somewhat	Not at all
Sell your property	☐	☐	☐
Move but keep your property	☐	☐	☐
Refinance the mortgage on your property	☐	☐	☐
Pay off your mortgage and own property mortgage-free	☐	☐	☐
Lose your property because you cannot afford the payment	☐	☐	☐

56. Did the Covid-19 (coronavirus) pandemic cause you to do any of the following?

	Yes	No
Delay or cancel a major home improvement or remodeling project	☐	☐
Delay or cancel maintenance	☐	☐
Delay or cancel a planned move or sale of your property	☐	☐
Sell investment property or second home	☐	☐
Take out a home equity loan/line of credit	☐	☐

→ **Skip to 63**

No Property/No Mortgage

57. What happened to the property you no longer have?

- ☐ Sold the property at reduced price agreed to by lender (short sale)
- ☐ Sold the property - regular sale
- ☐ Property in foreclosure now
- ☐ Property was taken in foreclosure
- ☐ Gave home to lender to cancel mortgage debt (deed-in-lieu, mortgage release, "cash for keys")
- ☐ Walked away and let the lender have the property
- ☐ Other _____

58. When did this happen?

_____/_____
Month/Year

59. Considering the decision to end the mortgage, would you say the decision was primarily…

- ☐ Your or your family's decision
- ☐ Lender or servicer's decision
- ☐ Other _____

60. Which of the following best describes why you no longer have this property?

- ☐ Owed more on the loan than the property was worth or could sell it for
- ☐ Could not afford the mortgage and related expenses (maintenance, taxes, condo fees, etc.)
- ☐ Could afford the property, but no longer have it for other reasons (specify)_____

61. Do you currently own or rent your primary residence?

- ☐ Own → **Skip to 63**
- ☐ Rent
- ☐ Live with family or friends

62. When do you think you might purchase another primary residence?

- ☐ 1 – 2 years
- ☐ 3 – 5 years
- ☐ Over 5 years
- ☐ Never

63. Would any of the following events cause you to consider buying sooner or at all?

	Yes	No
Increase in income/more hours at work	☐	☐
Improved credit score	☐	☐
Saving more for a down payment	☐	☐
Paying off other debts first	☐	☐
Lower interest rate	☐	☐
Lower required credit score	☐	☐
Other (specify)_____	☐	☐

☐ Nothing, will not buy again

Your Household

64. What is your current marital status?

☐ Married
☐ Separated
☐ Never married
☐ Divorced
☐ Widowed

65. Do you have a partner who shares the decision-making and responsibilities of running your household but is not your legal spouse?

☐ Yes ☐ No

Please answer the following questions for you and your spouse or partner, if applicable.

	You	Spouse/ Partner
66. Age at last birthday:	____years	____years

67. Sex:

	You	Spouse/ Partner
Male	☐	☐
Female	☐	☐

68. Highest level of education achieved:

	You	Spouse/ Partner
Some schooling	☐	☐
High school graduate	☐	☐
Technical school	☐	☐
Some college	☐	☐
College graduate	☐	☐
Postgraduate studies	☐	☐

69. Hispanic or Latino:

	You	Spouse/ Partner
Yes	☐	☐
No	☐	☐

70. Race: *Mark all that apply.*

	You	Spouse/ Partner
White	☐	☐
Black or African American	☐	☐
American Indian or Alaska Native	☐	☐
Asian	☐	☐
Native Hawaiian or Pacific Islander	☐	☐

71. If you were working at the beginning of 2020 how were you paid? *Mark all that apply.*

	You	Spouse/ Partner
Salary	☐	☐
Commissions	☐	☐
Bonus	☐	☐
Contract worker	☐	☐
Hourly wages	☐	☐
Tips	☐	☐
Self-employed/other	☐	☐
Not working	☐	☐

72. What was your work status at the beginning of 2020? *Mark all that apply.*

	You	Spouse/ Partner
Self-employed full time	☐	☐
Self-employed part time	☐	☐
Employed full time	☐	☐
Employed part time	☐	☐
Retired	☐	☐
Unemployed, temporarily laid-off, furlough	☐	☐
Not working for pay (*student, homemaker, disabled*)	☐	☐

73. Did you experience any of the following in 2020? *Mark all that apply*

	You	Spouse/ Partner
Reduced hours at work	☐	☐
Reduction in pay	☐	☐
Temporarily laid-off, furloughed	☐	☐
Job loss, unemployment	☐	☐

74. What is your work status today? *Mark all that apply.*

	You	Spouse/ Partner
No change from beginning of year	☐	☐
Self-employed full time	☐	☐
Self-employed part time	☐	☐
Employed full time	☐	☐
Employed part time	☐	☐
Retired	☐	☐
Unemployed, temporarily laid-off, furlough	☐	☐
Not working for pay (*student, homemaker, disabled*)	☐	☐

75. Ever serve on active duty in the U.S. Armed Forces, Reserves or National Guard?

	You	Spouse/ Partner
Never served in the military	☐	☐
Only on active duty for training in the Reserves or National Guard	☐	☐
Now on active duty	☐	☐
On active duty in the past, but not now	☐	☐

76. Besides you (and your spouse/partner), who else is a permanent resident in your household? *Mark all that apply.*

- ☐ Children/grandchildren 12 and under
- ☐ Children/grandchildren 13-18
- ☐ Children/grandchildren age 19 or older
- ☐ Parents of you or your spouse or partner
- ☐ Other relatives like siblings or cousins
- ☐ Non-relatives

☐ No one else

77. Has anyone temporarily moved into your home? *Mark all that apply.*

- ☐ Adult children
- ☐ Grandchildren
- ☐ Parents
- ☐ Someone else

☐ No one

78. In 2020, did any of the following happen?

	Yes	No
Marriage, remarried or new partner	☐	☐
New permanent addition to your household (not spouse/partner)	☐	☐
Death of household member	☐	☐
Separation, divorce or partner left	☐	☐
Other person left your household (not spouse/partner)	☐	☐
Disability or serious illness of a household member	☐	☐

79. Do you speak a language other than English at home?

- ☐ Yes
- ☐ No → **Skip to 81**

80. How well do you speak English?

- ☐ Very well
- ☐ Well
- ☐ Not well
- ☐ Not at all

81. In 2019, what was your total annual household income before taxes?

- ☐ Less than $35,000
- ☐ $35,000 to $49,999
- ☐ $50,000 to $74,999
- ☐ $75,000 to $99,999
- ☐ $100,000 to $174,999
- ☐ $175,000 or more

82. What do you think your total annual household will be in 2020 compared to 2019?

- ☐ A lot higher
- ☐ Somewhat higher
- ☐ Same
- ☐ Somewhat lower
- ☐ A lot lower

83. How likely is it that your total annual household income in 2021 will return to what it was in 2019?

- ☐ Very likely
- ☐ Somewhat likely
- ☐ Not at all likely

84. Does your total annual household income include any of the following sources?

	Yes	No
Wages or salary	☐	☐
Business or self-employment	☐	☐
Interest or dividends	☐	☐
Alimony or child support	☐	☐
Social Security, pension or other retirement benefits	☐	☐

85. Does anyone in your household have any of the following?

	Yes	No
401(k), 403(b), IRA, or pension plan	☐	☐
Stocks, bonds, or mutual funds *(not in retirement accounts or pension plans)*	☐	☐
Certificates of deposit	☐	☐
Investment real estate	☐	☐

86. Which <u>one</u> of the following statements best describes the amount of financial risk you are willing to take when you save or make investments?

- ☐ Take substantial risks expecting to earn substantial returns
- ☐ Take above-average risks expecting to earn above-average returns
- ☐ Take average risks expecting to earn average returns
- ☐ Not willing to take any financial risks

87. In 2020, how have the following changed?

	Significant Increase	Little/No Change	Significant Decrease
Housing expenses	☐	☐	☐
Non-housing expenses	☐	☐	☐

88. Over the next 12 months, how do you expect the following to change?

	Significant Increase	Little/No Change	Significant Decrease
Housing expenses	☐	☐	☐
Non-housing expenses	☐	☐	☐

89. How likely is it, that if needed, you will be able to…

	Very	Somewhat	Not At All
Pay your bills for the next 3 months without borrowing	☐	☐	☐
Get significant financial help from family or friends	☐	☐	☐
Borrow a significant amount from a bank or credit union	☐	☐	☐
Significantly increase your income	☐	☐	☐

90. How well could you explain to someone the …

	Very	Somewhat	Not At All
Process of taking out a mortgage	☐	☐	☐
Difference between a fixed- and an adjustable-rate mortgage	☐	☐	☐
Difference between a prime and a subprime loan	☐	☐	☐
Difference between a mortgage's interest rate and its APR	☐	☐	☐
Amortization of a loan	☐	☐	☐
Consequences of not making required mortgage payments	☐	☐	☐
Difference between lender's and owner's title insurance	☐	☐	☐
Relationship between discount points and interest rate	☐	☐	☐
Reason payments into an escrow account can change	☐	☐	☐

91. Do you know anyone who in the past year…

	Yes	No
Is behind in making their mortgage payments	☐	☐
Stopped making monthly mortgage payments when they could afford it	☐	☐
Has gotten forbearance relief from their lender/loan servicer	☐	☐
Has gone through foreclosure where the lender took over the property	☐	☐

92. Do you agree or disagree with the following statements?

	Agree	Disagree
Owning a home is a good financial investment	☐	☐
Most mortgage lenders generally treat borrowers well	☐	☐
Most mortgage lenders would offer me roughly the same rates and fees	☐	☐
Late payments will lower my credit rating	☐	☐
Lenders shouldn't care about any late payments only whether loans are fully repaid	☐	☐
It is okay to stop making mortgage payments when you can afford it	☐	☐
It is okay to stop making mortgage payments to pay other bills	☐	☐
I would consider counseling or taking a course about managing my finances if I faced financial difficulties	☐	☐

The Federal Housing Finance Agency and the Consumer Financial Protection Bureau appreciate your assistance.

We have provided space below for any additional comments. If the Covid-19 (coronavirus) pandemic affected your ability to make your mortgage payments in ways we have not covered in this survey, tell us about it here.

Please do not put your name or address on the questionnaire.

Please use the enclosed business-reply envelope to return your completed questionnaire.

FHFA
1600 Research Blvd, RC B16
Rockville, MD 20850

For any questions about the survey or online access you can call toll free 1-855-531-0724.

[FR Doc. 2020–16659 Filed 7–30–20; 8:45 am]
BILLING CODE 8070–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC–2020–0077; Docket No. NIOSH 338]

Advisory Board on Radiation and Worker Health (ABRWH), National Institute for Occupational Safety and Health (NIOSH); Correction

Notice is hereby given of a change in the meeting of the Advisory Board on Radiation and Worker Health (ABRWH), NIOSH; August 26, 2020 from 1:15 p.m. to 6:15 p.m., EDT and August 27, 2020 from 1:15 p.m. to 6:30 p.m., EDT, which was published in the **Federal Register** on July 14, 2020, Volume 85, Number 134, pages 41986–41987.

The Matters to be Considered should read as follows:

Matters to be Considered: The agenda will include discussions on the following: NIOSH Program Update; Department of Labor Program Update; Department of Energy Program Update; SEC Petitions Update; Completed Site Profile Review for W.R Grace Company (Erwin, Tennessee); Update on Site Profile Review for Idaho National Laboratory Site (Burial Ground and other Exposure Scenarios), and Hanford (Richland, Washington); SEC Petition Reviews for Superior Steel (Carnegie, Pennsylvania; 1952–1957), and Reduction Pilot Plant (Huntington, West Virginia; 1976–1978), and a Board Work Session. Agenda items are subject to change as priorities dictate.

FOR FURTHER INFORMATION CONTACT: Rashaun Roberts, Ph.D., Designated Federal Officer, NIOSH, CDC, 1090 Tusculum Avenue, Mailstop C–24, Cincinnati, Ohio 45226, Telephone (513) 533–6800, Toll Free 1(800)CDC–INFO, Email *ocas@cdc.gov.*

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2020–16551 Filed 7–30–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended, and the Determination of the Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)-DP21–001, Pregnancy Risk Assessment Monitoring System (PRAMS).

Dates: October 6, 2020–October 7, 2020, Panel A;

October 8, 2020–October 9, 2020, Panel B

Time: 10:00 a.m.–6:00 p.m., EDT

Place: Teleconference.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Jaya Raman Ph.D., Scientific Review Officer, CDC, 4770 Buford Highway, Mailstop F80, Atlanta, Georgia 30341, Telephone: (770) 488–6511, *JRaman@cdc.gov.*

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2020–16671 Filed 7–30–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Multi-Agency Informational Meeting To Discuss Reporting Requirements for Entities; Public Webinar

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Division of Select Agents and Toxins (DSAT) in the Centers for Disease Control, an Operating Division of the Department of Health and Human Services, and the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), Agriculture Select Agent Services (AgSAS), announce a public webinar to provide guidance regarding the forms used to report or submit information to the Federal Select Agent Program.

DATES: The webinar will be held September 23, 2020 from 11 a.m. to 4 p.m. EDT. Participants must register by September 18, 2020. Registration instructions are found on the website, *https://www.selectagents.gov.*

ADDRESSES: This meeting will be held by webinar.

FOR FURTHER INFORMATION CONTACT: CDC: Samuel S. Edwin, Ph.D., Director, DSAT, Center for Preparedness and Response, CDC, 1600 Clifton Road NE, MS H–21–7, Atlanta, Georgia 30329. Telephone: (404) 718–2000; email: *lrsat@cdc.gov.* APHIS: Jack Taniewski, DVM, Director, AgSAS, APHIS, 4700 River Road, Unit 2, Riverdale, MD 20737. Telephone: (301) 851–3300 (option 3); email: *AgSAS@aphis.usda.gov.*

SUPPLEMENTARY INFORMATION: The public webinar, scheduled for Wednesday, September 23, 2020, is an opportunity for the affected community and other interested individuals to obtain specific regulatory guidance for the forms used to report or submit information to the Federal Select Agent Program.

Representatives from the Federal Select Agent Program, Department of Commerce, Department of Transportation, and the Minnesota Department of Health will be present during the webinar to address questions and concerns from the webinar participants.

Participants who want to participate in the webinar should complete their registration online by September 18, 2020. Special instructions will be

provided to those who may need special accommodation in order to participate in the webinar. The registration instructions are located on this website: *http://www.selectagents.gov.*

Dated: July 28, 2020.

Sandra Cashman,

Executive Secretary, Centers for Disease Control and Prevention.

[FR Doc. 2020–16615 Filed 7–30–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, National Center for Health Statistics (BSC, NCHS)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the CDC announces the following meeting for the Board of Scientific Counselors, National Center for Health Statistics (BSC, NCHS). This meeting is open to the public limited only by the audio (via teleconference) lines available. The public is welcome to listen to the meeting by joining the teleconference (information below).

DATES: The meeting will be held on September 17, 2020 from 9:30 a.m. to 3:00 p.m., EDT, and September 18, 2020 from 9:00 a.m. to 11:30 a.m., EDT.

ADDRESSES: Please use the following URL *https://www.cdc.gov/nchs/about/bsc/bsc_meetings.htm* that points to the BSC homepage. Further information and meeting agenda will be available on the BSC website including instructions for accessing the live meeting broadcast. The teleconference access is *https://www.cdc.gov/nchs/about/bsc/bsc_meetings.htm.*

FOR FURTHER INFORMATION CONTACT: Sayeedha Uddin, M.D., M.P.H., Executive Secretary, NCHS/CDC, Board of Scientific Counselors, 3311 Toledo Road, Room 2627, Hyattsville, Maryland 20782, telephone (301) 458–4303, email *SUddin@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: This Board is charged with providing advice and making recommendations to the Secretary, Department of Health and Human Services; the Director, CDC; and the Director, NCHS, regarding the scientific and technical program goals and objectives, strategies, and priorities of NCHS.

Matters to be considered: Day One meeting agenda includes welcome remarks and a Center update by NCHS leadership; update from the National Ambulatory Medical Care Survey Workgroup; update on Population Health Survey Planning, Methodology and Data Presentation Workgroup; update on Healthy People 2030 Rollout; and RANDS overview. Day Two meeting agenda includes an update on Maternal Mortality Data; release of 2019 Estimates from National Health Interview Survey (NHANES) Early Release Program; and update on NHANES Data Release. Agenda items are subject to change as priorities dictate.

The Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Strategic Business Initiatives Unit, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2020–16552 Filed 7–30–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–8003]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by August 31, 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 30-day Review—Open for Public Comments'' or by using the search function.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

2. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Reinstatement with change of a previously approved collection; *Title of*

Information Collection: 1915(c) Home and Community Based Services (HCBS) Waiver Application; *Use:* We will use the web-based application to review and adjudicate individual waiver actions. The web-based application will also be used by states to submit and revise their waiver requests. *Form Number:* CMS–8003 (OMB control number 0938–0449); *Frequency:* Yearly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 47; *Total Annual Responses:* 71; *Total Annual Hours:* 6,005. (For policy questions regarding this collection contact Kathy Poisal at 410–786–5940.)

Dated: July 28, 2020.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2020–16648 Filed 7–30–20; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10592 and CMS–10287]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by August 31, 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 30-day Review—Open for Public Comments'' or by using the search function.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

2. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Extension without change of a currently approved collection; *Title of Information Collection:* Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers; *Use:* Section 1321(a) requires HHS to issue regulations setting standards for meeting the requirements under Title I of the Affordable Care Act including the offering of Qualified Health Plans (QHPs) through the Exchanges. On March 27, 2012, HHS published the rule CMS–9989–F: Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers. The Exchange rule contains provisions that mandate reporting and data collections necessary to ensure that health insurance issuers are meeting the requirements of the Affordable Care Act. These information collection requirements are set forth in 45 CFR part 156.

Information collected by the Exchanges or Medicaid and CHIP agencies will be used to determine eligibility for coverage through the Exchange and insurance affordability programs (*i.e.,* Medicaid, CHIP, and advance payment of the premium tax credits); evaluate how CMS can best communicate eligibility and enrollment updates to issuers; and assist consumers in enrolling in a QHP if eligible. Applicants include anyone who may be eligible for coverage through any of these programs. *Form Number:* CMS–10592 (OMB control number: 0938–1341); *Frequency:* Annually, Monthly, Occasionally; *Affected Public:* Private Sector: Business or other for-profits; *Number of Respondents:* 250; *Total Annual Responses:* 250; *Total Annual Hours:* 131,750. For policy questions regarding this collection contact Anne Pesto at 443–844–9966.

2. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Medicare Quality of Care Complaint Form; *Use:* Since 1986, Quality Improvement Organizations (QIO) have been responsible for conducting appropriate reviews of written complaints submitted by beneficiaries about the quality of care they have received. In order to receive these written complaints, each QIO has developed its own unique form on which beneficiaries can submit their complaints. CMS has initiated several efforts aimed at increasing the standardization of all QIO activities, and the development of a single, standardized Medicare Quality of Care Complaint Form beneficiaries can use to submit complaints is a key step towards attaining this increased standardization. The Medicare Quality of Care Complaint Form has been revised to improve its content, in order to provide clarity and support to beneficiaries. Section two of the form was updated to replace the Health Insurance Claim Number (HICN) with the current Medicare Beneficiary Identifier (MBI), a randomly generated number that replaced the SSN-based HICN. The information page of the form was revised to provide clear instruction as to how to complete the form and the implication of not providing certain requested information. *Form Number:* CMS–10287 (OMB control number:

0938–1102); *Frequency:* Occasionally; *Affected Public:* Individuals and Households; *Number of Respondents:* 4,350; *Total Annual Responses:* 4,350; *Total Annual Hours:* 725. (For policy questions regarding this collection contact Peter Ajuonuma at 410–786–3580.)

Dated: July 21, 2020.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2020–16677 Filed 7–30–20; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities; Proposed Collection; Comment Request; State Health Insurance Assistance Program Annual Sub-Recipients Report [OMB #0985–New]

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living (ACL) is announcing an opportunity for the public to comment on the proposed collection of information listed above. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish a notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the Proposed Revised Collection and solicits comments on the information collection requirements related to the State Health Insurance Assistance Program Annual Sub-Recipients Report.

DATES: Comments on the collection of information must be submitted electronically by 11:59 p.m. (EST) or postmarked by September 29, 2020.

ADDRESSES: Submit electronic comments on the collection of information to: Margaret Flowers. Submit written comments on the collection of information to Administration for Community Living, Washington, DC 20201, Attention: Margaret Flowers.

FOR FURTHER INFORMATION CONTACT: Margaret Flowers, Administration for Community Living, Washington, DC 20201, 202–795–7315, *Margaret.Flowers@acl.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in the PRA and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. The PRA requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, ACL is publishing a notice of the proposed collection of information set forth in this document. With respect to the following collection of information, ACL invites comments on our burden estimates or any other aspect of this collection of information, including:

(1) Whether the proposed collection of information is necessary for the proper performance of ACL's functions, including whether the information will have practical utility;

(2) the accuracy of ACL's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used to determine burden estimates; (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.

The purpose of this data collection is to collect sub-award data from grantees, including agency name, address, and annual federal funds received. Congress requires this data collection for program monitoring for the State Health Insurance Assistance Program (SHIP) under the Bipartisan Budget Act of 2018, SEC. 50207 (b). This data collection allows the Administration for Community Living (ACL) and the Center for Innovation and Partnership (CIP) to communicate with Congress and the public on the SHIP network of agencies. This is a new data collection requiring State SHIP grantees to provide the amount of federal funds provided annually to each sub-contractor and sub-grantee that are delivering SHIP services. The data collected will be will be electronically posted on the ACL website to educate the network on who the SHIP state sub-recipients are and how much money they are receiving.

SHIP grantees are located in each of the 50 states, the District of Columbia, Puerto Rico, Guam and the U.S. Virgin Islands. The respondents for this data collection are grantees who meet with Medicare beneficiaries and older adults' in-group settings and in one-on-one sessions to educate them on Medicare.

The proposed data collection tools may be found on the ACL website for review at *https://www.acl.gov/about-acl/public-input.*

Estimated Program Burden

ACL estimates the burden associated with this collection of information as follows:

Respondent/data collection activity	Number of respondents	Responses per respondent	Hours per response	Annual burden hours
	54	1	1	54
Total	54	1	1	54

Dated: July 27, 2020.

Mary Lazare,

Principal Deputy Administrator.

[FR Doc. 2020–16582 Filed 7–30–20; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities; Submission for OMB Review; Public Comment Request; Outcome Evaluation of the Long-Term Care Ombudsman Program (LTCOP); OMB# 0985–XXXX

AGENCY: Administration for Community Living (ACL), HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living is announcing that the proposed collection of information listed above has been submitted to the Office of Management and Budget (OMB) for review and clearance as required under section 506(c)(2)(A) of the Paperwork Reduction Act of 1995. This 30-day notice collects comments on the information collection requirements related to the proposed new information collection requirements related to the Outcome Evaluation for ACL's Long-term Ombudsman Program (LTCOP).

DATES: Submit written comments on the collection of information by August 31, 2020.

ADDRESSES: Submit written comments and recommendations for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find the Outcome Evaluation for ACL's Long-term Ombudsman Program (LTCOP) information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. By mail to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW, Rm. 10235, Washington, DC 20503, Attn: OMB Desk Officer for ACL.

FOR FURTHER INFORMATION CONTACT: Susan Jenkins, Ph.D., Administration for Community Living, Washington, DC 20201, 202.795.7369; *Susan.Jenkins@acl.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, ACL has submitted the following proposed collection of information to OMB for review and clearance. The mission of the Administration for Community Living (ACL) [1] is to maximize the independence, well-being, and health of older adults, people with disabilities across the lifespan, and their families and caregivers. The Long-Term Care Ombudsman Program serves individuals living in long-term care facilities (nursing homes, residential care communities, such as assisted living and similar settings) and works to resolve resident problems related to poor care, violation of rights, and quality of life.

Ombudsman programs also advocate at the local, state and national levels to promote policies and consumer protections to improve residents' care and quality of life. This data collection is part of an outcome evaluation of the Long-term Care Ombudsman Program (LTCOP) designed to determine the efficacy of LTCOP in carrying out core functions as described in the Older Americans Act, the long-term impacts of the LTCOP's for various stakeholders, what system advocacy among Ombudsman programs looks like, and effective or promising Ombudsman program practices. The efficacy of LTCOP in carrying out core functions as described in the Older Americans Act. ACL is interested in learning:

1. Are the critical functions, including federally mandated responsibilities, of the LTCOP at the state, and local levels, carried out effectively and efficiently?

2. How effective is the LTCOP in ensuring Ombudsman services for the full range of residents of long-term care facilities, including individuals with the greatest economic and social needs?

3. How cost-effective LTCOP strategies are, for example, the cost effectiveness of services offered through consultations, referrals, complaint handling, and via education and outreach activities.

4. What impact do LTCOPs have on long-term care practices, programs, and policies?

5. What impact do LTCOPs have on residents' health, safety, welfare, well-being, and rights?

Act (OAA) programs such as Title VII Long- Term Care Ombudsman Program (LTCOP), ACL/AoA seeks increased understanding of how these programs are operationalized at the State and local levels and their progress towards their goals and mission. This information will enable ACL/AoA to effectively report its results to the President, to Congress, to the Department of Health and Human Services and to the public.

The information will also aid in program refinement and continuous improvement. The more productive ACL/AoA' s programs, the greater the number of older adults have access to a higher quality of life. Therefore, in addition to the legislative mandate under the OAA, it is important for program integrity and function to evaluate the LTCOP.

Comments in Response to the 60-Day Federal Register Notice

A notice was published in the **Federal Register** on April 13, 2020 in FR 85 20506. There were no public comments received during the 60-day FRN comment period.

To comment and review the proposed data collection please visit the ACL website at *https://www.acl.gov/about-acl/public-input.*

ACL estimates the burden associated with this collection of information as follows:

ESTIMATED PROGRAM BURDEN

Respondent/data collection activity	Number of respondents	Responses per respondent	Hours per response	Annual burden hours
Focus Group-Facility staff including participant information	16	1	0.33	5.3
Focus Group-Residents/family including participant information	24	1	1	24
Interview-Stakeholders	40	1	1	40
Survey-Facility Administrator	1840	1	0.33	607.2
Survey-Former Ombudsmen	12	1	1	12
Survey-SUA director	53	1	0.5	26.5
Total	1985		4.16	715

[1] In April 2012, a new Operating Division was created within the US Department of Health and Human Services named the Administration for Community Living (ACL). This Operating Division contains the Administration on Aging (AoA).This document consistently refer to the federal agency as ''ACL/AoA.''

Dated: July 27, 2020.

Mary Lazare,

Principal Deputy Administrator.

[FR Doc. 2020–16583 Filed 7–30–20; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

[OMB #0985–0050]

Agency Information Collection Activities; Proposed Collection; Comment Request; The National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR) Grantee Annual Performance Reporting (APR) and Final Report Forms

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living (ACL) is announcing an opportunity for the public to comment on the proposed collection of information listed above. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish a notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice.

This notice solicits comments on the Proposed Extension without Change and solicits comments on the information collection requirements related to the NIDILRR Grantee Annual Performance Reporting (APR) and Final Report Forms.

DATES: Comments on the collection of information must be submitted electronically by 11:59 p.m. (EST) or postmarked by September 29, 2020.

ADDRESSES: Submit electronic comments on the collection of information to: Mary Darnell *Mary.Darnell@acl.hhs.gov.* Submit written comments on the collection of information to Administration for Community Living, Washington, DC 20201, Attention: Mary Darnell.

FOR FURTHER INFORMATION CONTACT: Mary Darnell, Administration for Community Living, 202–795–7337.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in the PRA and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 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 extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, ACL is publishing a notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, ACL invites comments on our burden estimates or any other aspect of this collection of information, including:

(1) Whether the proposed collection of information is necessary for the proper performance of ACL's functions, including whether the information will have practical utility;

(2) the accuracy of ACL's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used to determine burden estimates;

(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.

The National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR) Grantee Annual Performance Reporting (APR) and Final Report Forms collect data from all NIDILRR Grantees via a web-based reporting system and addresses specific HHS regulations that shall be met by applicants and grantees. HHS regulations that apply to NIDILRR Grant programs include Part 75 of the Uniform Administrative Requirements, Cost Principles and Audit requirements for HHS Awards. Specifically, § 75.342 which requires grantees to submit an annual performance report or, for the last year of a project, a final report that evaluates: (a) The grantee's progress in achieving the objectives in its approved application, (b) the effectiveness of the project in meeting the purposes of the program, and (c) the results of research and related activities.

Additionally, GPRA requires all federal agencies to implement performance measurement systems that include: (1) A five-year strategic plan, (2) an annual performance plan, and (3) an annual performance report. Currently, NIDILRR has met these requirements and has established performance indicators to meet the reporting requirements. The NIDILRR APR System currently includes reporting forms for all 10 of NIDILRR's grant programs.

Reporting forms for all 10 programs are web-based. Data collected through these forms (a) Facilitate program planning and management; (b) respond to ACL/HHS Grants Policy Administration Manual (GPAM) requirements and (c) respond to the reporting requirements of the Government Performance and Results Act (GPRA) of 1993.

NIDILRR uses the information gathered annually from these data collection efforts to provide Congress with the information mandated in GPRA, provide OMB information required for assessment of performance on GPRA indicators, and support its evaluation activities. Data collected from the 10 grant programs will provide a national description of the research activities of approximately 255 NIDILRR grantees. NIDILRR's GPRA plan must collect information to meet the following mandates: (a) Implementation of a comprehensive plan that includes goals and objectives; (b) measurement of the program's progress in meeting its objectives; and (c) submission of an annual report on program performance, including plans for program improvement, as appropriate. The data collection system addresses nearly all of the agency's GPRA indicators, either directly or by providing information for the agency's other review processes.

The proposed data collection tools may be found on the ACL website for review at *https://www.acl.gov/about-acl/public-input.*

Estimated Program Burden

ACL estimates the burden associated with this collection of information as follows:

	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
New Grantees	75	1	52	3.900
Continuations of Major Programs	124	1	22	2,728
Other Continuations	76	1	10	760
Total	275	.....	.....	7,388

Dated: July 27, 2020.

Mary Lazare,

Principal Deputy Administrator.

[FR Doc. 2020–16584 Filed 7–30–20; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–3240]

List of Bulk Drug Substances for Which There is a Clinical Need Under Section 503B of the Federal Food, Drug, and Cosmetic Act

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is developing a list of bulk drug substances (active pharmaceutical ingredients) for which there is a clinical need (the 503B Bulks List). Drug products that outsourcing facilities compound using bulk drug substances on the 503B Bulks List can qualify for certain exemptions from the Federal Food, Drug, and Cosmetic Act (FD&C Act) provided certain conditions are met. This notice identifies four bulk drug substances that FDA has considered and proposes to include on the 503B Bulks List: Diphenylcyclopropenone (DPCP), glycolic acid, squaric acid dibutyl ester (SADBE), and trichloroacetic acid (TCA). This notice also identifies 19 bulk drug substances that FDA has considered and proposes not to include on the list: Diazepam, dobutamine hydrochloride (HCl), dopamine HCl, edetate calcium disodium, folic acid, glycopyrrolate, hydroxyzine HCl, ketorolac tromethamine, labetalol HCl, mannitol, metoclopramide HCl, moxifloxacin HCl, nalbuphine HCl, polidocanol, potassium acetate, procainamide HCl, sodium nitroprusside, sodium thiosulfate, and verapamil HCl. Additional bulk drug substances nominated by the public for inclusion on this list are currently under consideration and may be the subject of future notices.

DATES: Submit either electronic or written comments on the notice by September 29, 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 September 29, 2020. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of September 29, 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–2018–N–3240 for ''List of Bulk Drug Substances for Which There is a Clinical Need Under Section 503B of the Federal Food, Drug, and Cosmetic Act.'' 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, 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: Elizabeth Hankla, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 5216, Silver Spring, MD 20993, 240–402–3359.

SUPPLEMENTARY INFORMATION:

I. Background

Section 503B of the FD&C Act (21 U.S.C. 353b) describes the conditions that must be satisfied for drug products compounded by an outsourcing facility to be exempt from section 505 (21 U.S.C. 355) (concerning the approval of drugs under new drug applications (NDAs) or abbreviated new drug applications (ANDAs)), section 502(f)(1) (21 U.S.C. 352(f)(1)) (concerning the labeling of drugs with adequate directions for use), and section 582 (21 U.S.C. 360eee–1) (concerning drug supply chain security requirements).[1]

Drug products compounded that meet the conditions in section 503B are not exempt from current good manufacturing practice (CGMP) requirements in section 501(a)(2)(B) of the FD&C Act (21 U.S.C. 351(a)(2)(B)).[2] Outsourcing facilities are also subject to FDA inspections according to a risk-based schedule, specific adverse event reporting requirements, and other conditions that help to mitigate the risks of the drug products they compound.[3] Outsourcing facilities may or may not obtain prescriptions for identified individual patients and can, therefore, distribute compounded drugs to healthcare practitioners for ''office stock,'' to hold in their offices in advance of patient need.[4]

One of the conditions that must be met for a drug product compounded by an outsourcing facility to qualify for exemptions under section 503B of the FD&C Act is that the outsourcing facility may not compound a drug using a bulk drug substance unless: (1) The bulk drug substance appears on a list established by the Secretary of Health and Human Services identifying bulk drug substances for which there is a clinical need (the 503B Bulks List) or (2) the drug compounded from such bulk drug substances appears on the drug shortage list in effect under section 506E of the FD&C Act (21 U.S.C. 356e) at the time of compounding, distribution, and dispensing.[5]

Section 503B of the FD&C Act directs FDA to establish the 503B Bulks List by: (1) Publishing a notice in the **Federal Register** proposing bulk drug substances to be included on the list, including the rationale for such proposal; (2) providing a period of not less than 60 calendar days for comment on the notice; and (3) publishing a notice in the **Federal Register** designating bulk drug substances for inclusion on the list.[6]

In March 2019, FDA published a notice that identified two bulk drug substances, nicardipine hydrochloride and vasopressin, that were nominated for inclusion on the 503B Bulks List, and that, after consideration, FDA did not include on that list (84 FR 7383, March 4, 2019). The March 2019 notice stated that additional bulk drug substances were under evaluation and that additional substances would be the subject of future notices. This notice identifies 4 bulk drug substances that FDA has considered and proposes to include on the 503B Bulks List and 19 bulk drug substances that FDA has considered and proposes not to include on the 503B Bulks List.

For purposes of section 503B of the FD&C Act, *bulk drug substance* means an active pharmaceutical ingredient as defined in 21 CFR 207.1.[7] *Active pharmaceutical ingredient* means any substance that is intended for incorporation into a finished drug product and is intended to furnish pharmacological activity or other direct effect in the diagnosis, cure, mitigation, treatment, or prevention of disease, or to affect the structure or any function of the body, but the term does not include intermediates used in the synthesis of the substance.[8] [9]

For further information about drug compounding and the background for the 503B Bulks List, see 83 FR 43877 (August 28, 2018).

II. Methodology for Developing the 503B Bulks List

A. Process for Developing the List

FDA requested nominations for specific bulk drug substances for the Agency to consider for inclusion on the 503B Bulks List in the **Federal Register** of December 4, 2013 (78 FR 72838). FDA reopened the nomination process in the **Federal Register** of July 2, 2014 (79 FR 37747) and provided more detailed information on what FDA needs to evaluate nominations for the list. On October 27, 2015 (80 FR 65770), the Agency opened a new docket, FDA–2015–N–3469, to provide an opportunity for interested persons to submit new nominations of bulk drug substances or to renominate substances with sufficient information.

As FDA evaluates bulk drug substances, it intends to publish notices for public comment in the **Federal Register** that describe the FDA's proposed position on each substance along with the rationale for that position.[10] After considering any comments on FDA's proposals regarding whether to include nominated substances on the 503B Bulks List, FDA intends to consider whether input from the Pharmacy Compounding Advisory Committee (PCAC) on the nominations would be helpful to the Agency in making its determination, and if so, it will seek PCAC input.[11] Depending on its review of the docket comments and other relevant information before the Agency, FDA may finalize its proposed determination without change, or it may finalize a modification to its proposal to reflect new evidence or analysis regarding clinical need. FDA will then publish in the **Federal Register** a list identifying the bulk drug substances for

[1] Section 503B(a) of the FD&C Act.

[2] Compare section 503A(a) of the FD&C Act (21 U.S.C. 353a(a); exempting drugs compounded in accordance with that section) with section 503B(a) of the FD&C Act (not providing the exemption from CGMP requirements).

[3] Section 503B(b)(4) and (5) of the FD&C Act.

[4] Section 503B(d)(4)(C) of the FD&C Act.

[5] Section 503B(a)(2)(A) of the FD&C Act.

[6] Section 503B(a)(2)(A)(i)(I) to (III) of the FD&C Act.

[7] 21 CFR 207.3.

[8] Section 503B(a)(2) of the FD&C Act and 21 CFR 207.1.

[9] Inactive ingredients are not subject to section 503B(a)(2) of the FD&C Act and will not be included in the 503B Bulks List because they are not included within the definition of a bulk drug substance. Pursuant to section 503B(a)(3), inactive ingredients used in compounding must comply with the standards of an applicable U.S. Pharmacopeia or National Formulary monograph, if a monograph exists.

[10] This is consistent with procedure set forth in section 503B(a)(2)(A)(i) of the FD&C Act. Although the statute only directs FDA to issue a **Federal Register** notice and seek public comment when it proposes to include bulk drug substances on the 503B Bulks List, we intend to seek comment when the Agency has evaluated a nominated substance and proposes either to include or not to include the substance on the list.

[11] Section 503B of the FD&C Act does not require FDA to consult the PCAC before developing a 503B Bulks List.

which it has determined there is a clinical need and FDA's rationale in making that final determination. FDA will also publish in the **Federal Register** a list of those substances it considered but found that there is no clinical need to use in compounding and FDA's rationale in making this decision.

FDA intends to maintain a current list of all bulk drug substances it has evaluated on its website, and separately identify bulk drug substances it has placed on the 503B Bulks List and those it has decided not to place on the 503B Bulks List. FDA will only place a bulk drug substance on the 503B Bulks List where it has determined there is a clinical need for outsourcing facilities to compound drug products using the bulk drug substance. If a clinical need to compound drug products using the bulk drug substance has not been demonstrated, based on the information submitted by the nominator and any other information considered by the Agency, FDA will not place a bulk drug substance on the 503B Bulks List.

FDA intends to evaluate bulk drug substances nominated for the 503B Bulks List on a rolling basis. FDA intends to evaluate and publish in the **Federal Register** its proposed and final determinations in groups of bulk drug substances until all nominated substances that were sufficiently supported have been evaluated and either placed on the 503B Bulks List or identified as bulk drug substances that were considered but determined not to be appropriate for inclusion on the 503B Bulks List (Ref. 1).[12]

B. Analysis of Substances Nominated for the List

As noted above, the 503B Bulks List will include bulk drug substances for which there is a clinical need. The Agency is currently evaluating bulk drug substances that were nominated for inclusion on the 503B Bulks List, proceeding case by case, under the clinical need standard provided by the statute (Ref. 2).[13] In applying this standard to develop the proposals in this notice, FDA is interpreting the phrase ''bulk drug substances for which there is a clinical need'' to mean that the 503B Bulks List may include a bulk drug substance if: (1) There is a clinical need for an outsourcing facility to compound the drug product and (2) the drug product must be compounded using the bulk drug substance. FDA is not interpreting supply issues, such as backorders, to be within the meaning of ''clinical need'' for compounding with a bulk drug substance. Section 503B separately provides for compounding from bulk drug substances under the exemptions from the FD&C Act discussed above if the drug product compounded from the bulk drug substance is on the FDA drug shortage list at the time of compounding, distribution, and dispensing. Additionally, we are not considering cost of the compounded drug product as compared with an FDA-approved drug product to be within the meaning of ''clinical need.''

Some of the bulk drug substances that we are addressing in this notice are components of FDA-approved drug products,[14] and we therefore began our evaluation of these bulk drug substances by asking one or both of the following questions:

(1) Is there a basis to conclude, for each FDA-approved product that includes the nominated bulk drug substance, that: (a) An attribute of the FDA-approved drug product makes it medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and (b) the drug product proposed to be compounded is intended to address that attribute?

(2) Is there a basis to conclude that the drug product proposed to be compounded must be produced from a bulk drug substance rather than from an FDA-approved drug product?

The reason for question 1 is that unless an attribute of the FDA-approved drug is medically unsuitable for certain patients, and a drug product compounded using a bulk drug substance that is a component of the approved drug is intended to address that attribute, there is no clinical need to compound a drug product using that bulk drug substance. Rather, such compounding would unnecessarily expose patients to the risks associated with drug products that do not meet the standards applicable to FDA-approved drug products for safety, effectiveness, quality, and labeling and would undermine the drug approval process. The reason for question 2 is that to place a bulk drug substance on the 503B Bulks List, FDA must determine that there is a clinical need for outsourcing facilities to compound a drug product *using the bulk drug substance* rather than starting with an FDA-approved drug product.

If the answer to both of these questions is ''yes,'' there may be a clinical need for outsourcing facilities to compound using the bulk drug substance, and we would evaluate the substance further, applying the factors described below. If the answer to either of these questions is ''no,'' we generally would not include the bulk drug substance on the 503B Bulks List, because there would not be a basis to conclude that there may be a clinical need to compound drug products using the bulk drug substance instead of administering or compounding starting with an approved drug product. FDA did not answer ''yes'' to both of the threshold questions for the 19 bulk drug substances that are components of approved drug products that we are addressing in this notice. Accordingly, as explained further below, we did not proceed further in our evaluation of these substances and are proposing not to include them on the 503B Bulks List.

With respect to four bulk drug substances we are addressing in this notice that are not components of FDA-approved drug products,[15] we are conducting a balancing test with four factors, considering each factor in the context of the others and balancing them, on a substance-by-substance basis, to determine whether the statutory ''clinical need'' standard has been met. The balancing test includes the following factors:

(a) The physical and chemical characterization of the substance;

(b) Any safety issues raised by the use of the substance in compounding;

(c) The available evidence of effectiveness or lack of effectiveness of a drug product compounded with the substance, if any such evidence exists; and

[12] On January 13, 2017, FDA announced the availability of a revised final guidance for industry that provides additional information regarding FDA's policies for bulk drug substances nominated for the 503B Bulks List pending our review of nominated substances under the ''clinical need'' standard entitled ''Interim Policy on Compounding Using Bulk Drug Substances Under Section 503B of the Federal Food, Drug, and Cosmetic Act'' (''Interim Policy''); available at *https://www.fda.gov/media/94402/download.*

[13] On March 4, 2019, FDA announced the availability of a final guidance entitled ''Evaluation of Bulk Drug Substances Nominated for Use in Compounding Under Section 503B of the Federal Food, Drug, and Cosmetic Act'' (84 FR 7390); available at *https://www.fda.gov/media/121315/download.* This guidance describes FDA policies for developing the 503B Bulks List and the Agency's interpretation of the phrase ''bulk drug substances for which there is a clinical need'' as it is used in section 503B of the FD&C Act. The analysis under the statutory ''clinical need'' standard described in this notice is consistent with the approach described in FDA's guidance.

[14] Specifically: Diazepam, dobutamine HCl, dopamine HCl, edetate calcium disodium, folic acid, glycopyrrolate, hydroxyzine HCl, ketorolac tromethamine, labetalol HCl, mannitol, metoclopramide HCl, moxifloxacin HCl, nalbuphine HCl, polidocanol, potassium acetate, procainamide HCl, sodium nitroprusside, sodium thiosulfate, and verapamil HCl.

[15] Specifically: DPCP, glycolic acid, SADBE, and TCA.

(d) Current and historical use of the substance in compounded drug products, including information about the medical condition(s) that the substance has been used to treat and any references in peer-reviewed medical literature.

The discussion below reflects FDA's consideration of these four factors where they are applicable and describes how they were applied to develop FDA's proposal to include four bulk drug substances on the 503B Bulks List.

C. Inclusion of a Bulk Drug Substance on the 503B Bulks List

In preparing its proposal to include four substances on the 503B Bulks List, FDA considered whether the clinical need for the bulk drug substance is limited. For example, we considered whether there are safety risks associated with a drug product compounded using the bulk drug substance at a higher concentration that are not associated with compounding at a lower concentration. Similarly, we considered whether evidence that a compounded drug product may be effective is available for only certain routes of administration or dosage forms. As appropriate, and as explained further below, the Agency tailored its proposed entries on the 503B Bulks List to reflect its findings related to clinical need for each of the four bulk substances proposed for inclusion on the list. Specifically, the proposed entries would authorize use of these four bulk drug substances to compound drug products for topical dermal use only, and one of them—glycolic acid—would be authorized to compound drug products with a concentration of not more than 70 percent.

In addition, we solicit comment on whether to include a further limitation relating to the use of these bulk drug substances to compound drug products containing more than one bulk drug substance.

In developing its proposal, the Agency has considered information regarding the use of each of the four bulk drug substances to compound a drug product containing a single active ingredient and did not review information related to the use of these bulk drug substances in combination with one or more other active ingredients. For each bulk drug substance, FDA's evaluation of clinical need included a review of the physical and chemical characteristics of the substance, any safety issues raised by the use of the substance in compounding, the available evidence of effectiveness or lack of effectiveness of a drug product compounded with the substance, and the current and historical use of the substance in compounded drug products. On this basis we have identified a clinical need to compound certain topical dermal products containing the bulk drug substances. These assessments regarding clinical need could be affected if the bulk drug substances are used in compounded products containing multiple active ingredients. In particular, the use of certain active ingredients in combination with other active ingredients in a compounded product could pose a safety risk or affect the product's effectiveness. FDA's evaluation did not take into consideration all of the possible drug products that could be made with other ingredients or evaluate the clinical need for the bulk substance in every possible combination with other substances.

We solicit comment on two options for listing the four bulk drug substances we are proposing to include on the 503B Bulks List; either: (1) To allow compounding of drug products containing only the listed bulk drug substance and no other active ingredients; or (2) to allow compounding of drug products that contain the listed bulk drug substance without limits on compounding a drug product that contains other active ingredients. Under option 2, the compounded drug product would need to meet all of the conditions of section 503B; *e.g.,* if the outsourcing facility compounded a drug product using two bulk drug substances, both of the bulk drug substances would have to meet the conditions in section 503B(a)(2).

III. Substances Considered and Proposed for Inclusion on the 503B Bulks List

Because the substances in this section are not components of FDA-approved drug products, we applied the balancing test described above. The four bulk drug substances that have been evaluated and that FDA is proposing to place on the 503B Bulks List are DPCP, glycolic acid, SADBE, and TCA. The reasons for FDA's proposals are included below (Refs. 3 to 6).[16]

[16] In addition to the nominations for the 503B Bulks List, the Agency considered data and information from its earlier evaluations regarding the use of these bulk drug substances for the list of bulk drug substances that can be used in compounding under section 503A of the FD&C Act (the 503A Evaluations). FDA also considered a report provided by the University of Maryland Center of Excellence in Regulatory Science and Innovation and conducted a search for relevant scientific literature and safety information, focusing on materials published or submitted to FDA since the 503A Evaluations.

A. Diphenylcyclopropenone (DPCP)

DPCP was nominated as a bulk drug substance for the 503B Bulks List to compound drug products for topical use at variable concentrations, usually 2 percent, in the treatment of alopecia areata.[17] The nominated bulk drug substance is not a component of an FDA-approved drug product. We evaluated DPCP for potential inclusion on the 503B Bulks List under the clinical need standard in section 503B of the FD&C Act, considering data and information regarding the physical and chemical characterization of DPCP, safety issues raised by use of this substance in compounding, available evidence of effectiveness or lack of effectiveness, and historical and current use in compounding (Ref. 3).

DPCP is well characterized but there are concerns about stability and consistency in product quality. Although there are still gaps in the evidence for DPCP's safety and effectiveness, including a lack of long-term safety data, substantial human safety data have been collected and clinicians worldwide have gained experience in the use of DPCP to treat alopecia areata. DPCP has been used for several decades to compound drug products for dermatologists to treat alopecia areata and continues to be used for this purpose. The reported adverse effects are related to DPCP's mechanism of therapeutic action as a sensitizer, causing allergic contact dermatitis in treated patients. Alopecia areata may not respond adequately to available treatments. DPCP can be a potentially effective agent for patients who have failed FDA-approved and other therapies for this condition.

On balance, the physical and chemical characterization, safety, effectiveness, and historical and current use of DPCP weigh in favor of including this substance on the 503B Bulks List. Accordingly, we propose adding DPCP to the 503B Bulks List for topical dermal use only. Nominators did not submit, and we have not identified, significant evidence to support use in other routes of administration.

B. Glycolic Acid

Glycolic acid was nominated as a bulk drug substance for the 503B Bulks List to compound drug products for topical use at concentrations ranging from 0.08 to 70 percent for the treatment of hyperpigmentation and photodamaged

[17] See Docket No. FDA–2013–N–1524, document no. FDA–2013–N–1524–1363.

skin.[18] The nominated bulk drug substance is not a component of an FDA-approved drug product. We evaluated glycolic acid for potential inclusion on the 503B Bulks List under the clinical need standard in section 503B, considering data and information regarding the physical and chemical characterization of glycolic acid, safety issues raised by use of this substance in compounding, available evidence of effectiveness or lack of effectiveness, and historical and current use in compounding (Ref. 4).

Glycolic acid, also known as hydroxyacetic acid, is physically and chemically well characterized. When used in high concentrations, glycolic acid causes local effects that are typical of a strong acid, such as dermal and eye irritation. Reported adverse reactions were generally limited in duration and readily manageable. There is no information available on long-term outcomes. The available data on short-term outcomes do not raise major safety concerns associated with the topical use of glycolic acid.

Data from controlled clinical trials have shown consistently positive results in the treatment of epidermal melasma or other forms of hyperpigmentation. The available evidence suggests that there is a role for glycolic acid in the treatment of melasma, typically as a second line treatment. There is also some evidence indicating that glycolic acid may be effective for the mitigation of manifestations of photodamaged skin. Glycolic acid has been used for several decades to compound drug products for dermatologists and continues to be used for this purpose. Conclusions regarding each of these factors are for use at concentrations up to 70 percent; data and evidence regarding use of higher concentrations are very limited.

On balance, the physical and chemical characterization, safety, effectiveness, and historical and current use of glycolic acid weigh in favor of including this substance on the 503B Bulks List at concentrations up to 70 percent. Accordingly, we propose adding glycolic acid to the 503B Bulks List for topical dermal use in concentrations up to 70 percent. Nominators did not submit, and we have not identified, significant evidence to support use in other routes of administration or higher concentrations.

C. Squaric Acid Dibutyl Ester (SADBE)

SADBE was nominated as a bulk drug substance for the 503B Bulks List to compound drug products for topical use at variable concentrations, ranging from 2 percent initially to 0.0001 percent to 0.001 percent for maintenance, for the treatment of alopecia areata and warts.[19] The nominated bulk drug substance is not a component of an FDA-approved drug product. We evaluated SADBE for potential inclusion on the 503B Bulks List under the clinical need standard in section 503B, considering data and information regarding the physical and chemical characterization of SADBE, safety issues raised by use of this substance in compounding, available evidence of effectiveness or lack of effectiveness, and historical and current use in compounding (Ref. 5).

SADBE is well-characterized but there are concerns about stability and consistency in product quality. There is a lack of adequate nonclinical data, long-term safety data, and safety information about use in specific populations such as pregnant and lactating women. Despite these data gaps, considerable human safety data have accumulated over the past 40 years from its use in compounding drug products for dermatologists to treat alopecia areata and resistant non-genital warts and from reports for its use internationally. The reported adverse effects are related to SADBE's mechanism of therapeutic action as a sensitizer causing allergic contact dermatitis in treated patients.

In addition, both alopecia areata and warts may not respond adequately to available treatments. SADBE can be a potentially effective agent for patients who have failed FDA-approved and other therapies for these conditions. We recognize that treatment with SADBE requires initial sensitization and typical protocols involve a SADBE concentration of 2 percent, but lower concentrations may be used in other patients.

On balance, the physical and chemical characterization, safety, effectiveness, and historical and current use of SADBE weigh in favor of including this substance on the 503B Bulks List. Accordingly, we propose adding SADBE to the 503B Bulks List for topical dermal use only. Nominators did not submit, and we have not identified, significant evidence to support use in other routes of administration.

D. Trichloroacetic Acid (TCA)

TCA was nominated as a bulk drug substance for the 503B Bulks List to compound drug products for topical use at concentrations ranging from 6 percent to 20 percent as a chemical skin peeling agent for the treatment of acne and melasma.[20] The nominated bulk drug substance is not a component of an FDA-approved drug product. We evaluated TCA for potential inclusion on the 503B Bulks List under the clinical need standard in section 503B, considering data and information regarding the physical and chemical characterization of TCA, safety issues raised by use of this substance in compounding, available evidence of effectiveness or lack of effectiveness, and historical and current use in compounding (Ref. 6).

TCA is well characterized in its physical and chemical properties. Nonclinical evidence suggests that topical use of TCA does not raise serious safety issues for humans. Although there have been no clinical trials specifically designed to address the safety of TCA, safety assessments were among the study procedures in several clinical trials and reports of adverse reactions have included burning, pain, erythema, hyperpigmentation, and hypopigmentation. More serious adverse reactions reported were ulcerations, scarring, and pustules. Adverse events were reported more frequently with higher concentrations. Several studies indicate that TCA may be effective as a chemical peel for the treatment of acne (Ref. 7) and melasma (Ref. 8), but there is a lack of evidence comparing TCA to FDA-approved drug products for those uses. TCA has been used, in the United States and worldwide, for dermatologic conditions for over 40 years and for at least 20 years in pharmacy compounding.

On balance, the physical and chemical characterization, safety, effectiveness, and historical and current use of TCA weigh in favor of including this substance on the 503B Bulks List. Accordingly, we propose adding TCA to the 503B Bulks List for topical dermal use only. Nominators did not submit,

[18] See Docket No. FDA–2015–N–3469, document nos. FDA–2015–N–3469–0035 and FDA–2015–N–3469–0123. One of the nominations also states that prescribers may want glycolic acid compounds in other formulations to treat other conditions but does not identify the conditions or formulations. It also refers to the use of glycolic acid in combination with other ingredients and, in particular, to compounding a formulation containing hydroquinone 6 percent and tretinoin 0.1 percent. Information submitted with this nomination relevant to compounding with glycolic acid for the treatment of hyperpigmentation disorders and photodamaged skin was considered. FDA's evaluation does not consider whether there is a clinical need for outsourcing facilities to compound drug products using the bulk drug substances hydroquinone or tretinoin, or other bulk drug substances.

[19] See Docket No. FDA–2013–N–1524, document no. FDA–2013–N–1524–1363.

[20] See Docket No. FDA–2018–D–1067, document No. FDA–2018–D–1067–0005.

and we have not identified, significant evidence to support use in other routes of administration.

IV. Substances Evaluated and Not Proposed for Inclusion on the 503B Bulks List

Because the substances in this section are components of FDA-approved drug products, we considered one or both of the following questions: (1) Is there is a basis to conclude that an attribute of each FDA-approved drug product containing the bulk drug substance makes each one medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation, and the drug product proposed to be compounded is intended to address that attribute and (2) is there a basis to conclude that the drug product proposed to be compounded must be compounded using a bulk drug substance.

The 19 bulk drug substances that have been evaluated and that FDA is proposing not to place on the list are as follows: Diazepam, dobutamine HCl, dopamine HCl, edetate calcium disodium, folic acid, glycopyrrolate, hydroxyzine HCl, ketorolac tromethamine, labetalol HCl, mannitol, metoclopramide HCl, moxifloxacin HCl, nalbuphine HCl, polidocanol, potassium acetate, procainamide HCl, sodium nitroprusside, sodium thiosulfate, and verapamil HCl. The reasons for FDA's proposals are included below.

A. Diazepam

Diazepam has been nominated for inclusion on the 503B Bulks List to compound drug products that are used for alcohol withdrawal syndrome, anxiety, and as premedication before surgery, endoscopic procedures, and cardioversion, among other conditions.[21] The proposed route of administration is intravenous or intramuscular, the proposed dosage form is a preserved solution, and the proposed concentration is 5 milligrams per milliliter (mg/mL). The nominators propose to compound a preserved solution. However, they fail to acknowledge that there is an FDA-approved formulation of diazepam that is preserved and do not explain why that formulation would be medically unsuitable for certain patients. The nominations state that diazepam might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDA 072079). FDA-approved diazepam is available as a preserved 10 mg/2 mL (5 mg/mL) and 50 mg/10 mL (5 mg/mL) solution for intravenous or intramuscular administration.[22] [23] [24]

1. Suitability of FDA-Approved Drug Product(s)

The nominations do not explain why an attribute of each of the FDA-approved preserved 5 mg/mL solution products is medically unsuitable for certain patients or identify an attribute of the approved drug products that the proposed compounded drug product (also a preserved 5 mg/mL solution) is intended to address. FDA finds no basis to conclude that an attribute of the FDA-approved products makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using diazepam and approved drug products containing diazepam, there is nothing for FDA to evaluate under question 2.

B. Dobutamine HCl

Dobutamine HCl has been nominated for inclusion on the 503B Bulks List to compound drug products for ionotropic support in the short-term treatment of adults with cardiac decompensation due to depressed contractility resulting either from organic heart disease or from cardiac surgical procedures.[25] The proposed route of administration is intravenous (IV), the proposed dosage form is an injection, and the proposed concentrations are 1 mg/mL, 2 mg/mL, and 4 mg/mL in various volumes of IV infusions (large volume parenterals). The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDA 074086 and NDA 020201). FDA has approved dobutamine drug products as EQ 50 mg base/100 mL (EQ 0.5 mg base/mL), EQ 100 mg base/100 mL (EQ 1 mg base/mL), EQ 200 mg base/100 mL (EQ 2 mg base/mL), and EQ 400 mg base/100 mL (EQ 4 mg base/mL) ready-to-administer forms (*e.g.,* no further dilutions needed) for intravenous administration and as an EQ 12.5mg base/mL single-dose vial that must be diluted prior to infusion.[26] [27]

1. Suitability of FDA-Approved Drug Product(s)

The nomination does not explain why an attribute of each of the FDA-approved EQ 12.5 mg base/mL solution for dilution for intravenous administration products and each of the approved EQ 1 mg base/mL, EQ 2 mg base/mL, and EQ 4 mg base/mL ready-to-administer forms is medically unsuitable for certain patients, or identify an attribute of the approved drug products that the proposed compounded drug products are intended to address. FDA finds no basis to conclude that an attribute of the FDA-approved products makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nomination does not identify specific differences between drug products that would be compounded using dobutamine HCl and approved drug products containing dobutamine HCl, there is nothing for FDA to evaluate under question 2.

C. Dopamine HCl

Dopamine HCl has been nominated for inclusion on the 503B Bulks List to compound drug products that treat cardiogenic shock, congestive heart failure, decreased cardiac output, and renal failure, among other conditions.[28] The proposed route of administration is intravenous, the proposed dosage form is a preservative-free solution, and the proposed concentration is 80 mg/mL. The nominators proposed to compound

[21] See Docket No. FDA–2013–N–1524, document no. FDA–2013–N–1524–2292 and FDA–2013–N–1524–2298.

[22] See, *e.g.,* ANDA 072079 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/4e800d0d-2181-49b1-a2c8-4c6c49edd83a/4e800d0d-2181-49b1-a2c8-4c6c49edd83a.xml.*

[23] Per the label for ANDA 072079, each mL contains 5 mg diazepam, 40 percent propylene glycol, 10 percent alcohol, 5 percent sodium benzoate and benzoic acid added as buffers, and 1.5 percent benzyl alcohol added as a preservative.

[24] Diazepam is also approved as an oral tablet, oral concentrate, oral solution, and rectal gel.

[25] See Docket No. FDA–2015–N–3469, document no. FDA–2015–N–3469–0032.

[26] See, *e.g.,* ANDA 074086 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/7b9ea626-7073-2e77-e053-2a91aa0a9215/7b9ea626-7073-2e77-e053-2a91aa0a9215.xml.*

[27] See, *e.g.,* NDA 020201 (ready-to-use version) labeling available as the date of this notice at *https://www.accessdata.fda.gov/spl/data/d1873a74-56e6-4a01-8e4d-875789e5e344/d1873a74-56e6-4a01-8e4d-875789e5e344.xml.*

[28] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2292 and FDA–2013–N–1524–2298.

a preservative-free solution. However, they failed to acknowledge that there is a preservative-free formulation of dopamine HCl available that is FDA-approved or explain why that formulation would be medically unsuitable for certain patients. The nominations state that dopamine HCl might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDA 207707). FDA-approved dopamine HCl is available as a single-dose, preservative-free 40 mg/mL or 80 mg/mL solution for intravenous administration.[29] [30]

1. Suitability of FDA-Approved Drug Product(s)

The nominations do not explain why an attribute of each of the FDA-approved preservative-free 80 mg/mL solution products is medically unsuitable for certain patients or identify an attribute of the approved drug products that the proposed compounded drug products are intended to address. FDA finds no basis to conclude that an attribute of the FDA-approved products makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using dopamine HCl and approved drug products containing dopamine HCl, there is nothing for FDA to evaluate under question 2.

D. Edetate Calcium Disodium

Edetate calcium disodium dihydrate has been nominated for inclusion on the 503B Bulks List to compound drug products that treat cardiovascular disease, diabetes, hypercholesterolemia, arthritis, cancer, and chronic renal failure, among other conditions.[31] The proposed route of administration is slow intravenous, the proposed dosage form is a preservative-free injection, and the proposed concentration is 200 mg/mL. The nominators proposed to compound a preservative-free solution. However, they failed to acknowledge that there is a preservative-free formulation of edetate calcium disodium available that is FDA-approved or explain why that formulation would be medically unsuitable for certain patients. The nominated bulk drug substance is a component of an FDA-approved drug product (NDA 008922).[32] FDA-approved edetate calcium disodium is available as a preservative-free 200 mg/mL injection for intravenous and intramuscular administration.[33] [34]

1. Suitability of FDA-Approved Drug Product(s)

The nominations do not explain why an attribute of the FDA-approved preservative-free 200 mg/mL injection is medically unsuitable for certain patients or identify an attribute of the approved drug product that the proposed compounded drug product is intended to address. FDA finds no basis to conclude that an attribute of the FDA-approved product makes it medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using edetate calcium disodium and the approved drug product containing edetate calcium disodium, there is nothing for FDA to evaluate under question 2.

E. Folic Acid

Folic acid has been nominated for inclusion on the 503B Bulks List to compound drug products that treat megaloblastic and macrocytic anemias.[35] The proposed routes of administration are intravenous, intramuscular, and subcutaneous, the proposed dosage forms are injection solutions, and the proposed concentration is 5 mg/mL. The nomination states that folic acid might also be used to compound other drug products but does not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDA 089202). FDA-approved folic acid is available as a 50 mg/10 mL (5 mg/mL) solution for intravenous, intramuscular, and subcutaneous administration.[36] [37]

1. Suitability of FDA-Approved Drug Product(s)

The nomination does not explain why an attribute of each of the FDA-approved 5 mg/mL solution products for intravenous, intramuscular, and subcutaneous administration is medically unsuitable for certain patients or identify an attribute of the approved drug products that the proposed compounded drug product is intended to address. FDA finds no basis to conclude that an attribute of the FDA-approved products makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nomination does not identify specific differences between drug products that would be compounded using folic acid and approved drug products containing folic acid, there is nothing for FDA to evaluate under question 2.

F. Glycopyrrolate [38]

Glycopyrrolate bromide has been nominated for inclusion on the 503B

[29] See, *e.g.,* ANDA 207707 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/d2927591-5fe5-4704-9091-82ab08bb792b/d2927591-5fe5-4704-9091-82ab08bb792b.xml.*

[30] According to the label for ANDA 207707, each mL contains metabisulfite 9 mg added as an antioxidant, citric acid, anhydrous 10 mg, sodium citrate, and dihydrate 5 mg added as a buffer. May contain additional citric acid and/or sodium citrate for pH adjustment.

[31] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2302, FDA–2013–N–1524–2301, FDA–2013–N–1525–0225, FDA–2013–N–1524–2305, and FDA–2013–N–1524–2297.

[32] In the nominations, the name of the nominated substance is listed as ''edetate calcium disodium dihydrate.'' Since the nominated dosage form is an injection, ''edetate calcium disodium'' and ''edetate calcium disodium dihydrate'' result in the same entity when in solution.

[33] See NDA 008922 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/143830d7-46a5-49a3-b8b2-457a59533008/143830d7-46a5-49a3-b8b2-457a59533008.xml.*

[34] Per the label for NDA 008922, edetate calcium disodium dihydrate is available in a preservative-free ampule. Each 5 ml ampule contains 1,000 mg of edetate calcium disodium (equivalent to 200 mg/ml) in water for injection.

[35] See Docket No. FDA–2013–N–1524, document no. FDA–2013–N–1524–2292.

[36] See, *e.g.,* ANDA 089202 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/d1a4f664-040d-4c6d-b137-e0a0a9e7bf26/d1a4f664-040d-4c6d-b137-e0a0a9e7bf26.xml.*

[37] Folic acid is also approved in as a single ingredient as an oral tablet.

[38] One nominator nominated ''Glycopyrrolate, USP'' and the other nominator nominated ''Glycopyrrolate Bromide.'' The UNII code for both nominations (V92SO9WP2I) corresponds to the chemical formula for glycopyrrolate bromide (C19H28NO3.Br). The official FDA and USP nonproprietary name for glycopyrrolate bromide is ''glycopyrrolate.'' Therefore, if finalized, glycopyrrolate (not glycopyrrolate bromide) will not be added to the 503B Bulks List.

Bulks List to compound drug products that treat cardiac dysrhythmia, surgically induced or drug-induced vagal reflex, and peptic ulcer disease, among other conditions.[39] The proposed route of administration is intravenous, the proposed dosage forms are both a preservative-free and a preserved solution, and the proposed concentration is 0.2 mg/mL. The nominators proposed to compound a preservative-free solution. However, they failed to acknowledge that there is a preservative-free formulation of glycopyrrolate available that is FDA-approved or explain why that formulation would be medically unsuitable for certain patients. The nominations state that glycopyrrolate might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* NDA 210997). FDA-approved glycopyrrolate is available as a 0.2 mg/mL in 1 mL or 2 mL preserved and preservative-free, single-dose vials for intramuscular or intravenous administration.[40] [41] [42]

1. Suitability of FDA-Approved Drug Product(s)

The nominations do not explain why an attribute of the FDA-approved 0.2 mg/mL preservative-free and the FDA-approved preserved solutions for intramuscular or intravenous administration are medically unsuitable for certain patients or identify an attribute of the approved drug products that the proposed compounded drug products are intended to address. FDA finds no basis to conclude that an attribute of the FDA-approved products makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using glycopyrrolate and approved drug products containing glycopyrrolate, there is nothing for FDA to evaluate under question 2.

G. Hydroxyzine HCl

Hydroxyzine HCl has been nominated for inclusion on the 503B Bulks List to compound drug products that treat alcohol withdrawal syndrome, analgesia in labor, pre- and postpartum reduction of narcotic use, and relief of anxiety, among other conditions.[43] The proposed route of administration is intramuscular, the proposed dosage form is a preserved solution, and the proposed concentration is 50 mg/mL. The nominators proposed to compound a preserved solution. However, they failed to acknowledge that there is a preserved formulation of hydroxyzine HCl available that is FDA-approved or explain why that formulation would be medically unsuitable for certain patients. The nominations state that hydroxyzine HCl might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDA 087408). FDA-approved hydroxyzine HCl is available as a preserved 50 mg/mL solution for intramuscular administration.[44] [45] [46]

1. Suitability of FDA-Approved Drug Product(s)

The nominations do not explain why an attribute of the FDA-approved preserved 50 mg/mL hydroxyzine HCl solution for intramuscular administration is medically unsuitable for certain patients or identify an attribute of the approved drug products that the proposed compounded drug product is intended to address. FDA finds no basis to conclude that an attribute of the FDA-approved products makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using hydroxyzine HCl and the approved drug product containing hydroxyzine HCl, there is nothing for FDA to evaluate under question 2.

H. Ketorolac Tromethamine

Ketorolac tromethamine has been nominated for inclusion on the 503B Bulks List to compound drug products for seasonal allergic conjunctivitis, short-term pain, pain in the eye, and extraction of cataract.[47] The proposed route of administration is intravenous and intramuscular, the proposed dosage form is a preserved solution, and the proposed concentration is 30 mg/mL. The nominators proposed to compound a preserved solution. However, they failed to acknowledge that there is a preserved formulation of ketorolac tromethamine available that is FDA-approved or explain why that formulation would be medically unsuitable for certain patients. The nominations state that ketorolac tromethamine might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDA 209900). FDA-approved ketorolac tromethamine is available as a 15 mg/mL or 30 mg/mL solution for intravenous and intramuscular administration.[48] [49] [50]

1. Suitability of FDA-Approved Drug Product(s)

The nominations do not explain why an attribute of each of the FDA-approved preserved 30 mg/mL solution products is medically unsuitable for

[39] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2292 and FDA–2013–N–1524–2298.

[40] See, *e.g.,* NDA 210997 and ANDA 208973 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/6a379327-0f29-44a4-ba4f-54cb9379f854/6a379327-0f29-44a4-ba4f-54cb9379f854.xml* and *https://www.accessdata.fda.gov/spl/data/fdebc248-87d3-4afd-a5ed-592fcaddab1c/fdebc248-87d3-4afd-a5ed-592fcaddab1c.xml.*

[41] Per the label for NDA 210997, glycopyrrolate is available in a preservative-free, single-dose vial. Per the label for ANDA 208973, glycopyrrolate is available in preserved, single-dose and multiple-dose vials.

[42] Glycopyrrolate is also approved oral tablet, oral solution, and for inhalation as a single ingredient.

[43] See Docket No FDA–2013–N–1524, document nos. FDA–2013–N–1524–2292 and FDA–2013–N–1524–2298.

[44] See, *e.g.,* ANDA 087408 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/4d9d37b0-7fa0-47e1-8414-c2b86f83fe73/4d9d37b0-7fa0-47e1-8414-c2b86f83fe73.xml.*

[45] Per the label for ANDA 087408, each mL contains hydroxyzine HCl 25 mg or 50 mg, benzyl alcohol 0.9 percent, and water for injection q.s. pH is adjusted with sodium hydroxide and/or hydrochloric acid.

[46] Hydroxyzine HCl is also approved as an oral tablet and as an oral syrup.

[47] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2292 and FDA–2013–N–1524–2298.

[48] See, *e.g.,* ANDA 209900 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/f7e12067-6ba2-48d8-abac-7b4d9a6822f3/f7e12067-6ba2-48d8-abac-7b4d9a6822f3.xml.*

[49] According to the label for ANDA 209900, the solution contains 10 percent (w/v) alcohol USP, and 6.68 mg, 4.35 mg, and 8.70 mg, respectively, of sodium chloride in sterile water. The pH range is 6.9 to 7.9 and is adjusted with sodium hydroxide and/or hydrochloric acid.

[50] Ketorolac tromethamine is also approved as a single ingredient in an ophthalmic drop, a nasal spray, and an oral tablet.

certain patients or identify an attribute of the approved drug products that the proposed compounded drug product is intended to address. FDA finds no basis to conclude that an attribute of the FDA-approved products makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using ketorolac tromethamine and approved drug products containing ketorolac tromethamine, there is nothing for FDA to evaluate under question 2.

I. Labetalol HCl

Labetalol HCl has been nominated for inclusion on the 503B Bulks List to compound drug products that control blood pressure in severe hypertension.[51] The proposed route of administration is intravenous, the proposed dosage form is an injection solution, and the proposed concentration is 5 mg/mL. The nomination states that labetalol HCl might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDA 075240). FDA-approved labetalol hydrochloride is available as a 100 mg/20 mL (5 mg/mL) and 200 mg/40 mL (5 mg/mL) solution for dilution for intravenous administration.[52] [53]

1. Suitability of FDA-Approved Drug Product(s)

The nominations do not explain why an attribute of each of the FDA-approved 5 mg/mL solution for dilution products is medically unsuitable for certain patients or identify an attribute of the approved drug products that the proposed compounded drug product is intended to address. FDA finds no basis to conclude that an attribute of the FDA-approved products makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using labetalol HCl and approved drug products containing labetalol HCl, there is nothing for FDA to evaluate under question 2.

J. Mannitol

Mannitol has been nominated for inclusion on the 503B Bulks List to compound drug products for treatment of acute renal failure, inhalation bronchial challenge testing, and irrigation of the urinary bladder, among other conditions.[54] The proposed route of administration is intravenous, the proposed dosage form is a preservative-free solution, and the proposed concentration is 25 percent. The nominators proposed to compound a preservative-free solution. However, they failed to acknowledge that there is a preservative-free formulation of mannitol available that is FDA-approved or explain why that formulation would be medically unsuitable for certain patients. The nominations state that mannitol might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* NDA 016269). FDA-approved mannitol is available as a preservative-free solution in water for injection in various concentrations, including a 25 percent concentration in a flip-top vial for administration by intravenous infusion only.[55] [56] [57]

1. Suitability of FDA-Approved Drug Product(s)

The nominations do not explain why an attribute of each of the FDA-approved 25 percent preservative-free solution products is medically unsuitable for certain patients or identify an attribute of the approved drug product that the proposed compounded drug product is intended to address. FDA finds no basis to conclude that an attribute of the FDA-approved products makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using mannitol and approved drug products containing mannitol, there is nothing for FDA to evaluate under question 2.

K. Metoclopramide HCl

Metoclopramide HCl has been nominated for inclusion on the 503B Bulks List to compound drug products that treat chemotherapy-induced nausea and vomiting, diabetic gastroparesis, gastroesophageal reflux disease, and postoperative nausea and vomiting, among other conditions.[58] The proposed routes of administration are intravenous and intramuscular, the proposed dosage forms are both a preservative-free and a preserved suspension and the proposed concentration is 5 mg/mL. The nominators proposed to compound both preservative-free and preserved suspensions. However, they failed to acknowledge that there is a preservative-free formulation of metoclopramide HCl available that is FDA-approved or explain why that formulation would be medically unsuitable for certain patients. The nominations state that metoclopramide HCl might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDA 073118). FDA-approved metoclopramide HCl is available as a preservative-free 10 mg/2 mL (5 mg/mL) solution for intravenous or intramuscular administration.[59] [60] [61]

[51] See Docket No. FDA–2013–N–1524, document no. FDA–2013–N–1524–2292.

[52] See, *e.g.,* ANDA 075240 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/d92ec06a-794d-4951-8173-b7fa7c9a66bd/d92ec06a-794d-4951-8173-b7fa7c9a66bd.xml.*

[53] Labetalol hydrochloride is also approved as an oral tablet.

[54] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2292 and FDA–2013–N–1524–2298.

[55] See, *e.g.,* NDA 016269 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/785b3a4e-c632-48c6-9fc9-b1b4e7d5d885/785b3a4e-c632-48c6-9fc9-b1b4e7d5d885.xml.*

[56] Per the label for NDA 016269, the solutions contain no bacteriostat, antimicrobial agent or added buffer (except for pH adjustment) and each is intended only as a single-dose injection.

[57] Mannitol is also approved as a single ingredient as a solution for irrigation and as a powder for inhalation.

[58] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2292 and FDA–2013–N–1524–2298.

[59] See, *e.g.,* ANDA 073118 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/93db98f7-b687-432f-810a-5c4da6d874ab/93db98f7-b687-432f-810a-5c4da6d874ab.xml.*

[60] Per the label for ANDA 073118, the solution is preservative-free and is intended for intravenous or intramuscular administration.

[61] Metoclopramide is also approved as an oral solution and as a tablet.

1. Suitability of FDA-Approved Drug Product(s)

The nominations do not explain why an attribute of each of the FDA-approved preservative-free 10 mg/2 mL (5 mg/mL) solution products for intravenous or intramuscular administration is medically unsuitable for certain patients or identify an attribute of the approved drug products that the proposed compounded drug product is intended to address. In particular, the nominations do not identify any data or information indicating that there are some patients who need a preserved product rather than the approved preservative-free products. In addition, the nominations do not identify any data or information indicating that there are some patients who need a suspension rather than a solution for intravenous and intramuscular administration. FDA finds no basis to conclude that an attribute of the FDA-approved products makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations have not identified a population for whom the approved products would be medically unsuitable, FDA has not evaluated whether the proposed preserved drug products containing metoclopramide HCl must be compounded from bulk drug substances rather than using the approved drug product.

L. Moxifloxacin HCl

Moxifloxacin HCl has been nominated for inclusion on the 503B Bulks List in combination with other bulk drug substances, including triamcinolone acetonide and vancomycin HCl, as a topical ophthalmic and as an intravitreal injection in patients who undergo cataract surgery.[62] According to the nomination, the compounded products are as follows:

(1) Moxifloxacin hydrochloride (0.2ml-0.3ml; 1mg/ml in combination with other compounds);

(2) Moxifloxacin hydrochloride in a formulation with triamcinolone ''acetonidenide'' [63] (0.1 mg/mL to 50.0 mg/ml 165 mcg injection); and

(3) Moxifloxacin hydrochloride in a formulation with triamcinolone ''aceton[id]e'' and vancomycin hydrochloride (0.1 mg/mL to 50.0 mg/ml 165 mcg injection).[64]

The nominated bulk drug substance is a component of FDA-approved drug products. FDA-approved moxifloxacin HCl is available as an EQ 0.5 percent base ophthalmic solution under two separate NDAs (Vigamox, NDA 021598; Moxexa, NDA 022428) and various ANDAs.[65] In addition, FDA-approved moxifloxacin HCl is available as an EQ 400 mg base/250 mL (EQ 1.6 mg base/mL) solution for intravenous administration (*e.g.* ANDA 205833).[66] [67]

The nomination proposes to combine moxifloxacin HCl with two other bulk drug substances, both of which are components of FDA-approved products. Triamcinolone acetonide (Triesence, NDA 022048) is available as a 40 mg/mL suspension for intravitreal administration.[68] [69] Vancomycin HCl is available as an intravenous solution and as a lyophilized powder for preparing intravenous infusions in various strengths (*e.g.* ANDA 205694).[70] [71]

1. Suitability of FDA-Approved Drug Product(s)

a. Moxifloxacin HCl in Combination With ''other compounds''

The proposal to combine moxifloxacin HCl with ''other compounds'' will not be considered further. The nomination does not identify the ''other compounds'' [72] that the nominator proposes to combine with moxifloxacin HCl in a compounded drug product, or other attributes of those products (*e.g.,* proposed dosage strength(s)). Nor does the nomination identify any attribute of the FDA-approved drug products that makes them medically unsuitable to treat certain patients for a condition and that the proposed compounded drugs are intended to address.

b. Moxifloxacin HCl in Combination With Triamcinolone Acetonide for Injection

The nomination states that the FDA-approved products are drops, and that a compounded intravitreal product is needed for patients recovering from cataract surgery. Specifically, the nomination states that ''intravitreal placement of the compounded drug'' during surgery, relative to the post-surgical installation of ''a number of'' topical medications, ''avoids confusion of post-operative treatment to patients who undergo cataract surgery.'' The nomination states, further, that ''the length of a typical postoperative drop regimen is further complicated by the different daily dosing regiments of various medications, which can cause confusion for patients because age [sic] and physical handicaps. '' Thus, the proposed clinical need for compounding from bulk moxifloxacin HCl and triamcinolone acetonide is to prepare an intraoperative injection for patients who would have difficulty with topical administration of the approved topical products post-operatively.

The nomination does not provide supporting data or information for its statement about the medical unsuitability of FDA-approved topical products to treat patients post-operatively.[73] We take no position at this time on whether any such unsuitability exists. To the extent there may be patients for whom the FDA-approved topical dosage forms are medically unsuitable post-operatively, the nomination does not acknowledge that there are FDA-approved products containing moxifloxacin HCl and triamcinolone acetonide that are available as intravitreal injections or could be used to prepare such injections for patients undergoing cataract surgery.

[62] See Docket No. FDA–2015–N–3469, document no. FDA–2015–N–3469–0004.

[63] We assume this refers to triamcinolone acetonide.

[64] The nomination did not propose to compound drug products using moxifloxacin as a single active ingredient, and FDA's evaluation does not consider such uses.

[65] See, NDA 021598 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/f9febc6f-db6d-44e8-9730-f7c1a2354d71/f9febc6f-db6d-44e8-9730-f7c1a2354d71.xml.*

[66] See, ANDA 205833 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/840eeb54-1874-4831-8c55-38efa1099c69/840eeb54-1874-4831-8c55-38efa1099c69.xml.*

[67] Moxifloxacin is also available as a single ingredient as an oral tablet.

[68] See, NDA 022048 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/5561cb6d-1ddb-4b3a-a131-efc210f35e6b/5561cb6d-1ddb-4b3a-a131-efc210f35e6b.xml.*

[69] Triamcinolone acetonide is also available as a single ingredient in topical, injectable, nasal, and dental products.

[70] ANDA 205694 is available as a preservative free lyophilized powder, for preparing intravenous infusions, in vials each containing vancomycin HCl EQ 500 mg base/vial and EQ 1 gram base/vial. See, ANDA 205694 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/028f4949-396d-d15b-8fc3-2bf69daf67f2/028f4949-396d-d15b-8fc3-2bf69daf67f2.xml.*

[71] Vancomycin HCl is also available as a single ingredient as an oral capsule and powder for oral solution.

[72] We understand the term ''other compounds'' to refer to other bulk drug substances that would be contained in the compounded drug.

[73] For example, the nomination did not provide supporting data or information to demonstrate a medical unsuitability for certain patients, or to identify which patients might find the topical products medically unsuitable and under what conditions.

Nor does the nomination explain how the drugs it proposes to compound from bulk drug substances are intended to address an attribute of these approved drugs.

Specifically, the nomination does not acknowledge that there is an FDA-approved triamcinolone acetonide product for intravitreal injection (Triescence, NDA 022048), nor does it identify an attribute of this approved product that would make it medically unsuitable for the proposed use. Nor does the nomination identify an attribute of the FDA-approved drug products that contain moxifloxacin HCl (*e.g.,* Vigamox NDA 021598 or moxifloxacin HCl solution for intravenous administration (*e.g.,* ANDA 205833)) that would make them medically unsuitable for the proposed use. For example, if there are patients for whom products for topical administration would be medically unsuitable, the nomination does not explain or provide support for the view that the approved products, or drug products prepared using the approved products, could not be injected sequentially during cataract surgery to address the same clinical condition.[74] [75] [76] Further, the nomination does not explain or provide support for the view that compounding a drug product for injection that contains both moxifloxacin HCl and triamcinolone acetonide, in a single solution, is intended to change some attribute of the approved drugs that makes the approved drugs medically unsuitable to treat certain patients who have cataract surgery. In general, the combination of two or more active ingredients to allow for the administration of fewer drug products is not likely to constitute clinical need, and we are not aware of a basis to conclude that there is clinical need to make the combination proposed by this nomination.

Accordingly, with respect to the moxifloxacin HCl with triamcinolone acetonide for intraocular injection products proposed to be compounded, FDA finds no basis to conclude that an attribute of the FDA-approved products make them medically unsuitable to treat certain patients who undergo cataract surgery and that the proposed compounded drugs are intended to address.

c. Moxifloxacin HCl With Triamcinolone Acetonide and Vancomycin HCl for Injection

The nomination states that there is a clinical need for the proposed compounded drug products to prepare an intraoperative injection for patients who would have difficulty with topical administration of the approved products post-operatively. As discussed above, the nomination does not identify an attribute of the FDA-approved products containing moxifloxacin HCl and triamcinolone acetonide that would make them medically unsuitable for the proposed use. The nomination also does not acknowledge the availability of FDA-approved vancomycin HCl for injection products (*e.g.,* ANDA 62663), or identify an attribute of the FDA-approved products that would make them medically unsuitable for the proposed use. For example, if there are patients for whom products for topical administration would be medically unsuitable, the nomination does not explain or provide support for the view that the approved products, or drug products prepared using the approved products, could not be injected sequentially during cataract surgery.[77] Further, the nomination does not explain or provide support for the view that compounding a drug product for injection that contains moxifloxacin HCl, triamcinolone acetonide, and vancomycin HCl, in a single solution, is intended to address any attribute of the approved drugs that make them medically unsuitable to treat certain patients who have cataract surgery.[78]

Accordingly, with respect to the moxifloxacin HCl with triamcinolone acetonide and vancomycin HCl for injection product proposed to be compounded, FDA finds no basis to conclude that there are attributes of the FDA-approved products that make them medically unsuitable to treat certain patients who undergo cataract surgery.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because we are proposing not to include moxifloxacin HCl on the 503B Bulks list for the reasons described above, we do not consider whether there is a basis to conclude that the drug products proposed to be compounded must be produced from a bulk drug substance rather than from an FDA-approved drug product.

3. Additional Comments

For the reasons stated above, we did not evaluate this nomination using the factors that we considered for our evaluation in section II.B above. However, we note that the nomination provided no data or support regarding the evidence or lack of evidence of efficacy for the drug products it proposed to compound using bulk drug substances, or regarding the evidence of safety. The nomination also did not provide information regarding the extent of historic and current use of the drug products it proposed to compound.

Further, the prophylactic use of intraocular vancomycin, alone or in a compounded drug combining multiple active ingredients, during cataract surgery is associated with the risk of hemorrhagic occlusive retinal vasculitis (HORV),[79] a rare, potentially blinding postoperative complication that has been observed after intraocular injection of vancomycin formulations toward the end of otherwise uncomplicated cataract surgeries.[80] On September 28, 2017, FDA approved a supplemental new drug application that adds a subsection about HORV to the WARNINGS section in the labeling of Vancomycin Injection, USP. The warning states:

Hemorrhagic occlusive retinal vasculitis, including permanent loss of vision, occurred in patients receiving intracameral or intravitreal

[74] In making this observation, we do not suggest that the approved drug products, or products prepared from them, are approved for the use proposed by the nomination. Here we are asking a limited, threshold question to determine whether there might be clinical need for a compounded drug product, by asking what attributes of the approved drug the proposed compounded drug would change, and why. Asking this question helps ensure that if a bulk drug substance is included on the 503B Bulks List, it is to compound drugs that include a needed change to an approved drug product rather than to produce drugs without such a change. Because our answer to question (1) is ''no'', we do not evaluate the available evidence of effectiveness or lack of effectiveness of a drug product compounded with moxifloxacin HCl and triamcinolone acetonide. Vigamox and moxifloxacin HCl for injection have not been demonstrated to be safe and effective as an intravitreal injection to treat any condition or disease. FDA-approved Triesence is an intravitreal injection product, approved for a different use than what is proposed in the nomination.

[75] In 2020, based on FDA's review of safety data and information, the Agency approved a supplemental application to remove a warning from the Vigamox labeling against intraocular injection.

[76] Typically, endotoxin testing is not required for topically administered ophthalmic products (*e.g.,* Vigamox). See USP General Chapter <771> Ophthalmic Products-Quality Tests. Under CGMP requirements for outsourcing facilities each shipment of each lot of components must be tested to verify identity and evaluated for conformity with appropriate specifications before use (see 21 CFR 211.84). Appropriate specifications for components in products intended for intravitreal use include bacterial endotoxin level.

[77] In noting this issue, we do not mean to suggest or imply that the approved drug products, or products prepared from them, are approved for the use proposed by the nomination. See fn. 71 above.

[78] See fn. 73, above.

[79] See FDA's compounding risk alert current as of June 21, 2018, at *https://www.fda.gov/drugs/human-drug-compounding/case-hemorrhagic-occlusive-retinal-vasculitis-horv-following-intraocular-injections-compounded.*

[80] Id.

administration of vancomycin during or after cataract surgery. The safety and efficacy of vancomycin administered by the intracameral or the intravitreal route have not been established by adequate and well-controlled trials. Vancomycin is not indicated for prophylaxis of endophthalmitis.

Most of the bulk drug substance nominations FDA has evaluated to date have only proposed to compound drug products containing a single active ingredient. This nomination proposed to compound drug products containing more than one active ingredient. If FDA finalizes its proposal not to include moxifloxacin HCl on the 503B Bulks List, we intend to remove the substance from Category 1 for purposes of the Interim Policy, which would mean that drug products compounded using the bulk drug substance moxifloxacin HCl, including the proposed compounded products addressed in this notice, would fall outside the enforcement discretion described in the Interim Policy. However, if the proposal not to include moxifloxacin HCl on the 503B Bulks List is finalized, FDA would not remove triamcinolone acetonide or vancomycin HCl from Category 1 at that time as a result, because we are not currently in the process of reviewing nominations for those substances or any supporting data or information they contain. Nominations for vancomycin and triamcinolone acetonide, if they are not withdrawn, remain the subject of future evaluations. Finally, if FDA determines there is a clinical need for outsourcing facilities to use bulk drug substances to compound the proposed drug products, we would include each substance, as appropriate, on the 503B Bulks List at the time that final determination is made.

M. Nalbuphine HCl

Nalbuphine HCl has been nominated for inclusion on the 503B Bulks List to compound drug products that are used for general anesthesia and to treat moderate to severe pain as a preoperative, postoperative, and obstetrical analgesia.[81] The proposed routes of administration are intravenous, intramuscular, and subcutaneous, the proposed dosage form is a preservative-free solution, and the proposed concentrations are 10 mg/mL and 20 mg/mL. The nominators proposed to compound a preservative-free solution. However, they failed to acknowledge that there is a preservative-free formulation of nalbuphine HCl available that is FDA-approved or explain why that formulation would be medically unsuitable for certain patients. The nominations state that nalbuphine HCl might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDA 070914). FDA-approved nalbuphine HCl is available as a preservative-free 10 mg/mL and 20 mg/mL solution for intravenous, intramuscular, and subcutaneous administration.[82] [83]

1. Suitability of FDA-Approved Drug Product(s)

The nominations do not explain why an attribute of each of the FDA-approved preservative-free 10 mg/mL and 20 mg/mL nalbuphine HCl solutions for intravenous, intramuscular, and subcutaneous administration makes them medically unsuitable for certain patients or identify an attribute of the approved drug products that the proposed compounded drug products are intended to address. FDA finds no basis to conclude that an attribute of the FDA-approved products makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using nalbuphine HCl and approved drug products containing nalbuphine HCl, there is nothing for FDA to evaluate under question 2.

N. Polidocanol

Polidocanol was nominated for inclusion on the 503B Bulks List to compound drug products for the treatment of v[a]ricose and spider veins.[84] The proposed route of administration is intravenous, the proposed dosage form is an injection solution, and the proposed concentration is 1 percent to 5 percent. The nominated bulk drug substance is a component of FDA-approved drug products. FDA-approved polidocanol (Asclera) is available as a 0.5 percent (5 mg/mL) and 1 percent (10 mg/mL) solution for intravenous administration.[85] In addition, FDA-approved polidocanol (Varithena) is available as a 1 percent (10 mg/mL) solution for intravenous administration that must be activated before use.[86]

1. Suitability of FDA-Approved Drug Product(s)

The nomination proposes polidocanol solution for the 503B Bulks List at a concentration of 1 percent to 5 percent. The nomination does not identify an attribute of the approved products that makes them medically unsuitable to treat certain patients and that the proposed compounded drug products are intended to address. Specifically, the nomination does not explain why the FDA-approved 1 percent solution products are medically unsuitable to treat certain patients for varicose veins or spider veins. While FDA is aware that higher concentrations of polidocanol have sometimes been used to treat patients with larger spider veins and varicose veins, FDA is not aware of patients who would need concentrations above 1 percent for this purpose. Varithena, approved in 2013, demonstrated safety and efficacy based on adequate and well-controlled studies in veins above 12 mm in diameter.

FDA finds no basis to conclude that an attribute of each FDA-approved product makes it medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because we are proposing not to include polidocanol on the 503B Bulks list for the reasons described above, we do not consider whether there is a basis to conclude that the drug product proposed to be compounded must be produced from a bulk drug substance rather than from an FDA-approved drug product.

[81] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2298 and FDA–2013–N–1524–2292.

[82] See, *e.g.,* ANDA 070914 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/96944c71-2337-47f2-bab6-f46ad01499f3/96944c71-2337-47f2-bab6-f46ad01499f3.xml.*

[83] Per the label for ANDA 070914, single-dose products contain no bacteriostat or antimicrobial agent and unused portions must be discarded.

[84] See Docket No. FDA–2013–N–1524, document no. FDA–2013–N–1524–2292.

[85] See, NDA 021201 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/fe391849-9f70-4c3b-8698-39b243647727/fe391849-9f70-4c3b-8698-39b243647727.xml.*

[86] See, NDA 205098 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/5cfae95c-e866-4c37-857c-ab72e7a0fb40/5cfae95c-e866-4c37-857c-ab72e7a0fb40.xml.*

3. Additional Comments

For the reasons stated above, we did not evaluate this nomination using the factors that we considered for our evaluation in section II.B above. However, we note that polidocanol products that are of higher concentrations than the approved product would deliver higher doses if used in the same volume, potentially posing greater risk to patients.

O. Potassium Acetate

Potassium acetate has been nominated for inclusion on the 503B Bulks List to compound drug products that facilitate electrolyte management.[87] The proposed route of administration is intravenous, the proposed dosage form is a preservative-free solution, and the proposed concentration is 2 milliequivalents per milliliter (mEq/mL). The nominators proposed to compound a preservative-free solution. However, they failed to acknowledge that there is a preservative-free formulation of potassium acetate available that is FDA-approved or explain why that formulation would be medically unsuitable for certain patients. The nominations state that potassium acetate might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* NDA 018896). FDA-approved potassium acetate is available as a 40 mEq/20 mL (2 mEq/mL) preservative-free solution for intravenous administration.[88] [89]

1. Suitability of FDA-Approved Drug Product(s)

The nominations do not explain why an attribute of each of the FDA-approved 2 mEq/mL preservative-free solution products is medically unsuitable for certain patients or identify an attribute of the approved drug products that the proposed compounded drug product is intended to address. FDA finds no basis to conclude that an attribute of the FDA-approved products makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using potassium acetate and approved drug products containing potassium acetate, there is nothing for FDA to evaluate under question 2.

P. Procainamide HCl

Procainamide HCl has been nominated for inclusion on the 503B Bulks List to compound drug products that treat ventricular arrhythmia.[90] The proposed routes of administration are intramuscular and intravenous, the proposed dosage form is a preserved solution, and the proposed concentrations are 100 mg/mL and 500 mg/mL. The nominators proposed to compound a preserved solution. However, they failed to acknowledge that there is a preserved formulation of procainamide HCl available that is FDA-approved or explain why that formulation would be medically unsuitable for certain patients. The nominations state that procainamide HCl might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDA 089069). FDA-approved procainamide HCl is available as a 100 mg/mL and 500 mg/mL preserved solution for intramuscular and intravenous administration.[91] [92]

1. Suitability of FDA-Approved Drug Product(s)

The nominations do not explain why an attribute of each of the FDA-approved 100 mg/mL and 500 mg/mL preserved solutions makes them medically unsuitable for certain patients or identify an attribute of the approved drug products that the proposed compounded drug products are intended to address. FDA finds no basis to conclude that an attribute of the FDA-approved products makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using procainamide HCl and approved drug products containing procainamide HCl, there is nothing for FDA to evaluate under question 2.

Q. Sodium Nitroprusside

Sodium nitroprusside has been nominated for inclusion on the 503B Bulks List to compound drug products to treat acute decompensated heart failure and acute hypertension.[93] The proposed route of administration is a sterile, injectable solution, the proposed dosage form is a diluted injection, and the proposed concentration is 12.5 mg/mL. The nomination states that sodium nitroprusside might also be used to compound other drug products but does not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDA 209493). FDA-approved sodium nitroprusside is available as a 50 mg/2 mL (25 mg/mL) solution that must be diluted prior to injection.[94] [95]

1. Suitability of FDA-Approved Drug Product(s)

The nomination does not explain why an attribute of each of the FDA-approved 50 mg/2 mL solution for dilution products are medically unsuitable for certain patients or identify an attribute of the approved drug products that the proposed compounded drug product is intended to address. FDA finds no basis to conclude that an attribute of the FDA-approved products makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

[87] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2292 and FDA–2013–N–1524–2298.

[88] See, *e.g.,* NDA 018896 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/fed21ec1-a0e2-457e-9b7d-c9a04f5d8871/fed21ec1-a0e2-457e-9b7d-c9a04f5d8871.xml.*

[89] Per the label for NDA 018896, the potassium acetate solution contains no bacteriostat, antimicrobial agent or added buffer but may contain acetic acid for pH adjustment.

[90] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2292 and FDA–2013–N–1524–2298.

[91] See, *e.g.,* ANDA 089069 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/0ddcc43e-3d9c-4a79-ab19-790d8c0043cd/0ddcc43e-3d9c-4a79-ab19-790d8c0043cd.xml.*

[92] Per the label for ANDA 089069, each milliliter of the 2 mL vial contains procainamide hydrochloride 500 mg; methylparaben 1 mg and sodium metabisulfite 1.8 mg added in water for injection and may contain hydrochloric acid and/or sodium hydroxide for pH adjustment.

[93] See Docket No. FDA–2015–N–3469, document no. FDA–2015–N–3469–0238.

[94] See, *e.g.,* ANDA 209493 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/61245426-5d5a-4788-b060-33671152b526/61245426-5d5a-4788-b060-33671152b526.xml.*

[95] Sodium nitroprusside is also approved as a solution for intravenous administration.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

The nomination does not take the position or provide support for the position that drug products containing sodium nitroprusside must be compounded from bulk drug substances rather than using the approved drug product. FDA finds no basis to conclude that the sodium nitroprusside drug products proposed in the nomination must be compounded using a bulk drug substance rather than using the approved drug product.

R. Sodium Thiosulfate

Sodium thiosulfate has been nominated for inclusion on the 503B Bulks List for the treatment of calciphylaxis, cyanide toxicity, extravasation, *Malassezia furfur,* and nephrotoxicity prophylaxis.[96] Sodium thiosulfate was nominated as a 250 mg/mL injectable, for intravenous, intradermal, intramuscular, and subcutaneous administration, and in a topical dosage form at an unknown concentration. The nominated bulk drug substance is a component of an FDA-approved drug product (NDA 203923). FDA-approved sodium thiosulfate is available as a 12.5 g/50 mL (250 mg/mL) solution for intravenous administration.[97] [98]

1. Suitability of FDA-Approved Drug Product(s)

Sodium thiosulfate was nominated for injectable (intravenous, intradermal, intramuscular, subcutaneous) and topical administration [99] for the treatment of calciphylaxis, cyanide toxicity, extravasation, *Malassezia furfur,* and nephrotoxicity prophylaxis.

a. Calciphylaxis

The nominator proposes to remove potassium chloride from the proposed injectable compounded product used in the treatment of calciphylaxis. The nominator asserts that the safety of the approved product is of concern because the potassium level of the product is too high for patients with renal disease or impairment. This assertion is inaccurate because the amount of potassium in the approved 12.5 g/50 mL (250 mg/mL) solution for intravenous administration is small (440 mg or ~6 mEq potassium chloride per dose), and when it is used off-label for the treatment of calciphylaxis, to the best of our knowledge, the product is generally administered during hemodialysis, which allows for removal of the excess potassium.[100]

The nomination proposes to make a 250 mg/mL injectable, as well as unspecified higher concentrations. The nomination states that it may be necessary to compound a product with a greater concentration than is commercially available, but the nomination does not identify specific higher concentrations that the nominator proposes to compound or provide any data or information supporting the need for a higher concentration. In addition, FDA is not aware of patients who would need concentrations above 250 mg/mL. The approved product is available as a concentrated solution (12.5 g/50 mL). Although the product is generally diluted in normal saline before administration to minimize potential complications associated with the intravenous infusion of a hypertonic solution, presumably, a concentrated, compounded sodium thiosulfate product would also need to be diluted before administration. In addition, when used for the treatment of calciphylaxis in hemodialysis patients, the product is administered during dialysis, which allows for removal of excess fluid (Refs. 9 to 11) (discussing how sodium thiosulfate is generally used to treat calciphylaxis).

Accordingly, FDA finds no basis to conclude that an attribute of the FDA-approved product makes it medically unsuitable to treat patients with calciphylaxis and that the sodium thiosulfate drug products proposed to be compounded are intended to address.[101]

b. Cyanide Toxicity

The nomination also proposes to combine sodium thiosulfate with sodium nitroprusside to reduce the risk of cyanide toxicity during sodium nitroprusside administration. Sodium thiosulfate is FDA-approved for sequential use with sodium nitrite for treatment of acute cyanide poisoning that is judged to be serious or life-threatening. The nomination states that sodium thiosulfate is commonly administered with sodium nitroprusside, but the nomination does not identify the final product formulation proposed to be compounded (*e.g.,* dosage form and strength of each ingredient).[102] Sodium nitroprusside was also nominated separately (see FDA's analysis at section IV.Q. above), but that nomination does not mention the use of sodium nitroprusside in combination with sodium thiosulfate.

The nomination states that providing sodium thiosulfate and sodium nitroprusside in a combined compounded preparation would allow for faster administration in the clinical setting and fewer human manipulations, thus reducing the rate of error. We do not consider the risk that a clinician may mishandle the approved product to be an indicator of clinical need. Further, the approved labeling for sodium nitroprusside states that no other drugs should be administered in the same solution with sodium nitroprusside. The

[96] See Docket No. FDA–2015–N–3469, document no. FDA–2015–N–3469–0173.

[97] See, *e.g.,* NDA 203923 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/29449d76-f4c7-4571-b7bb-5c2a55f637b5/29449d76-f4c7-4571-b7bb-5c2a55f637b5.xml.*

[98] Sodium thiosulfate is also approved for sequential use with sodium nitrite for intravenous administration.

[99] The topical route of administration will not be considered further because the nomination does not identify a condition that this formulation is intended to address. The nomination also did not identify an attribute of the approved intravenous drug product that makes it medically unsuitable to treat patients with the conditions for which the bulk drug substance was nominated.

[100] Even in circumstances where it is not administered during dialysis, the amount of potassium in the approved product is small and potassium levels could be monitored for safety. (See, *e.g.,* Nigwekar, S.U., S.M. Brunelli, D. Meade, et al., 2013, ''Sodium Thiosulfate Therapy for Calcific Uremic Arteriolopathy, '' *Clinical Journal of the American Society of Nephrology,* 8(7):1162–1170 (providing, ''The median dose of STS treatment was 25 g administered intravenously in 100 ml of normal saline given over the last half-hour of each HD session''); Generali, J.A. and D.J. Cada, 2015, ''Sodium Thiosulfate: Calciphylaxis,'' *Hospital Pharmacy,* 50(11):975–977 (studying dialysis patients on ''25 grams intravenously diluted in 100 mL of sodium chloride 0.9 percent administered over 30 to 60 minutes 3 times per week during the last hour or after the hemodialysis session.'')).

[101] In making this observation, we do not suggest that the approved drug product, or products prepared from it, are approved for the use proposed by the nomination. Here we are asking a limited, threshold question to determine whether there might be clinical need for a compounded drug product, by asking what attributes of the approved drug the proposed compounded drug would change, and why. Asking this question helps ensure that if a bulk drug substance is included on the 503B Bulks List it is to compound drugs that include a needed change to an approved drug product rather than to produce drugs without such a change. Because our answer to question (1) is ''no'', we do not evaluate the available evidence of effectiveness or lack of effectiveness of a drug product compounded with sodium thiosulfate for the treatment of calciphylaxis. We note that the references cited by the nominator appear to be general reviews of potassium homeostasis and studies in other populations showing associations between potassium excretion or potassium levels and clinical outcomes. None of these references address whether there is a risk of the amount of potassium in the approved product to patients receiving sodium thiosulfate for the treatment of calciphylaxis.

[102] While the nomination does not provide final product formulation information, it does include an article (Ref. 12), which reports on the stability of a 1:10 sodium nitroprusside: sodium thiosulfate admixture stored up to 48 hours when compounded from the approved products.

nomination has not identified any patients for whom co-administration of both approved drug products would not be medically appropriate, and for whom compounding a drug product with both active ingredients in one solution would address an unmet medical need.

Accordingly, with respect to the combination sodium thiosulfate and sodium nitroprusside drug products proposed to be compounded, FDA finds no basis to conclude that an attribute of the FDA-approved products makes them medically unsuitable to treat certain patients.

c. Extravasation, Malassezia furfur, and Nephrotoxicity Prophylaxis

The nomination does not identify an attribute of the approved products that makes them medically unsuitable for the conditions listed above and that the proposed compounded injectable drug products are intended to address.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because we are proposing not to include sodium thiosulfate on the 503B Bulks list for the reasons described above, we do not consider whether there is a basis to conclude that the drug products proposed to be compounded must be produced from a bulk drug substance rather than from an FDA-approved drug product.

S. Verapamil HCl

Verapamil HCl has been nominated for inclusion on the 503B Bulks List to compound drug products that treat atrial fibrillation and flutter, hypertension, and paroxysmal supraventricular tachycardia, among other conditions.[103] The proposed route of administration is intravenous, the proposed dosage form is a preservative-free solution, and the proposed concentration is 2.5 mg/mL. The nominators proposed to compound a preservative-free solution. However, they failed to acknowledge that there is a preservative-free formulation of verapamil HCl available that is FDA-approved or explain why that formulation would be medically unsuitable for certain patients. The nominations state that verapamil HCl might also be used to compound other drug products but do not identify those products. The nominated bulk drug substance is a component of FDA-approved drug products (*e.g.,* ANDA 070737). FDA-approved verapamil HCl is available as a preservative-free 5 mg/2 mL (2.5 mg/mL) solution for intravenous administration.[104] [105] [106]

1. Suitability of FDA-Approved Drug Product(s)

The nominations do not explain why an attribute of each of the FDA-approved preservative-free 5 mg/2 mL (2.5 mg/mL) solution products for intravenous administration is medically unsuitable for certain patients or identify an attribute of the approved drug products that the proposed compounded drug products are intended to address. FDA finds no basis to conclude that an attribute of the FDA-approved products makes them medically unsuitable to treat certain patients for a condition that FDA has identified for evaluation and that a proposed compounded product is intended to address.

2. Whether the Drug Product Must Be Compounded From a Bulk Drug Substance

Because the nominations do not identify specific differences between drug products that would be compounded using verapamil HCl and approved drug products containing verapamil HCl, there is nothing for FDA to evaluate under question 2.

V. Other Issues Raised in Nominations

Some of the bulk drug substance nominations included in this notice state that there could be a benefit gained from using a bulk drug substance contained in an approved drug product to compound drug products that do not require dilution or reconstitution prior to administration. As explained above, when a bulk drug substance is a component of an approved drug, we considered whether there is a basis to conclude that an attribute of each approved drug product makes each one medically unsuitable to treat certain patients for their condition, an interpretation that protects patients and the integrity of the drug approval process. The nominations proposing to compound drug products in ready-to-use form containing bulk drug substances in one or more FDA-approved drug products do not show that the approved drug product, when not manufactured in the ready-to-use form, is medically unsuitable for certain patients. Nor do the nominations establish that drug products in the relevant concentrations, including ready-to-use products, cannot be prepared from the approved drug products. Rather, they propose to compound a ready-to-use product from bulk drug substances to seek improved efficiency for prescribers or healthcare providers, or to address the possibility that the approved drug might be mishandled by a medical professional, neither of which falls within the meaning of clinical need to compound a drug product using a bulk drug substance.

Some of the nominations for the substances in this notice include statements that these substances should be added to the 503B Bulks List because compounding from the bulk drug substance could help outsourcing facilities address drug shortages and supply disruptions of approved drugs. As noted above, section 503B of the FD&C Act contains a separate provision for compounding from bulk drug substances to address a drug shortage, and we do not interpret the other price- and supply-related issues advanced by the nominations to be within the meaning of ''clinical need'' for compounding with a bulk drug substance.[107]

Some of the nominations for the substances in this notice assert that it would be preferable to compound a drug product using a bulk drug substance rather than using an approved drug product; however, they do not take the position or provide support for the position that a bulk drug substance must be used to prepare these concentrations.[108]

VI. Conclusion

For the reasons stated above, we tentatively conclude that there is a clinical need for outsourcing facilities to compound drug products using the bulk drug substances DPCP, glycolic acid,

[103] See Docket No. FDA–2013–N–1524, document nos. FDA–2013–N–1524–2298 and FDA–2013–N–1524–2292.

[104] See, *e.g.,* ANDA 070737 labeling available as of the date of this notice at *https://www.accessdata.fda.gov/spl/data/3d8f6e3e-444b-44e3-b60c-a725948085b6/3d8f6e3e-444b-44e3-b60c-a725948085b6.xml.*

[105] Per the label for ANDA 070737, the solution contains no bacteriostat or antimicrobial agent and is intended for single-dose intravenous administration and may contain hydrochloric acid for pH adjustment.

[106] Verapamil hydrochloride is also approved as oral extended release tablet.

[107] Please see the final guidance entitled ''Evaluation of Bulk Drug Substances Nominated for Use in Compounding Under Section 503B of the Federal Food, Drug, and Cosmetic Act'' (84 FR 7390) (Ref. 2) and the **Federal Register** notice entitled ''List of Bulk Drug Substances for Which There Is a Clinical Need Under Section 503B of the Federal Food, Drug, and Cosmetic Act'' available at *https://www.federalregister.gov/documents/2019/03/04/2019-03810/list-of-bulk-drug-substances-for-which-there-is-a-clinical-need-under-section-503b-of-the-federal.*

[108] For example, the nominations do not take the position or provide support for the position that a drug product prepared by starting with the approved drug would be unsuitable for administration.

SADBE, and TCA, and we therefore propose to include them on the 503B Bulks List as described in this notice.

At this time, we find no basis to conclude that there is a clinical need for outsourcing facilities to compound drug products using the bulk drug substances diazepam, dobutamine HCl, dopamine HCl, edetate calcium disodium, folic acid, glycopyrrolate, hydroxyzine HCl, ketorolac tromethamine, labetalol HCl, mannitol, metoclopramide HCl, moxifloxacin HCl, nalbuphine HCl, polidocanol, potassium acetate, procainamide HCl, sodium nitroprusside, sodium thiosulfate, and verapamil HCl. We therefore propose not to include these bulk drug substances on the 503B Bulks List.

VII. References

The following references marked with an asterisk (*) are on display at the Dockets Management Staff (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at *https://www.regulations.gov.* References without asterisks are not on public display at *https://www.regulations.gov* because they have copyright restriction. Some may be available at the website address, if listed. References without asterisks are available for viewing only at the Dockets Management Staff. FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

*1. FDA, Guidance for Industry, ''Interim Policy on Compounding Using Bulk Drug Substances Under Section 503B of the Federal Food, Drug, and Cosmetic Act,'' January 2017 (available at *https://www.fda.gov/media/94402/download*).

*2. FDA, Guidance for Industry, ''Evaluation of Bulk Drug Substances Nominated for Use in Compounding Under Section 503B of the Federal Food, Drug, and Cosmetic Act,'' March 2019 (available at *https://www.fda.gov/media/121315/download*).

*3. FDA Memorandum to File, Clinical Need for Diphenylcyclopropenone (DPCP) in Compounding Under Section 503B of the FD&C Act, July 2020.

*4. FDA Memorandum to File, Clinical Need for Glycolic Acid in Compounding Under Section 503B of the FD&C Act, July 2020.

*5. FDA Memorandum to File, Clinical Need for Squaric Acid Dibutyl Ester (SADBE) in Compounding Under Section 503B of the FD&C Act, July 2020.

*6. FDA Memorandum to File, Clinical Need for Trichloroacetic Acid (TCA) in Compounding Under Section 503B of the FD&C Act, July 2020.

7. Leheta, T.M., A. El Tawdy, R.M. Abdel Hay, and S. Farid, 2011, ''Percutaneous Collagen Induction Versus Full-Concentration Trichloroacetic Acid in the Treatment of Atrophic Acne Scars,'' *Dermatologic Surgery,* 37(2):207–216.

8. Kumari, R. and D.M. Thappa, 2010, ''Comparative Study of Trichloroacetic Acid Versus Glycolic Acid Chemical Peels in the Treatment of Melasma,'' *Indian Journal of Dermatology, Venereology and Leprology,* 76:447, available at *http://www.ijdvl.com/text.asp?2010/76/4/447/66602.*

9. Nigwekar, S.U., S.M. Brunelli, D. Meade, et al., 2013, ''Sodium Thiosulfate Therapy for Calcific Uremic Arteriolopathy,'' *Clinical Journal of the American Society of Nephrology,* 8(7):1162–1170.

10. Generali, J.A. and D.J. Cada, 2015, ''Sodium Thiosulfate: Calciphylaxis,'' *Hospital Pharmacy,* 50(11):975–977.

*11. Udomkarnjananun, S., K. Kongnatthasate, K. Praditpornsilpa, et al., 2019, ''Treatment of Calciphylaxis in CKD: A Systematic Review and Meta-Analysis,'' *Kidney International Reports,* 4(2):231–244.

*12. Schulz, L.T., E.J. Elder, Jr, K.J. Jones, et al., 2010, ''Stability of Sodium Nitroprusside and Sodium Thiosulfate 1:10 Intravenous Admixture,'' *Hospital Pharmacy,* 45(10):779–784.

Dated: July 28, 2020.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2020–16649 Filed 7–30–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious 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 Allergy and Infectious Diseases Special Emphasis Panel; Emergency Awards: Rapid Investigation of Severe Acute Respiratory Syndrome Coronavirus 2 (SARS–CoV–2) and Coronavirus Disease 2019 (COVID–19) (R21, R01 Clinical Trials Not Allowed).

Date: August 21, 2020.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 4F30, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Chelsea D. Boyd, 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 4F30, Rockville, MD 20892–9834, 301–761–6664, *chelsea.boyd@nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Emergency Awards: Rapid Investigation of Severe Acute Respiratory Syndrome Coronavirus 2 (SARS–CoV–2) and Coronavirus Disease 2019 (COVID–19) (R21, R01 Clinical Trials Not Allowed).

Date: August 26, 2020.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G41B, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Brenda Lange-Gustafson, 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 3G41B, Bethesda, MD 20892–9834, (240) 669–5047, *bgustafson@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: July 27, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–16585 Filed 7–30–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2020–0041]

National Merchant Marine Personnel Advisory Committee; Vacancy

AGENCY: U.S. Coast Guard, Department of Homeland Security.

ACTION: Request for applications; Re-solicitation for members credentialed with ratings.

SUMMARY: The Coast Guard is re-soliciting applications from persons interested in membership on the National Merchant Marine Personnel Advisory Committee (Committee). This recently established Committee will advise the Secretary of the Department

of Homeland Security on matters relating to personnel in the United States merchant marine, including the training, qualifications, certification, documentation, and fitness of mariners. Please read the notice for description of Committee positions we are seeking to fill.

DATES: Your completed application should reach the Coast Guard on or before August 14, 2020.

ADDRESSES: Applicants should send a cover letter expressing interest in an appointment to the Committee and a resume detailing their experience. We will not accept a biography.

Applications should be submitted: via the following method:

• *By Email: Megan.C.Johns@uscg.mil.* Subject Line: N–MERPAC (preferred)

FOR FURTHER INFORMATION CONTACT: Megan Johns Henry, Alternate Designated Federal Officer of the Merchant Marine Personnel Advisory Committee; Telephone 202–372–1255; or Email at *Megan.C.Johns@uscg.mil.*

SUPPLEMENTARY INFORMATION: On May 15, 2020, the Coast Guard published a request in the **Federal Register** (85 FR 29467) for applications for membership in the National Merchant Marine Personnel Advisory Committee. Due to a lack of applications received for the membership positions representing credentialed ratings, the Coast Guard is re-soliciting applications from persons interested in membership on the National Merchant Marine Personnel Advisory Committee. Applicants who responded to the initial notice do not need to reapply.

The National Merchant Marine Personnel Advisory Committee is a Federal advisory committee. It will operate under the provisions of the *Federal Advisory Committee Act,* 5 U.S.C. Appendix, and the administrative provisions in Section 601 of the *Frank LoBiondo Coast Guard Authorization Act of 2018* (specifically, 46 U.S.C. 15109).

The Committee was established on December 4, 2019, by the *Frank LoBiondo Coast Guard Authorization Act of 2018,* which added section 15103, National Merchant Marine Personnel Advisory Committee, to Title 46 of the U.S. Code. The Committee will advise the Secretary of Homeland Security on matters relating to personnel in the United States merchant marine, including the training, qualifications, certification, documentation, and fitness of mariners.

The Committee is required to meet at least once a year in accordance with 46 U.S.C. 15109(a). We expect the Committee to meet at least twice a year, but it may meet more frequently. The meetings are generally held in cities that have high concentrations of maritime personnel and related marine industry businesses.

All members serve at their own expense and receive no salary or other compensation from the Federal Government. Members may be reimbursed, however, for travel and per diem in accordance with Federal Travel Regulations.

Under provisions in 46 U.S.C. 15109(f)(6), if you are appointed as a member of the Committee, your membership term will expire on December 31 of the third full year after the effective date of your appointment. The Secretary may require an individual to have passed an appropriate security background examination before appointment to the Committee, 46 U.S.C. 15109(f)(4).

In this solicitation for Committee members, we will consider applications for positions, which include:

• United States citizens holding active licenses or certificates issued under 46 U.S.C. chapter 71 or merchant mariner documents issued under 46 U.S.C. chapter 73, including two credentialed with ratings: one of which shall be endorsed as an able bodied seamen; and one that shall be endorsed as a qualified member of the engine department.

The Department of Homeland Security does not discriminate in selection of Committee members based on race, color, religion, sex, national origin, political affiliation, sexual orientation, gender identity, marital status, disabilities and genetic information, age, membership in an employee organization, or any other non-merit factor. The Department of Homeland Security strives to achieve a widely diverse candidate pool for all of its recruitment selections.

If you are interested in applying to become a member of the Committee, send your cover letter and resume to Megan Johns Henry, Alternate Designated Federal Officer of the National Merchant Marine Personnel Advisory Committee via one of the transmittal methods in the **ADDRESSES** section by the deadline in the **DATES** section of this notice. When you send your application to us via email, we will send you an email confirming receipt of your application.

Dated: July 28, 2020.

Jeffrey G. Lantz,

Director of Commercial Regulations and Standards.

[FR Doc. 2020–16652 Filed 7–30–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2020–0002; Internal Agency Docket No. FEMA–B–2044]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The LOMR will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings. For rating purposes, the currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository

address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm,

Assistant Administrator for Risk Management, Department of Homeland Security, Federal Emergency Management Agency.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Alabama:						
Madison	City of Madison (19–04–6821P).	The Honorable Paul Finley, Mayor, City of Madison, 100 Hughes Road, Madison, AL 35758.	Engineering Department, 100 Hughes Road, Madison, AL 35758.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 5, 2020	010308
Madison	Unincorporated Areas of Madison County (19–04–6821P).	The Honorable Dale W. Strong, Chairman, Madison County Commission, 100 North Side Square, Huntsville, AL 35801.	Madison County Public Works Department, 266–C Shields Road, Huntsville, AL 35811.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 5, 2020	010151
Arizona: Pinal	Unincorporated areas of Pinal County (19–09–1873P).	The Honorable Anthony Smith, Chairman, Pinal County Board of Supervisors, P.O. Box 827, Florence, AZ 85132.	Pinal County Flood Control District, 31 North Pinal Street, Building F, Florence, AZ 85132.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 30, 2020	040077
Arkansas: Benton	City of Rogers (19–06–2805P).	The Honorable Greg Hines, Mayor, City of Rogers, 301 West Chestnut Street, Rogers, AR 72756.	Community Development Department, 301 West Chestnut Street, Rogers, AR 72756.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 27, 2020	050013
Colorado:						
Weld	City of Evans (19–08–0862P).	The Honorable Brian Rudy, Mayor, City of Evans, 1100 37th Street, Evans, CO 80620.	Engineering Department, 1100 37th Street, Evans, CO 80620.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 26, 2020	080182
Weld	Unincorporated areas of Weld County (19–08–0862P).	The Honorable Mike Freeman, Chairman, Weld County Board of Commissioners, P.O. Box 758, Greeley, CO 80632.	Weld County Department of Planning Services, 1555 North 17th Avenue, Greeley, CO 80631.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 26, 2020	080266
Connecticut:						
Fairfield	Town of Darien (20–01–0946P).	The Honorable Jayme J. Stevenson, First Selectman, Town of Darien Board of Selectmen, 2 Renshaw Road, Room 202, Darien, CT 06820.	Planning and Zoning Department, 2 Renshaw Road, Darien, CT 06820.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 2, 2020	090005
Fairfield	Town of Westport (20–01–0945P).	The Honorable James Marpe, First Selectman, Town of Westport Board of Selectmen, 110 Myrtle Avenue, Westport, CT 06880.	Planning and Zoning Department, 110 Myrtle Avenue, Room 203, Westport, CT 06880.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 5, 2020	090019

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Florida:						
Alachua	City of Hawthorne (18–04–6771P).	The Honorable Matthew Surrency, Mayor, City of Hawthorne, P.O. Box 2413, Hawthorne, FL 32640.	Public Works Department, 6875 Southeast 221st Street, Hawthorne, FL 32640.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 26, 2020	120682
Alachua	Unincorporated areas of Alachua County (18–04–6771P).	The Honorable Robert ''Hutch'' Hutchinson, Chairman, Alachua County Board of Commissioners, 12 Southeast 1st Street, 2nd Floor, Gainesville, FL 32601.	Alachua County Public Works Department, 5620 Northwest 120th Lane, Gainesville, FL 32653.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 26, 2020	120001
Charlotte	Unincorporated areas of Charlotte County (20–04–2886P).	The Honorable Bill Truex, Chairman, Charlotte County Board of Commissioners, 18500 Murdock Circle, Suite 536, Port Charlotte, FL 33948.	Charlotte County Building Department, 18400 Murdock Circle, Port Charlotte, FL 33948.	*https://msc.fema.gov/portal/advanceSearch.*	Nov. 6, 2020	120061
Indian River	Unincorporated areas of Indian River County (19–04–6224P).	The Honorable Susan Adams, Chair, Indian River County Board of Commissioners, 1801 27th Street, Vero Beach, FL 32960.	Indian River County Community Development Department, 1801 27th Street, Vero Beach, FL 32960.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 9, 2020	120119
Monroe	Unincorporated areas of Monroe County (20–04–2774P).	The Honorable Heather Carruthers, Mayor, Monroe County Board of Commissioners, 500 Whitehead Street, Suite 102, Key West, FL 33040.	Monroe County Building Department, 2798 Overseas Highway, Suite 300, Marathon, FL 33050.	*https://msc.fema.gov/portal/advanceSearch.*	Nov. 2, 2020	125129
Orange	Unincorporated areas of Orange County (19–04–5112P).	The Honorable Jerry L. Demings, Mayor, Orange County, 201 South Rosalind Avenue, 5th Floor, Orlando, FL 32801.	Orange County Stormwater Department, 4200 South John Young Parkway, Orlando, FL 32839.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 27, 2020	120179
Georgia: Douglas	Unincorporated areas of Douglas County (19–04–5352P).	The Honorable Romona Jackson Jones, Chair, Douglas County Board of Commissioners, 8700 Hospital Drive, 3rd Floor, Douglasville, GA 30134.	Douglas County Development Services Department, 8700 Hospital Drive, Douglasville, GA 30134.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 23, 2020	130306
Massachusetts: Bristol.	City of Taunton (20–01–0947P).	The Honorable Shaunna O'Connell, Mayor, City of Taunton, 141 Oak Street, Taunton, MA 02780.	Engineering Department, 90 Ingell Street, Taunton, MA 02780.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 5, 2020	250066
Maine:						
Washington	Baring Plantation (20–01–0666P).	Ms. Stacie Beyer, Planning Manager, Baring Plantation, Land Use Planning Commission, 22 State House Station, Augusta, ME 04333.	Baring Plantation Hall, 22 State House Station, Augusta, ME 04333.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 26, 2020	230468
Washington	Grand Lake Stream Plantation (20–01–0494P).	Ms. Stacie Beyer, Planning Manager, Grand Lake Stream Plantation Land Use Planning Commission, 18 Elkins Lane, Augusta, ME 04333.	Grand Lake Stream Plantation Hall, 22 SHS, 18 Elkins Lane, Augusta, ME 04333.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 22, 2020	230469
Washington	Town of Alexander (20–01–0625P).	The Honorable Foster Carlow Jr., Chairman, Town of Alexander Board of Selectmen, 50 Cooper Road, Alexander, ME 04694.	Town Hall, 50 Cooper Road, Alexander, ME 04694.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 23, 2020	230303
Washington	Town of Alexander (20–01–0666P).	The Honorable Foster Carlow Jr., Chairman, Town of Alexander Board of Selectmen, 50 Cooper Road, Alexander, ME 04694.	Town Hall, 50 Cooper Road, Alexander, ME 04694.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 26, 2020	230303
Washington	Town of Baileyville (20–01–0666P).	Mr. Chris Loughlin, Town of Baileyville Manager, P.O. Box 370, Baileyville, ME 04694.	Town Hall, 63 Broadway, Baileyville, ME 04694.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 26, 2020	230304

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Washington	Town of Brookton (20–01–0423P).	Ms. Stacie Beyer, Chief Planner, Township of Brookton Land Use Planning Commission, 18 Elkins Lane, Augusta, ME 04333.	Township Hall, 22 SHS, 18 Elkins Lane, Augusta, ME 04333.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 22, 2020	230470
Washington	Town of Crawford (20–01–0625P).	The Honorable Coburn Wallace, Chairman, Town of Crawford Board of Selectmen, 359 Crawford Arm Road, Crawford, ME 04694.	Town Hall, 359 Crawford Arm Road, Crawford, ME 04694.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 23, 2020	230309
Washington	Town of Danforth (20–01–0423P).	The Honorable Carrie Oliver, Chair, Town of Danforth Board of Selectmen, P.O. Box 117, Danforth, ME 04424.	Town Hall, 18 Central Street, Danforth, ME 04424.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 22, 2020	230136
Washington	Town of Talmadge (20–01–0494P).	The Honorable Zachary Beane, Chairman, Town of Talmadge Board of Selectmen, 455 Houlton Road, #13, Waite, ME 04492.	Town Hall, 14 Old Mill Road, Waite, ME 04492.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 22, 2020	230914
Washington	Town of Topsfield (20–01–0423P).	The Honorable Rickey Irish, Chairman, Town of Topsfield Board of Selectmen, 48 North Road, Topsfield, ME 04490.	Town Hall, 48 North Road, Topsfield, ME 04490.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 22, 2020	230324
Washington	Town of Topsfield (20–01–0494P).	The Honorable Rickey Irish, Chairman, Town of Topsfield Board of Selectmen, 48 North Road, Topsfield, ME 04490.	Town Hall, 48 North Road, Topsfield, ME 04490.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 22, 2020	230324
Washington	Town of Wesley (20–01–0625P).	The Honorable Glen Durling, Chairman, Town of Wesley Board of Selectmen, 2 Whining Pines Drive, Wesley, ME 04686.	Town Hall, 2 Whining Pines Drive, Wesley, ME 04686.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 23, 2020	230327
North Carolina: Buncombe.	Unincorporated areas of Buncombe County (20–04–3616P).	The Honorable Brownie Newman, Chairman, Bumcombe County Board of Commissioners, 200 College Street, Suite 300, Asheville, NC 28801.	Buncombe County Service Foundation, 200 College Street, Suite 300, Asheville, NC 28801.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 8, 2020	370031
Oklahoma: Tulsa	City of Tulsa (20–06–0617P).	The Honorable G.T. Bynum, Mayor, City of Tulsa, 175 East 2nd Street, 15th Floor, Tulsa, OK 74103.	Development Services Department, 175 East 2nd Street, 4th Floor, Tulsa, OK 74103.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 30, 2020	405381
Pennsylvania:						
Allegheny	Municipality of Mt. Lebanon (20–03–1146P).	Mr. Keith McGill, Manager, Municipality of Mt. Lebanon, 710 Washington Road, Pittsburgh, PA 15228.	Inspection Department, 710 Washington Road, Pittsburgh, PA 15228.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 8, 2020	421272
Columbia	Township of Mifflin (20–03–0995X).	The Honorable Ricky L. Brown, President, Township of Mifflin Board of Supervisors, P.O. Box 359, Mifflinville, PA 18631.	Code Enforcement and Zoning Department, 207 East 1st Street, Mifflinville, PA 18631.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 26, 2020	421167
York	Borough of Hanover (20-03-1145P).	The Honorable William W. Reichart II, President, Borough of Hanover Council, 44 Frederick Street, Hanover, PA 17331.	Borough Hall, 44 Frederick Street, Hanover, PA 17331.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 5, 2020	422212
York	Township of Penn (20-03-1145P).	The Honorable Justin J. Heiland, President, Township of Penn Board of Commissioners, 20 Wayne Avenue, Hanover, PA 17331.	Zoning Department, 20 Wayne Avenue, Hanover, PA 17331.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 5, 2020	421025
South Dakota:						

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Lincoln	City of Harrisburg (20-08-0017P).	The Honorable Julie Burke-Van Luvanee, Mayor, City of Harrisburg, 301 East Willow Street, Harrisburg, SD 57032.	City Hall, 301 East Willow Street, Harrisburg, SD 57032.57.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 2, 2020	460114
Pennington ..	City of Rapid City (19-08-0857P).	The Honorable Steve Allender, Mayor, City of Rapid City, 300 6th Street, Rapid City, SD 57701.	Public Works Department, Engineering Services Division, 300 6th Street, Rapid City, SD 57701.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 5, 2020	465420
Texas: Williamson.	Unincorporated areas of Williamson County (20–06–0255P).	The Honorable Bill Gravell, Jr., Williamson County Judge, 710 South Main Street, Suite 101, Georgetown, TX 78626.	Williamson County Engineering Department, 3151 Southeast Inner Loop, Georgetown, TX 78626.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 29, 2020	481079
Virginia: Stafford	Unincorporated areas of Stafford County (20–03–0607P).	Mr. Thomas C. Foley, Stafford County Administrator, 1300 Courthouse Road, Stafford, VA 22554.	Stafford County Department of Public Works, Environmental Division, 2126 Jefferson Highway, Suite 203, Stafford, VA 22554.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 19, 2020	510154

[FR Doc. 2020–16609 Filed 7–30–20; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2020–0023; OMB No. 1660–0005]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; FEMA Inspection and Claims Form

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) will submit the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission will describe the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before August 31, 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 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Information Management Division, 500 C Street SW, Washington, DC 20472, email address *FEMA-Information-Collections-Management@fema.dhs.gov* or Daniel Claire, Program Analyst, Federal Insurance & Mitigation Administration, 202–552–9891, *Daniel.Claire@fema.dhs.gov or* Brian Thompson, Supervisory Program Specialist, FEMA Recovery Directorate, 540–686–3602, *Brian.Thompson6@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: This proposed information collection previously published in the **Federal Register** on May 14, 2020, at 85 FR 28968 with a 60 day public comment period. No comments were received. The purpose of this notice is to notify the public that FEMA will submit the information collection abstracted below to the Office of Management and Budget for review and clearance.

Collection of Information

Title: FEMA Inspection and Claims Forms, formerly National Flood Insurance Program Claim Forms.

Type of information collection: Revision of a currently approved information collection.

OMB Number: 1660–0005.

Form Titles and Numbers: FEMA Form 086–0–6; Personal Property (Contents) Worksheet, FEMA Form 086–0–7; Building Property Worksheet, FEMA Form 086–0–9; Proof of Loss—Building & Contents (Policyholder-Prepared), FEMA Form 086–0–10; Proof of Loss—Increased Cost of Compliance (ICC), FEMA Form 086–0–11; First Notice of Loss, FEMA Form 086–0–17; Manufactured (Mobile) Home/Travel Trailer Worksheet, FEMA Form 086–0–22; Proof of Loss—Building & Contents (Adjuster-Prepared), FEMA Form 086–0–23; Advance Payment Request—Building & Contents, FEMA Form 086–0–24; Advance Payment Request—Increased Cost of Compliance (ICC), FEMA Form 086–0–25; Claim Appeal, FEMA Form 009–0–143; Onsite Housing Inspections, FEMA Form 009–0–144; Remote Voice Telephony Housing Inspections, FEMA Form 009–0–145; Remote Video Telephony Housing Inspections.

Abstract: The claims forms used for the National Flood Insurance Program are used by policyholders to collect the information needed to investigate, document, evaluate, and settle claims against National Flood Insurance Program policies for flood damage to their insured property or qualification for benefits under Increased Cost of Compliance coverage. The housing inspection instruments are used to collect and store damage assessment information in Automated Construction Estimator software to assist in the determination of Individuals and Households Program assistance for applicants with disaster caused damage to their primary residence.

Affected Public: Individuals, households, businesses, or other for-profit.

Estimated Number of Respondents: 312,026.

Estimated Number of Responses: 312,026.

Estimated Total Annual Burden Hours: 314,149.

Estimated Total Annual Respondent Cost: $11,796,263.

Estimated Respondents' Operation and Maintenance Costs: $0.00.

Estimated Respondents' Capital and Start-Up Costs: $0.00.

Estimated Total Annual Cost to the Federal Government: $103,715,613.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) 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.

Maile Arthur,

Acting Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2020–16657 Filed 7–30–20; 8:45 am]

BILLING CODE 9110–52–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2020–0002; Internal Agency Docket No. FEMA–B–2045]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report, once effective, will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings.

DATES: Comments are to be submitted on or before October 29, 2020.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://www.fema.gov/preliminaryfloodhazarddata* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2045, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP and are used to calculate the appropriate flood insurance premium rates for new buildings built after the FIRM and FIS report become effective.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://www.fema.gov/preliminaryfloodhazarddata* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm,

Assistant Administrator for Risk Management, Department of Homeland Security, Federal Emergency Management Agency.

Community	Community map repository address
Boone County, Iowa and Incorporated Areas Project: 17–07–0832S Preliminary Date: March 28, 2019	
City of Boxholm	City Hall, 106 Elm Street, Boxholm, IA 50040.

[FR Doc. 2020–16607 Filed 7–30–20; 8:45 am]
BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2020–0002; Internal Agency Docket No. FEMA–B–2046]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The LOMR will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings. For rating purposes, the currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm,

Assistant Administrator for Risk Management, Department of Homeland Security, Federal Emergency Management Agency.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Arizona:						
Maricopa	City of Litchfield Park (20–09–0240P).	The Honorable Thomas L. Schoaf, Mayor, City of Litchfield Park, 214 West Wigwam Boulevard, Litchfield Park, AZ 85340.	City Hall, 214 West Wigwam Boulevard, Litchfield Park, AZ 85340.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 20, 2020	040128

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Maricopa	City of Peoria (20–09–0149P).	The Honorable Cathy Carlat, Mayor, City of Peoria, 8401 West Monroe Street, Peoria, AZ 85345.	City Hall, 8401 West Monroe Street, Peoria, AZ 85345.	*https://msc.fema.gov/portal/advanceSearch.*	Sep. 18, 2020	040050
Maricopa	City of Phoenix (20–09–1323P).	The Honorable Kate Gallego, Mayor, City of Phoenix, 200 West Washington Street, 11th Floor, Phoenix, AZ 85003.	Street Transportation Department, 200 West Washington Street, 5th Floor, Phoenix, AZ 85003.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 16, 2020	040051
Maricopa	City of Surprise (20–09–0147P).	The Honorable Skip Hall, Mayor, City of Surprise, 16000 North Civic Center Plaza, Surprise, AZ 85374.	Public Works Department, Engineering Development Services, 16000 North Civic Center Plaza, Surprise, AZ 85374.	*https://msc.fema.gov/portal/advanceSearch.*	Sep. 18, 2020	040053
Maricopa	City of Surprise (20–09–0619P).	The Honorable Skip Hall, Mayor, City of Surprise, 16000 North Civic Center Plaza, Surprise, AZ 85374.	Public Works Department, Engineering Development Services, 16000 North Civic Center Plaza, Surprise, AZ 85374.	*https://msc.fema.gov/portal/advanceSearch.*	Sep. 18, 2020	040053
Maricopa	City of Tempe (20–09–1323P).	The Honorable Mark Mitchell, Mayor, City of Tempe, P.O. Box 5002, Tempe, AZ 85280.	City Hall, Engineering Department, 31 East 5th Street, Tempe, AZ 85281.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 16, 2020	040054
Maricopa	Unincorporated Areas of Maricopa County (20–09–0020P).	The Honorable Clint L. Hickman, Chairman, Board of Supervisors, Maricopa County, 301 West Jefferson Street, 10th Floor, Phoenix, AZ 85003.	Flood Control District of Maricopa County, 2801 West Durango Street, Phoenix, AZ 85009.	*https://msc.fema.gov/portal/advanceSearch.*	Sep. 18, 2020	040037
California:						
Los Angeles	City of Santa Clarita (20–09–0137P).	The Honorable Cameron Smyth, Mayor, City of Santa Clarita, 23920 Valencia Boulevard, Suite 300, Santa Clarita, CA 91355.	City Hall, Planning Department, 23920 Valencia Boulevard, Suite 300, Santa Clarita, CA 91355.	*https://msc.fema.gov/portal/advanceSearch.*	Sep. 23, 2020	060729
Riverside	City of Banning (19–09–2247P).	The Honorable Daniela Andrade, Mayor, City of Banning, 99 East Ramsey Street, Banning, CA 92220.	Public Works Department, 99 East Ramsey Street, Banning, CA 92220.	*https://msc.fema.gov/portal/advanceSearch.*	Sep. 23, 2020	060246
Sacramento	City of Elk Grove (20–09–0792P).	The Honorable Steve Ly, Mayor, City of Elk Grove, 8401 Laguna Palms Way, Elk Grove, CA 95758.	Public Works Department, 8401 Laguna Palms Way, Elk Grove, CA 95758.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 27, 2020	060767
San Diego ...	City of San Marcos (20–09–0211P).	The Honorable Rebecca Jones, Mayor, City of San Marcos, 1 Civic Center Drive, San Marcos, CA 92069.	City Hall, 1 Civic Center Drive, San Marcos, CA 92069.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 16, 2020	060296
San Diego ...	City of Vista (20–09–0048P).	The Honorable Judy Ritter, Mayor, City of Vista, 200 Civic Center Drive, Vista, CA 92084.	City Hall, 200 Civic Center Drive, Vista, CA 92084.	*https://msc.fema.gov/portal/advanceSearch.*	Sep. 23, 2020	060297
Ventura	City of Simi Valley (18–09–0918P).	The Honorable Keith L. Mashburn, Mayor, City of Simi Valley, 2929 Tapo Canyon Road, Simi Valley, CA 93063.	City Hall, 2929 Tapo Canyon Road, Simi Valley, CA 93063.	*https://msc.fema.gov/portal/advanceSearch.*	Sep. 23, 2020	060421
Ventura	City of Simi Valley (18–09–2061P).	The Honorable Keith L. Mashburn, Mayor, City of Simi Valley, 2929 Tapo Canyon Road, Simi Valley, CA 93063.	City Hall, 2929 Tapo Canyon Road, Simi Valley, CA 93063.	*https://msc.fema.gov/portal/advanceSearch.*	Nov. 6, 2020	060421
Iowa:						
Polk	City of Johnston (20–07–0961P).	The Honorable Paula Dierenfeld, Mayor, City of Johnston, 6221 Merle Hay Road, Johnston, IA 50131.	City Hall, 6221 Merle Hay Road, Johnston, IA 50131.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 21, 2020	190745
Polk	Unincorporated Areas of Polk County (20–07–0961P).	Mr. Tom Hockensmith, Supervisor, Board of Polk County Supervisors, Polk County Administration Building, 111 Court Avenue, Room 300, Des Moines, IA 50309.	Polk County Public Works, 5885 Northeast 14th Street, Des Moines, IA 50313.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 21, 2020	190901

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Nebraska: Lancaster.	City of Lincoln (20–07–0142P).	The Honorable Leirion Gaylor Baird, Mayor, City of Lincoln, 555 South 10th Street, Suite 301, Lincoln, NE 68508.	Building & Safety Department, 555 South 10th Street, Lincoln, NE 68508.	*https://msc.fema.gov/portal/advanceSearch.*	Sep. 25, 2020	315273
Nevada: Washoe	Unincorporated Areas of Washoe County (20–09–0371P).	The Honorable Bob Lucey, Chairman, Board of Commissioners, Washoe County, 1001 East 9th Street, Building A, Reno, NV 89512.	Washoe County Administration Building, Department of Public Works, 1001 East 9th Street, Reno, NV 89512.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 8, 2020	320019
New Jersey: Essex.	Township of Belleville (19–02–0938P).	The Honorable Michael Melham, Mayor, Township of Belleville, 152 Washington Avenue #1, Belleville, NJ 07109.	Engineering Office, 152 Washington Avenue, Belleville, NJ 07109.	*https://msc.fema.gov/portal/advanceSearch.*	Sep. 25, 2020	340177
New York: Westchester.	Village of Mamaroneck (20–02–0294P).	The Honorable Thomas A. Murphy, Mayor, Village of Mamaroneck, 123 Mamaroneck Avenue, Mamaroneck, NY 10543.	Building Inspector, The Regatta Building, 123 Mamaroneck Avenue, Mamaroneck, NY 10543.	*https://msc.fema.gov/portal/advanceSearch.*	Dec. 3, 2020	360916
Ohio:						
Cuyahoga	City of North Olmsted (19–05–3365P).	The Honorable Kevin M. Kennedy, Mayor, City of North Olmsted, 5200 Dover Center Road, North Olmsted, OH 44070.	City Hall, 5200 Dover Center Road, North Olmsted, OH 44070.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 29, 2020	390120
Cuyahoga	City of Westlake (19–05–3365P).	The Honorable Dennis M. Clough, Mayor, City of Westlake, 27700 Hilliard Boulevard Westlake, OH 44145.	City Hall, 27700 Hilliard Boulevard, Westlake, OH 44145.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 29, 2020	390136
Texas:						
Tarrant	City of Arlington (19–06–0599P).	The Honorable Jeff Williams, Mayor, City of Arlington, City Hall, P.O. Box 90231, Arlington, TX 76010.	City Hall, 101 West Abram Street, Arlington, TX 76010.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 22, 2020	485454
Tarrant	City of Arlington (20–06–2305P).	The Honorable Jeff Williams, Mayor, City of Arlington, City Hall, P.O. Box 90231, Arlington, TX 76010.	City Hall, 101 West Abram Street, Arlington, TX 76010.	*https://msc.fema.gov/portal/advanceSearch.*	Sep. 24, 2020	485454
Tarrant	City of Grand Prairie (20–06–2305P).	The Honorable Ron Jensen, Mayor, City of Grand Prairie, P.O. Box 534045, Grand Prairie, TX 75053.	Community Development Center, 206 West Church Street, Grand Prairie, TX 75050.	*https://msc.fema.gov/portal/advanceSearch.*	Sep. 24, 2020	485472
Wisconsin:						
Brown	Village of Ashwaubenon (20–05–2968P).	The Honorable Mary Kardoskee, President, Village of Ashwaubenon, Village Hall, 2155 Holmgren Way, Ashwaubenon, WI 54304.	Village Hall, 2155 Holmgren Way, Ashwaubenon, WI 54304.	*https://msc.fema.gov/portal/advanceSearch.*	Oct. 16, 2020	550600
Jefferson	City of Jefferson (20–05–1721P).	The Honorable Dale Oppermann, Mayor, City of Jefferson, 317 South Main Street, Jefferson, WI 53549.	City Hall, 317 South Main Street, Jefferson, WI 53549.	*https://msc.fema.gov/portal/advanceSearch.*	Nov. 6, 2020	55 555561

[FR Doc. 2020–16612 Filed 7–30–20; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2020–0002]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency; DHS.

ACTION: Notice; correction.

SUMMARY: On July 10, 2020, FEMA published in the **Federal Register** a changes in flood hazard determination notice that contained an erroneous table. This notice provides corrections to that table to be used in lieu of the information published. The table provided here represents the changes in flood hazard determinations and

communities affected for Mobile County, Alabama.

DATES: These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

Correction

In the changes in flood hazard determination notice published at 85 FR 41608 in the July 10, 2020 issue of the **Federal Register,** FEMA published a table with erroneous information. This table contained inaccurate information as to date of modification for Unincorporated Areas of Mobile County, Alabama.

In this document, FEMA is publishing a table containing the accurate information. The information provided below should be used in lieu of that previously published.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Michael M. Grimm

Assistant Administrator for Risk Management, Department of Homeland Security, Federal Emergency Management Agency.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Alabama: Mobile	Unincorporated areas of Mobile County (19–04–4767P).	The Honorable Connie Hudson, President, Mobile County Commission, 205 Government Street, Mobile, AL 36644.	Mobile County Department of Public Works, 205 Government Street, Mobile, AL 36644.	Jun. 15, 2020	015008

[FR Doc. 2020–16608 Filed 7–30–20; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Faith-Based Security Advisory Council; Request for Applicants for Appointment

AGENCY: Office of Partnership and Engagement (OPE), Department of Homeland Security (DHS).

ACTION: Notice; request for applicants.

SUMMARY: The Office of Partnership and Engagement is requesting individuals who are interested in serving on the Faith-Based Security Advisory Council (FBSAC) to apply for appointments as identified in this notice. Pursuant to the Secretary's authority within the Homeland Security Act, this agency-led committee will be established and will operate under the provisions of the Federal Advisory Committee Act.

DATES: Resumes will be accepted until 11:59 p.m. EST on August 31, 2020.

ADDRESSES: The preferred method of submission is via email. However, resumes may also be submitted by mail. Please only submit by ONE of the following methods:

- *Email: FBSAC@hq.dhs.gov.*
- *Mail:* Department of Homeland Security: FBSAC ADFO Traci Silas, 2707 Martin Luther King Jr. Ave, Washington, DC 20020.

FOR FURTHER INFORMATION CONTACT: *Alternate Designated Federal Officer:* Traci Silas, (202) 603–1142, *FBSAC@hq.dhs.gov.*

SUPPLEMENTARY INFORMATION: The FBSAC shall provide organizationally independent, strategic, timely, specific and actionable advice to the Secretary through the Assistant Secretary for the Office of Partnership and Engagement (OPE), who serves as the DHS Faith-Based Organizations Security Coordinator and Executive Director on matters related to houses of worship, faith-based organizations, and preparedness. The FBSAC serves strictly as an advisory body with the purpose of providing advice upon the request of the Secretary. FBSAC advice may include:

A. Strategy and Policy: Recommendations for the development of strategies and policies that will further the Department's ability to prevent, protect against, respond to, and recover from terrorist attacks, major disasters, or other emergencies.

B. Information sharing and Coordination: Recommendations for improving coordination and sharing of threat and security-related information, internally across the Department, externally across the Federal Government, and among state, local, tribal governments, first responders, the private and non-profit sectors, academia, and research communities.

C. Management and Implementation: Recommendations for the development and

implementation of specific programs or initiatives to prevent, protect against, respond to, and recover from acts of terrorism and targeted violence.

D. Evaluation and Feedback: Recommendations for the efficiency and effectiveness of the Department's faith-based organization security programs (*e.g.,* two-way information sharing, facilitate training, building of bridges between faith-based communities and their law enforcement partners, addressing community issues of concerns, FEMA's non-profit security grant program, security training and tools for faith-based organizations, etc.). Recommendations will also prioritize how to prevent, protect against, respond to, and recover from domestic and international terrorist attacks (*e.g.,* white supremacist extremist attacks). This includes providing feedback on how DHS can address the needs of the faith-based community against evolving and future threats as they arise.

Solicitation for membership will be done through the **Federal Register** at a minimum, but may include additional correspondence to key stakeholders (*i.e.,* DHS leadership, existing DHS faith-based organization contacts, Congressional partners, White House staff, etc).

Members of the FBSAC are appointed by the Secretary for specified terms of appointment. The FBSAC membership selection and appointment process is designed to ensure continuity of FBSAC membership, and to afford the Secretary the advisory input of the most capable, diverse, and novel perspectives that the country has to offer. FBSAC members shall be appointed from known national leaders representative of the private sector, academia, professional service associations, federally funded research and development centers, nongovernmental organizations, State local and tribal governments, and other appropriate professions and communities. Individuals who are interested in serving on the committee are invited to apply for consideration for appointment. There is no application form; however, a current resume and statement of interest is required. The appointment shall be for a term of up to three years. Individuals selected for the appointment shall serve as Special Government Employees (SGEs), defined in section 202(a) of title 18, United States Code, regular government employees, or representatives. The candidates selected for the SGE appointments will be required to complete a New Entrant Confidential Financial Disclosure Form (OGE Form 450) annually. All non-federal members must also complete a background investigation, a gratuitous service agreement and a non-disclosure agreement.

FBSAC shall meet as often as needed to fulfill its mission, but typically twice each fiscal year to address its objectives and duties. The committee will aim to meet in person at least once each fiscal year with additional meetings held via teleconference. FBSAC members may be reimbursed for travel and per diem incurred in the performance of their duties as members of the committee. All travel for FBSAC business must be approved in advance by the Designated Federal Officer. To the extent practical, members shall serve on any subcommittee that is established.

The Department of Homeland Security does not discriminate in employment on the basis of race, color, religion, sex, national origin, political affiliation, sexual orientation, gender identity, marital status, disability and genetic information, age, membership in an employee organization, or other non-merit factor. DHS strives to achieve a diverse candidate pool for all its recruitment actions.

Zarinah Traci Silas,

Senior Director and Alternate Designated Federal Official.

[FR Doc. 2020–16676 Filed 7–30–20; 8:45 am]

BILLING CODE 9112–FN–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2003–14610]

Notice To Extend Exemption From Renewal of the Hazardous Materials Endorsement Security Threat Assessment for Certain Individuals

AGENCY: Transportation Security Administration (TSA), DHS.

ACTION: Notice; extension of temporary exemption.

SUMMARY: TSA is extending for 90 days the exemption from Renewal of the Hazardous Materials Endorsement Security Threat Assessment for Certain Individuals that TSA published on April 8, 2020, which was scheduled to expire on July 31, 2020. Under this exemption, states may extend the expiration date of hazardous materials endorsements (HMEs) that expire on or after March 1, 2020, for 180 days, due to restrictions and business closures in place in response to the COVID–19 pandemic. If a state grants an extension, the individual with an expired HME must initiate the process of renewing his or her security threat assessment (STA) for the HME no later than 60 days before the end of the state-granted extension. State licensing agencies and related associations report ongoing difficulties in timely renewal of expiring HMEs and asked TSA to consider extending the exemption for 90 days. TSA has determined it is in the public interest to extend the exemption for 90 days. TSA may extend this exemption at a future date depending on the status of the COVID–19 crisis.

DATES: This extension of the previously issued exemption, published on April 8, 2020 (85 FR 19767), becomes effective on August 1, 2020, and remains in effect through October 29, 2020, unless otherwise modified by TSA through a notice published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Stephanie Hamilton, 571–227–2851 or *HME.question@tsa.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

On March 11, 2020, the World Health Organization declared the SARS-CoV–2 virus and Coronavirus Disease 2019 (COVID–19) to be a global pandemic. On March 13, 2020, the President declared a National Emergency.[1]

The USA PATRIOT Act of 2001 requires individuals who transport hazardous materials via commercial motor vehicle to undergo a STA conducted by TSA.[2] As required by TSA's implementing regulations in 49 CFR part 1572, the STA for an HME consists of criminal, immigration, and terrorist checks. The STA and HME remain valid for five years.

Under 49 CFR 1572.13(a), no state may issue or renew an HME for an individual's commercial driver's license (CDL), unless the state first receives a Determination of No Security Threat for the individual from TSA following the STA. An individual seeking renewal of an HME must initiate an STA at least 60 days before expiration of his or her current HME.[3] The process of initiating an STA requires the individual to submit information either to the state licensing agency or a TSA enrollment center, including fingerprints and the information required by 49 CFR 1572.9,[4] at least 60 days before the expiration of the HME.[5]

It may be impracticable for some commercial drivers to renew their STAs

[1] *See* Proclamation 9994, *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak* (March 13, 2020). Published at 85 FR 15337 (March 18, 2020).

[2] Public Law 107–56 (Oct. 26, 2001; 115 Stat. 396), § 1012(a)(1), *codified as amended at* 49 U.S.C. 5103a.

[3] 49 CFR 1572.13(b).

[4] 49 CFR 1572.15.

[5] 49 CFR 1572.13(b).

during the current COVID–19 crisis. Measures to prevent the spread of COVID–19 may affect the ability of commercial drivers to present themselves in-person to a state licensing agency or TSA enrollment center for the collection of fingerprints and applicant information. Without the new STA, TSA's regulations prevent states from renewing or extending the expiration of the individual's state-issued HME.[6]

Consistent with the requirements in 49 CFR 1572.13(b), if the state grants an extension to a driver, the state must, if practicable, notify the driver that the state is extending the expiration date of the HME, the date that the extension will end, and the individual's responsibility to initiate the STA renewal process at least 60 days before the end of the extension. If it is not practicable for a state to give individualized notice to drivers, the state may publish general notice, for example, on the appropriate website.

Authority and Determination

TSA may grant an exemption from a regulation if TSA determines that the exemption is in the public interest.[7] On April 2, 2020, TSA determined that it was in the public interest to grant an exemption from certain process requirements in 49 CFR part 1572 related to STAs for HMEs, given the need for HME drivers to work without interruption during the COVID–19 crisis.[8] This exemption does not compromise the current level of transportation security because TSA continues to conduct recurrent security threat checks on HME holders and is able to take action to revoke an HME if derogatory information becomes available, regardless of expiration date. TSA uses data previously submitted by these individuals to conduct recurrent vetting against terrorism watch lists and databases to ensure that they continue to meet TSA requirements for having an HME.

This exemption permits states to extend the expiration date for an HME for up to 180 days for individuals with an HME that expires on or after March 1, 2020, even if the individual did not initiate or complete submission of required information for an STA at least 60 days before expiration of the HME.[9] With the 90-day extension of the exemption that TSA announces in this Notice, states may continue this procedure until October 29, 2020. Individuals who were eligible for an extension of their HMEs during the initial exemption may continue to be eligible under this notice of extension of the exemption.

States and the American Association of Motor Vehicle Administrators asked TSA to consider extending the exemption. Some states continue to face challenges maintaining regular operations at state Drivers Licensing Centers due to public health considerations related to the inability to predict how or where COVID–19 may spread in the future. Although most TSA enrollment centers have remained open during the pandemic, temporary closures in states and regions with limited enrollment center alternatives have complicated drivers' ability to enroll for an STA. TSA's enrollment provider has re-opened many sites that were temporarily closed, but due to the uncertain nature of the spread of COVID–19, applicants may encounter renewed closures in the coming months. The extension will help ensure that drivers can continue to perform critical services during the pandemic.

For these reasons, TSA is extending the exemption for 90 days.

Dated: July 23, 2020.

Kelli Ann Burriesci,

Assistant Administrator, Enrollment Services and Vetting Programs, Transportation Security Administration.

[FR Doc. 2020–16359 Filed 7–30–20; 8:45 am]

BILLING CODE 9110–05–P

[6] 49 CFR 1572.13(a).

[7] 49 U.S.C. 114(q). The Administrator of TSA delegated this authority to the Executive Assistant Administrator for Operations Security, effective March 26, 2020, during the period of the National Emergency cited supra, n. 1.

[8] *See* exemption from Renewal of the Hazardous Materials Endorsement Security Threat Assessment for Certain Individuals, 85 FR 19767 (April 8, 2020).

[9] This exemption remains in effect through October 29, 2020, unless otherwise modified by TSA through a notice published in the **Federal Register**. TSA considered tying the duration of the exemption to the duration of a public health emergency declaration, but believes that the option for further modification as noted above provides clearer notice to and better certainty for states administering the program.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6229–N–01]

Manufactured Housing Consensus Committee (MHCC): Notice Inviting Nominations of Individuals To Serve on the Committee

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice of request for nominations to serve on the Manufactured Housing Consensus Committee.

SUMMARY: The Department of Housing and Urban Development invites the public to nominate individuals for appointment, with the approval of the Secretary, to the Manufactured Housing Consensus Committee (MHCC), a federal advisory committee established by the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended by the Manufactured Housing Improvement Act of 2000. The Department will make appointments from nominations submitted in response to this Notice. However, individuals that applied last year do not need to re-apply; pursuant to this notice those applications are on file and may be considered for future appointments. Current MHCC members whose first term ends on December 31, 2020 and are eligible for reappointment need to resubmit their nomination application.

DATES: The Department will accept nominations until August 31, 2020.

ADDRESSES: Nominations must be submitted through the following website: *http://mhcc.homeinnovation.com/Application.aspx.* The submitted nominations are addressed to Teresa B. Payne, Administrator, Office of Manufactured Housing Programs, Department of Housing and Urban Development, c/o Home Innovation Research Labs; Attention: Kevin Kauffman, 400 Prince Georges Blvd., Upper Marlboro, MD 20774.

FOR FURTHER INFORMATION CONTACT: Teresa B. Payne, Administrator, Office of Manufactured Housing Programs, Department of Housing and Urban Development, 451 7th Street SW, Room 9166, Washington, DC 20410–8000; telephone number 202–708–5365 (this is not a toll-free number). For hearing and speech-impaired persons, this number may be accessed via TTY by calling the Federal Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 604 of the Manufactured Housing Improvement Act of 2000 (Pub. L. 106–569) amended the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401–5426) (Act) to require the establishment of the MHCC, a federal advisory committee, to: (1) Provide periodic recommendations to the Secretary to adopt, revise, and interpret the manufactured housing construction and safety standards; and (2) to provide periodic recommendations to the Secretary to adopt, revise, and interpret the procedural and enforcement

manufactured housing regulations. The Act authorizes the Secretary to appoint a total of twenty-two members to the MHCC. Twenty-one members have voting rights; the twenty-second member represents the Secretary and is a non-voting position. Service on the MHCC is voluntary. Travel and per diem for meetings is provided in accordance with federal travel policy pursuant to 5 U.S.C. 5703.

HUD seeks highly qualified and motivated individuals who meet the requirements set forth in the Act to serve as voting members of the MHCC for up to two terms of three years. The MHCC expects to meet at least one to two times annually. Meetings may take place by conference call or in person. Members of the MHCC undertake additional work commitments on subcommittees and task forces regarding issues under deliberation.

Nominee Selection and Appointment

Members of the Consensus Committee are appointed to serve in one of three member categories. Nominees will be appointed to fill voting member vacancies in the following categories:

1. *Producers*—Seven producers or retailers of manufactured housing.

2. *Users*—Seven persons representing consumer interests, such as consumer organizations, recognized consumer leaders, and owners who are residents of manufactured homes.

3. *General Interest and Public Officials*—Seven general interest and public official members.

The Act provides that the Secretary shall ensure that all interests directly and materially affected by the work of the MHCC have the opportunity for fair and equitable participation without dominance by any single interest; and may reject the appointment of any one or more individuals in order to ensure that there is not dominance by any single interest. For purposes of this determination, dominance is defined as a position or exercise of dominant authority, leadership, or influence by reason of superior leverage, strength, or representation.

Additional requirements governing appointment and member service include:

(1) Nominees appointed to the User category, and three of the individuals appointed to the General Interest and Public Official category shall not have a significant financial interest in any segment of the manufactured housing industry; or a significant relationship to any person engaged in the manufactured housing industry.

(2) Each member serving in the User category shall be subject to a ban disallowing compensation from the manufactured housing industry during the period of, and during the one year following, his or her membership on the MHCC.

(3) Nominees selected for appointment to the MHCC shall be required to provide disclosures and certifications regarding conflict-of-interest and eligibility for membership prior to finalizing an appointment.

All selected nominees will be required to submit certifications of eligibility under the foregoing criteria as a prerequisite to final appointment.

Consensus Committee—Advisory Role

The MHCC's role is to advise the Secretary on the subject matter described above.

Federal Advisory Committee Act

The MHCC is subject to the requirements of the Federal Advisory Committee Act (5 U.S.C. Appendix), 41 CFR parts 101–6 and 102–3 (the FACA Final Rule), and to the Presidential Memorandum, dated June 18, 2010, directing all heads of executive departments and agencies not to make any new appointments or reappointments of federally registered lobbyists to advisory committees and other boards and commissions. The June 18, 2010, Presidential Memorandum authorized the Director of the Office of Management and Budget (OMB) to issue guidance to implement this policy. On August 13, 2014 (79 FR 47482), OMB issued guidance regarding the prohibition against appointing or re-appointing federally registered lobbyists to clarify that the ban applies to persons serving on advisory committees, boards, and commissions in their individual capacity and does not apply if they are specifically appointed to represent the interests of a nongovernmental entity, a recognizable group of persons or nongovernmental entities (an industry sector, labor unions, environmental groups, etc.), or state or local governments.

Term of Office

Consensus Committee members serve at the discretion of the Secretary or for a three-year term and for up to two terms.

Nominee Information

Individuals seeking nomination to the MHCC should submit detailed information documenting their qualifications as addressed in the Act and this Notice. Individuals may nominate themselves. HUD recommends that the application form be accompanied by a resume.

Additional Information

The Department will make appointments from nominations submitted in response to this Notice. However, individuals that applied last year do not need to re-apply; pursuant to this notice those applications are on file and may be considered for future appointments.

To be considered for appointment to a position of an MHCC member whose term expires in December of 2019, the nomination should be submitted by August 31, 2020.

Appointments will be made at the discretion of the Secretary.

Len Wolfson,

Acting Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2020–16656 Filed 7–30–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7024–N–30]

30-Day Notice of Proposed Information Collection: Project Approval for Single-Family Condominiums; OMB Control Number: 2502–0610

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 30 days of public comment.

DATES: *Comments Due Date:* August 31, 2020.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; telephone 202–402–3400 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, US Department of

Housing and Urban Development, 451 7th Street SW, Room 4176, Washington, DC 20410–5000; telephone (202) 402–3400 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov.* Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A. Stakeholders may view the proposed changes to Form HUD–9991, FHA Condominium Loan Level/Single-Unit Approval Questionnaire and Form HUD–9992, FHA Condominium Project Approval Questionnaire at: *https://www.hud.gov/program_offices/housing/sfh/SFH_policy_drafts.*

A. Overview of Information Collection

Title of Information Collection: Project Approval for Single-Family Condominiums.

OMB Approval Number: 2502–0610.

Type of Request Revision of currently approved collection.

Form Number: HUD–9991, FHA Condominium Loan Level/Single-Unit Approval Questionnaire and Instructions; HUD–9992, FHA Condominium Project Approval Questionnaire and Instructions; HUD–92544, Warranty of Completion of Construction; HUD–92541, Builder's Certification of Plans, Specifications, and Site; HUD–96029, Condominium Rider.

Description of the need for the information and proposed use: This collection package seeks to renew and revise two collection forms, Form HUD–9992, FHA Condominium Project Approval Questionnaire used to process condominium project approval applications and Form HUD–9991 FHA Condominium Loan Level/Single-Unit Approval Questionnaire used to process single-unit approvals. These forms are needed to determine if a condominium project is eligible for FHA project approval and if a Unit in an approved or unapproved condominium project is eligible for FHA-insured financing. The Form HUD–9992, FHA Condominium Project Approval Questionnaire and the Form HUD–9991, FHA Condominium Loan Level/Single-Unit Approval Questionnaire have been revised to address comments on the 60-Day Notice. The HUD–92544, Warranty of Completion of Construction and HUD–96029, Condominium Rider were updated to comply with the burden statement requirements.

Respondents (*i.e.,* affected public): Business or other for-profit (lenders and condominium associations).

Estimated Number of Respondents: 180,000.

Estimated Number of Responses: 180,000.

Frequency of Response: One-time for each condominium project approval or recertification, and one-time for loan level approval and Single-Unit Approval.

Average Hours per Response: .51250 hours (varies by form and approval type: Project, loan level approval and Single-Unit Approval).

Total Estimated Burdens: 92,250.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

D. Summary of Public Comments and HUD Responses

The 60-day Notice was published in the **Federal Register** on January 31, 2020 Volume 85, No. 21, Pages 5686–5687, and the public comment period closed on March 31, 2020. HUD received 140 comments from 13 commenters by the close of the public comment period. Commenters included individuals, mortgage companies, banks, trade associations, and mortgage brokers. The following is a summary of the issues raised in the public comments. The comments that pertain to Forms HUD–9991 and HUD–9992 are addressed. Then, the comments specific to each form follow.

Comments on Forms HUD–9991 and HUD–9992

Comment: All the commenters requested changes to make it easier to use the forms and to reduce the amount of time required for completion. Suggestions for improvement included wording clarifications, consolidation of similar questions, and the elimination of questions to make the forms shorter and easier to understand. Several commenters noted that most condominium associations are not familiar with FHA requirements and requested additional guidance be provided. In addition, several commenters requested that the form be converted into a PDF fillable document with check boxes that can be changed.

HUD Response: HUD appreciates the feedback and used a combination of the suggestions to revise and restructure the forms. HUD agrees that the condominium associations and other non-mortgagee participants may not be familiar with FHA requirements. The forms do not specify percentage benchmarks to make them adaptable to future policy changes. HUD developed instructions to explain how questions should be answered and included Handbook 4000.1 section references. Once the content of the forms has been finalized, the forms will be formatted and converted to a PDF fillable format that will allow corrections.

Comment: Many commenters indicated that requiring the condominium association to complete the form and sign the certification caused significant delays in obtaining information and increased costs. Commenters reported that condominium associations were not always able to answer all the questions. Condominium associations have expressed concern about the certification and the potential penalties, often refusing to sign the form. Commenters also noted increases in the cost to obtain the information. Some commenters suggested making the mortgagee or Submitter solely responsible for the completion and certification of the form.

HUD Response: HUD agrees that most condominium associations are not familiar with FHA requirements and understands from the comments that this often leads to delays in receiving the information and/or additional costs to process the forms. HUD has removed the requirement that the condominium association must complete the form and sign the certification for loan-level approvals and Single-Unit Approvals.

Mortgagees using the Form HUD–9991 to determine the eligibility of a Unit for FHA-insured financing will be responsible for obtaining and certifying that the information provided is accurate and meets FHA requirements. For Condominium Project Approval, a Submitter is an Eligible Submission Source (Handbook 4000.1, section II.C. for Eligible Submission Sources) that prepares and submits a Condominium Project Approval application package. Submitters are responsible for completing the Form HUD–9992 and certifying that the FHA Condominium Project Approval requirements have been met. HUD also has removed the requirement that the condominium association must complete the form and sign the certification for Condominium Project Approval unless the condominium association is the Submitter. Mortgagees and Submitters must use information obtained from verifiable sources including the condominium association, public records, or other data sources. HUD revised the forms and developed instructions to explain how the questions should be answered.

Comment: Commenters suggested HUD consider extending the life of data collected to reduce the number of times information must be requested from a condominium association. A commenter noted that most of the data on the questionnaire could be reused for up to a year.

HUD Response: HUD agrees that the data collected should have a period of applicability. HUD will allow data collected on the questionnaire to be no more than 90 days old prior to the questionnaire being signed. This 90-day period will permit the previously collected information to be used again and create more efficiency for the condominium association staff, mortgagees and Submitters.

Comment: Most of the commenters stated that the burden hour estimates for Forms HUD–9991 and HUD–9992 did not reflect the amount of time it took to collect the documentation and fill out the forms.

HUD Response: HUD agrees that an overall increase in the burden hour estimates is warranted for both Forms HUD–9991 and HUD–9992. In response to the public comments, HUD revised both forms to reduce the length, streamlined the information collection process and developed instructions. The burden hour estimate for OMB No. 2502–0610 assumes that many of the sources of information are typically used to operate a condominium project and are accessible to mortgagees and Submitters. In addition, the Paperwork Reduction Act (PRA) burden hour estimates for Single-Unit Approval and Condominium Project Approval allocate time for the package preparation and collection of the documents, in addition, to the estimate for completion of the forms.

Comment: Many commenters noted that condominium associations are reluctant to provide their organization's Tax Identification Number and often refuse to provide it. A commenter requested that the field requiring the association tax identification number be marked as optional.

HUD Response: Many Condominium Projects have similar names and are often incorrectly entered into FHA's system. The condominium association tax identification number is required to establish a unique identifier number. Collection of this information provides a way to eliminate duplication and will help ensure the FHA concentration for each condominium project is correctly calculated. While HUD understands that the tax identification number may not be available in all situations, FHA would like to research the situations in which a tax identification number would not exist.

Comment: Several commenters indicated that it is difficult to determine how many units are owned by a single entity or related parties for individual owner concentration. Condominium associations do not track how individual Unit owners are related and cannot provide reliable information to verify if ''an individual related to the Unit owner by blood, marriage or operation of law.'' A commenter suggested collecting only information on units owned by a single owner and removing the ''Related Parties'' requirement.

HUD Response: HUD concurs that it is difficult for condominium associations to provide this information and is considering updates to the policy that will remove the ''Related Parties'' requirement. It is important to know if there is one or several owners of multiple units that could have an impact on the financial stability of the project if one or more of the owners were unable to pay their association dues.

Comment: Many commenters stated that the condominium associations are not able to accurately measure Owner Occupancy and that the data is difficult to obtain. One commenter noted that the reliability and accuracy of owner occupancy data reduces its usefulness in assessing the financial and operational viability of a condominium project.

HUD Response: HUD has revised the Owner Occupancy section on both forms and developed instructions to explain how the questions should be answered. Owner Occupancy plays a vital part in the successful operation of a condominium association. Maintaining occupancy records is something most condominium associations currently do to successfully manage their properties. HUD also understands lenders exercise their options to gather and verify this information. HUD finds the information requested and received to be effective and useful in the analysis of the condominium project's viability

Comment: Many commenters requested that third party industry questionnaires be allowed as a substitute for the Form HUD–9991 or Form HUD–9992. The commenters discussed the amount of condominium project information contained in these questionnaires and the wide-spread industry acceptance.

HUD Response: HUD agrees that these forms seem to provide useful information about the Condominium Project and condominium association. The Handbook 4000.1 lists the Form HUD–9991 and Form HUD–9992 as required documentation for many requirements. The Form HUD–9991 and HUD–9992 are official HUD forms and contain HUD's required certification for mortgagees and Submitters. Mortgagees and Submitters are not prohibited from using these pre-generated forms as a source of information to complete the HUD–9991 or HUD–9992 but they cannot be submitted as a replacement. HUD needs to further research the third-party providers to understand the information collection and validation methods before it can determine the role of industry questionnaires.

Comment: Several commenters requested the HUD consider automating the collection of information and approval for Single-Unit Approval and Condominium Project Approval.

HUD Response: HUD concurs that electronic submission would be advantageous and cost-effective for our stakeholders. Automating where possible directly impacts HUD stakeholders and will make navigating the condominium approval process much easier. HUD will review potential options for future development and plans to address in the technology plan. Once funding is available, HUD will automate as appropriate.

Form HUD–9991 Comments and HUD Responses

The following comments and HUD responses pertain to Form HUD–9991.

As previously noted, many of the commenters requested changes to Form HUD–9991 to simplify the process of completing the form to make it more user-friendly and less burdensome to complete. Suggestions included revising, eliminating, and consolidating questions to shorten the questionnaire. HUD appreciated the suggestions and used many of them to restructure the questionnaire.

Comment: HUD–9991, Section 2.a, Condominium Project, includes a field requesting the FHA Condo-ID Number. A commenter suggested adding a parenthetical ''(if applicable)'' since the form is used for units in condominium projects that are not approved and may not have an FHA Condo ID.

HUD Response: HUD has revised the Form HUD–9991 and developed instructions to explain how the questions should be answered. The FHA Condo ID number was moved to the Mortgagee Section. For Single-Unit Approval, an FHA case number may be requested without the submission of this form. It is the lender's responsibility to enter the FHA Condo ID number prior to submitting the form in the FHA case binder. If the Unit is in a Condominium Project that is not currently approved but has an FHA Condo ID, the lender will have to provide the FHA Condo ID when the FHA case number is requested.

Comment: A commenter noted that the Form HUD–9991 was not listed in the required documentation.

HUD Response: On October 24, 2019, Handbook 4000.1, Section II.A.8.p was updated to require Form HUD–9991 as required documentation. Mortgagees were permitted to use the Form HUD–9991 on the original effective date of October 15, 2019 and required to use it for case numbers assigned on or after January 2, 2020.

Comment: Commenters noted various questions in Sections 3 and 4 that condominium associations would not be able to answer because they did not understand FHA requirements.

HUD Response: HUD has reviewed the comments and revised Sections 3 and 4 of Form HUD–9991. The instructions provide additional guidance and explain how the questions should be answered. To accommodate future policy changes, the Form HUD–9991 does not cite specific percentage requirements. The mortgagee must refer to Handbook 4000.1 for the FHA requirements. The mortgagee is required to complete the form using information obtained from verifiable sources including the condominium association, public records, or other data sources, and certify it meets FHA requirements.

Comment: Several commenters requested using a simpler form on a loan level basis when a condominium project has been approved by FHA.

HUD Response: HUD restructured Form HUD–9991 and simplified the process of completing the form. Sections 1 through 3 must be completed for both Loan Level (Units in an approved Condominium Project) and Single-Unit Approval (Units in a Condominium Project that is not approved). Sections 1 through 4 must be completed for a Unit located in a Condominium Project that has not been approved. Form HUD–9991 is required documentation and must be included in the case binder along with all other required documentation as outlined in HUD Handbook 4000.1, FHA Single Family Housing Policy Handbook (Handbook 4000.1). Completion of this form is not required for the case number assignment process.

Comment: One commenter noted obtaining a new single unit approval takes the same level of effort as obtaining Condominium Project Approval. The commenter also noted that ''it creates an additional hurdle for the homeowner to financially qualify.''

HUD Response: The Single Unit Approval program is not a replacement for full Condominium Project approval. HUD has developed this program to provide increased access to FHA-insured financing for the borrowers and limit risk to the FHA Insurance Fund. Form-9991 is substantially shorter than Form-9992 (required for Full Approval) and requires much less documentation. HUD is hopeful that the commenters will be pleased with the recent changes made based on comments received. The Form HUD–9991 has been reduced by an additional two pages, has instructions, and only requires the mortgagee to complete now.

Comment: Commenter requested that FHA should highlight the circumstances in which recorded documents are not required.

HUD Response: HUD has revised the Form HUD–9991 and developed instructions to explain how the questions should be answered. The instructions identify when recorded governing documents would not be required.

Comment: One commenter recommended including a reference to the October 21, 2019, Memorandum of Understanding Between the Department of Housing and Urban Development and the Department of Justice concerning False Claims Act civil actions to convey the actual extent of False Claims Act liability incurred by form certification. The commenter noted that the information ''should meet plain English requirements for clarity and be understandable by community association professionals outside of the legal profession.''

HUD Response: HUD does not think the inclusion of a reference to the Memorandum is necessary. HUD has revised the Form HUD–9991 and developed instructions to explain how the questions should be answered. The certification language is consistent with other OMB HUD approved forms. The requirement for the condominium association to certify has been removed, and Form HUD–9991 must be completed by the Mortgagee. HUD expects the mortgagee to collect the information from reliable and verifiable sources.

Comment: One commenter recommended changing the Litigation question to include ''pending'' in the question to add more clarity.

HUD Response: HUD concurs and has amended Section 4.e.1 in the questionnaire to include ''pending'' in the question.

Comment: Several commenters indicated the question regarding adverse determination for the condominium project is confusing to condominium associations.

HUD Response: HUD agrees that the current phrasing may be confusing to the respondent and removed the question.

Comment: Many commenters noted that the estimated burden for the HUD–9991 was too low and identified the requirement for the condominium association to complete the form and certify; the lack of instructions; and questions needing clarification.

HUD Response: HUD increased the estimated burden hours for the Form HUD–9991 by 15 minutes. The Form HUD–9991 revisions included: Streamlining the form; developing instructions to explain how the questions should be answered; removing the requirement for the condominium association to complete the form and certify; and making the mortgagee solely responsible for completion of the form. HUD assumes that many of the sources of information are typically used in the operation of a condominium project and are accessible to mortgagees. The amount of time to complete the Form HUD–9991 for a Unit in an approved condominium project is significantly less than the amount of time it takes to complete the form for a Unit in a non-FHA-approved project (Single-Unit Approval). FHA will allow data collected on the questionnaire to be no more than 90 days old prior to the questionnaire being signed. This 90 day

period will permit information previously collected to be used again, and allow for a more efficient use of time, both for the staff of the condominium association and mortgagee by reducing burden hours. HUD expects the mortgagee to collect the information from reliable and verifiable sources.

HUD–9992 Comments and HUD Responses

HUD has made significant changes and streamlined Form HUD–9992 in response to the public comments received on the 60-Day Notice. To reduce duplication, Section 3: Project Eligibility and Section 4: Eligibility Worksheet for Condominium Project Approval have been consolidated. The project eligibility questions have been structured and, in some cases, removed to reduce the information collected. The first question of each section has been revised to determine if additional information is required or to direct the respondent to the next section. An N/A box also has been added where applicable. HUD also developed instructions to explain how questions should be answered with a Handbook 4000.1 reference. The form does not specify percentage benchmarks to make it adaptable to future policy changes.

HUD concurs that the condominium associations may not understand questions that do not specify the requirement. HUD removed the Form HUD–9992 completion and certification requirements for the condominium association unless the condominium association is the Submitter. The Submitter will be responsible for determining if the Condominium Project complies with Condominium Project Approval eligibility requirements and must use information obtained from reliable and verifiable sources including the Condominium Association, public records, or other data sources. Data that has been obtained within the past 90 days of the signature on the HUD–9992 for an approved condominium project can be used again. The Form HUD–9991 is designed to confirm continued eligibility of the Unit and Condominium Project with FHA requirements and this reduces the burden of completing the Form HUD–9991 for Units in FHA-approved condominium projects.

Comment: Several commenters requested clarification on how to complete Section 1: Mortgagee/Submitter and offered suggestions on the Mortgagee/Submitter information that should be collected.

HUD Response: HUD restructured Section 1: Mortgagee/Submitter Information and consolidated 1.b. Mortgagee Information and 1.c Submitter Information. In the updated form, 1.b. Submitter Information allows a variety of respondents to complete the form. The HUD–9992 instructions explain how the questions should be answered and contain Handbook 4000.1 references.

Comment: A commenter noted that the form should clarify if the submitter is not a mortgagee using the DELRAP process, then the submitter is not obligated to fill out Section 1.b. Right now, it is not clear whether a submitter using the HRAP process is supposed to leave Section 1.b blank. This confusion would be eliminated if there were separate forms for the DELRAP and HRAP processes.

HUD Response: HUD revised Section 1: Mortgagee/Submitter of the Form HUD–9992 and developed instructions to explain how the organizational information should be provided. Section 1.b Mortgagee was deleted and replaced with 1.b. Submitter. The Submitter preparing the approval package should complete the Form HUD–9992. According to Handbook 4000.1, Section II.C.2.c.i. i. Form HUD–9992, FHA Condominium Project Approval Questionnaire, the ''Form HUD–9992 must be completed, signed, and dated by an Eligible Submission Source or a DELRAP Mortgagee''). The same requirements apply to Condominium Projects seeking approval under HRAP and DELRAP and the Form HUD–9992 is listed as required documentation for many FHA Condominium Project Approval requirements. At this time, HUD has no plans to create separate forms for HRAP and DELRAP submissions but will take this into consideration for the future.

Comment: In Section 2: Condominium Project Information, a commenter suggested adding ''(if applicable)'' to the FHA Condo-ID Number in Section 2.a since, the HUD–9992 is used with both approved condominium projects and projects seeking approval.

HUD Response: HUD agrees that not all condominium projects will have FHA Condominium Project Approval. The phrase ''(if applicable)'' was not added to the Form HUD–9992 because the instructions note that the FHA Condo-ID Number should be provided if one exists.

Comment: There were many comments on how to make the questions in Section 3.a Project Eligibility more user-friendly. One commenter noted that a third column for ''unknown,'' should be added and suggested removing 3.a.3. because the condominium associations did not understand mandatory rental pooling agreements. A commenter indicated the question 3.a.9 regarding adverse determination for the condominium project is confusing to condominium associations and should be deleted.

HUD Response: HUD agrees that some of the FHA requirements may be difficult to understand without the Handbook 4000.1 guidance. HUD removed the project eligibility questions 3.a.1.–3.a.9. from the HUD–9992 to streamline the form and because it is the responsibility of the Submitter to determine if a condominium project complies with all the FHA condominium project eligibility and approval requirements. The Submitter must use information obtained from verifiable sources including the condominium association, public records, or other data sources to complete the HUD–9992 and to confirm compliance with the requirements.

Comment: Questions 3.c.3 through 3.c.9 request information about the status of the Legal Phases. A commenter noted that Section 3.c.3 through 3.c.9 should include an additional response column labeled ''Unknown.'' Another commenter suggested that 3.c.6 and 3.c.9 should be combined because the information requested is redundant.

HUD Response: HUD consolidated the Legal Phasing Sections 3.c. and 4.a and restructured how the information is collected. HUD needs to know the number of phases and related units that have been submitted for condominium project approval. HUD added an N/A check box the Legal Phasing section and structured the first question to determine if the respondent should provide more information or move to the next section. HUD also developed instructions to explain how the questions should be answered and to provide a reference to Handbook 4000.1.

Comment: A commenter noted that Sections 3.c and 4.a. ''pertain to proof of legal phasing and the request that the submitter provide a certificate of occupancy (CO) or ''their equivalent.'' The commenter also noted that ''FHA does not provide guidance on what documentation is an acceptable ''equivalent.'' The commenter noted they typically submit the recorded amendment to the condominium instruments adding phases and that a certificate of occupancy requirement is better suited for newly constructed projects only. Another commenter suggested that the recorded declarations be added to the list of required documentation.

HUD Response: Questions 3.c. and 4.a collect information to determine if the Condominium Project and its Legal

Phases comply with FHA requirements, which are written to apply to a broad array of laws throughout the United States and U.S. territories. The purpose of the ''Certificate of Occupancy'' or its ''equivalent'' is to demonstrate that all the units within the phase are built out and are ready for occupancy. HUD is open to other types of documentation that demonstrate the condominium project and legal phase(s) comply with FHA requirements. HUD will consider adding the recorded amendment annexing a phase to the required documentation in future updates.

Comment: Question 4.a.5 asks about the independently sustainability of Legal Phases. A commenter recommended that the Condominium Association answer this question instead of the Submitter.

HUD Response: HUD expects the Submitter to be able to determine if the completed Legal Phases are independently sustainable without future planned Legal Phases, as demonstrated by the budget and financial documentation, such that the submitted Legal Phases of the Condominium Project will not be jeopardized by the failure to complete additional Legal Phases. While the Condominium Association can provide its perspective, the Submitter should make the determination. The Submitter is responsible for determining if the Condominium Project complies with FHA eligibility Condominium Project Approval requirements and must use information obtained from verifiable sources including the Condominium Association, public records, or other data sources to complete the HUD–9992.

Comment: Several commenters noted similar questions in Section 3: Project Eligibility and Section 4: Eligibility Worksheet for Condominium Project Approval should be consolidated to make the form more user-friendly and to reduce the possibility of errors. A commenter noted that Sections 3.e and 4.e. relate to the individual owner concentration and should be consolidated. Another commenter noted that Sections 3.d.2. and 4.c.1 pertain to the project's owner-occupancy rate and should be consolidated. A final commenter noted that Section 3.j.1 should be amended to include information asked in Section 4.l.5, ''could legal action impact the future solvency of the Condominium Association?''

HUD Response: HUD agrees and combined Sections 3 and 4 to streamline the Form HUD–9992. The data collection and eligibility determination for individual owner concentration, owner occupancy and litigation have been consolidated into the same section. HUD developed instructions to explain how the questions should be answered.

Comment: Signature Pages. The Draft Form HUD–9992 requires the submitter to sign and date the form in 2 places, on pages 6 and 10. This seems unnecessary. The form should be consolidated so that the submitter only has sign in one place, as was the case the prior 2-page FHA Condominium Certification Checklist.

HUD Response: HUD has revised the Form HUD–9992 and only the Submitter's signature is required.

Comment: A commenter noted that Question 3.d.3.a.ii New Construction, Non-owner occupied Units in the HUD–9992 published with the 60-Day Notice should be eliminated because it is not possible to know if future transactions will be owner-occupied or not.

HUD Response: This question is asking for the number of owner-occupied units at a particular point in time and the non-owner-occupied units are equal to the difference between the total units and owner-occupied units. HUD based the categories of owner-occupancy in the Final Condominium Rule upon the Housing Opportunity Through Modernization Act of 2016 (HOTMA) requirements as directed by Congress. The question cannot be eliminated.

Comment: A commenter requested clarification regarding an owner concentration that is between 35% and 50% where a project meets the 10% delinquency requirement as to whether the submitter must also provide 3 years' worth of financial data and demonstrate 20% reserve funding, as provided for under Mortgagee Letter 2016–15, or if these requirements are now eliminated.

HUD Response: HUD thinks the reference to the FHA Single-Family Handbook 4000.1 is the comprehensive source of FHA condominium policy and Mortgagee Letter 2016–15 was superseded by Handbook 4000.1 published on August 14, 2019. For Condominium Project Approval, a Condominium Project with an owner occupancy percentage between 35% and 50% must meet the requirements in Handbook 4000.1, Section II.C.2.c.iv(c) Existing Construction Condominium Projects that are greater than 12 months old.

Comment: A commenter requested guidance on determining the reserve account balance for Question 3.f.1 in Section 3.f. Financial Stability. The commenter wanted to know if the balance sheet or another document should be used.

HUD Response: The Handbook 4000.1 lists the required financial documentation. The Submitter is responsible for determining the reserve account balance meets FHA requirements and is being funded in accordance with FHA requirements.

Comment: A commenter noted that many of the questions assume that the Homeowners Associations (HOA's) know HUD's guidelines. As an example, the commenter referenced Question 3.f.2 ''Is the reserve account funded as required by FHA?'' The commenter noted that not understanding FHA requirements makes the HOAs leery about answering many of the questions.

HUD Response: HUD concurs that the condominium associations may not understand questions that do not specify the requirement. HUD has revised the Form HUD–9992 and developed instructions, which explain how the questions should be answered and include Handbook 4000.1 references. The form does not specify percentage benchmarks to make it adaptable to future policy changes. HUD removed the Form HUD–9992 completion and certification requirements for condominium associations, which should make them feel more comfortable providing information to the Submitter. HUD expects the Submitter to know the requirements and to determine if the condominium project complies with FHA requirements.

Comment: A commenter asked if ''old'' delinquencies associated with prior owners should be included in the Unit in Arrears calculation in Question 3.f.5.

HUD Response: The Handbook 4000.1 guidance for Units in Arrears pertains to the current owners. If there are outstanding delinquencies from prior unit owners, they should be noted in the financial documentation if they pose a financial threat to the condominium project.

Comment: A commenter noted that Question 3.f.6. on the draft Form does not accommodate condominium projects that have units with different assessment amounts based on the unit size or common element interest of the units.

HUD Response: HUD agrees that the HUD–9992 structure does not allow for entry of a range of assessments. The form requests the annual amount of condominium assessments. If it will have a bearing on the condominium project's performance, the Submitter should address it in the condominium project approval package.

Comment: A commenter noted that Section 3.l. Subsections 3.h through 3.k are unclear as to whether any box needs to be checked off if these sections do not apply. In general, it is unclear which

boxes needed to be checked off if the subsection is inapplicable.

HUD Response: HUD revised the Form HUD–9992 and developed instructions to explain how the questions should be answered. To minimize the number of questions a respondent must answer the first question to determine if more information is required or to indicate the next required response. An N/A check box has been added to many of the sections including the Commercial, Live/Work and Leasehold sections referenced by the commenter.

Comment: For question 4.d.1., the commenter requested clarification that the specific documentation being reviewed to verify the requirement and on how to demonstrate that the project has had a stable income over the past two years with decreases that do not exceed FHA's percentage of 15%. The commenter noted that if the budget income from the previous year to the current year, the regulations need to be updated to request previous year's budget. Currently, only the current year budget is requested.

HUD Response: HUD will consider updates to the Handbook 4000.1 that will require the financial documentation for the past two years. Both the income and expense statement and the budget can be used to provide information on a Condominium Project's financial condition and the stability. The reviewer can also use the year-to-date to develop income projections for comparison with last year's statements to determine that the income did not decrease more than 15%.

Comment: A commenter also requested clarification on the requirements in Section 4.d.1 for new construction and asked for confirmation that if the operating income has not been in place for two years, a demonstration that the Project has not shown any decrease in income would suffice.''

HUD Response: HUD agrees with the approach and is considering updated guidance in the Handbook 4000.1 that will link the required financial condition documentation to the length of time the Condominium Project has been operating.

Comment: Questions 4.d.3 through 4.d.6 relate to the reserve account funding. A commenter noted that Questions 4.d.3 and 4.d.4. appear to be asking the same question. The commenter recommended revising Question 4.d.3 to read ''Does the Condominium budget demonstrate that at least 10% of the total annual assessment is being allocated toward reserve funding as required by FHA? If the answer is ''No'', answer questions 4.d.5 and 4.d.6.''

HUD: HUD concurs and revised the Financial Stability and Controls section in response to several comments received. The Submitter needs to confirm that the balance in the reserve account meets the FHA requirement and demonstrate that the reserve fund that is being funded consistently.

Comment: Section 4.d.5 also pertains to reserve funding. The commenter suggested rewording the question to make it clear when a reserve study must be reviewed to demonstrate the reserve account is funded as required. The commenter also requested guidance on the financial documentation that should be evaluated in conjunction with the reserve study.

HUD Response: In response to comments, HUD streamlined Form HUD–9992 and revised the reserve account balance questions to make it clear that if the reserve account balance is less than FHA's requirement and/or the reserve account is not being funded in accordance with FHA requirements, an acceptable reserve study is required. The funding and/or expenditures must be consistent with the reserve study recommendations for approval.

Comment: The commenter noted that Question 4.k.3. seems to inquire about whether the management contract can be terminated upon no more than 90 days' notice only if the management contract was entered into during the developer control period. However, Single Family Housing Policy Handbook 4000.1 states that the management contract, regardless of when it was entered into, must be terminable upon no more than 90 days' written notice. The commenter noted that there is no place on Form HUD–9992 to provide this information for a current management contract that was not entered into during the developer control period. The commenter also indicated that Handbook 4000.1 is not clear on whether a project is ineligible solely because the management contract is not terminable upon no more than 90 days' notice. The commenter indicated that the public could also use clarity on whether the management contract termination provision must be with or without cause and whether an early termination penalty is permissible or not.

HUD Response: In response to the comments, HUD streamlined and revised the Form HUD–9992. HUD concurs that grouping the management contract with the other contracts on the HUD–9992 could be confusing to the respondent. If there is a management company, Handbook 4000.1 requires the management agreement to have a provision giving the Condominium Association the right to terminate the Management Agreement with no more than 90 Days' notice. Handbook 4000.1 also requires that a current management agreement must be submitted. It is the Condominium Association's responsibility to determine if the termination provision should be ''with or without cause.'' FHA requirements must be met for a condominium project to be eligible for approval.

Comment: The commenter noted that in their practice, some condominium associations have cross-easements for shared recreational facility use.

HUD *Comment:* This comment seems to be a request for a policy interpretation regarding cross-easements for a shared recreational facility. If there is a specific case, HUD will review it. HUD will research to determine if additional guidance should be considered for future policy updates.

Comment: The commenter noted that Sections 4.k.4 through 6. inquire as to whether there are any recreational easements or leases. The commenter also noted that ''Under Single Family Housing Policy Handbook 4000.1, a project with recreational easements or leases is eligible for approval if either the lease or easement holder is a nonprofit entity under the control of the condominium association or if each unit owner has the right to cancel the membership with no more than 90 days' notice and without penalty. However, these sections are written as if the project has to satisfy both prongs in order to be eligible. The commenter asked for clarification on the requirements that must be satisfied to be eligible.

HUD Response: The leasehold questions in Form HUD–9992 have been reworded. The commenter's interpretation of the Handbook 4000.1 guidance is correct. It must be a nonprofit or any entity that gives the unit owners the right to cancel the membership with no more than 90 days' notice and without penalty. Handbook 4000.1 always takes precedence.

Comment: Section 4.l.5 asks about the impact of any legal action on the solvency of the condominium association. The commenter noted that the question is too broad and should be removed.

HUD Response: The Form HUD–9992 has been revised in response to comments. The questions pertaining to litigation have been consolidated and restructured. Understanding whether a current legal action could affect the financial stability of the project and if the Condominium Project or

Condominium Association is facing any other type of litigation risk is important. Question 4.l.5 has been revised. If the litigation is at a point, where a settlement has been determined, it is important to understand if the funds allocated for any required repairs are sufficient to cover the costs. If there is a gap, and how the condominium association plans to finish the repairs.

Comment: A commenter noted that Section 4.l. Subsections 8 through 10 seem to only apply if the litigation has to do with structural issues and requested clarification on how to note litigation related for something else. Another commenter noted that Section 4.l.9 and Section 4.l.10, which pertain to whether repairs have started should be properly indented for clarity.

HUD Response: The Form HUD–9992 has been revised in response to comments and the questions pertaining to litigation have been consolidated. HUD thinks the questions are broad enough to capture all types of pending and/or current litigation. Submitters are asked to indicate if the Condominium Project or Condominium Association is subject to any pending Litigation and to provide a signed and dated explanation if yes. The Submitter should respond no to the questions that do not apply. The questions have been revised and the dependent questions are noted in the preceding question(s) and the Instructions.

Comment: The commenter noted Section 4.l.11 is too broad and should be removed. Section 4.l.11 asks if the Condominium Project or Condominium Association are subject to any other Litigation risk not covered by insurance or that exceeds the amount of insurance coverage relating to the potential losses for that matter.

HUD Response: The Form HUD–9992 has been revised in response to comments and the questions pertaining to litigation have been consolidated. Understanding whether the Condominium Project or Condominium Association are facing any other type of litigation risk is important. If the litigation is at a point, where a settlement has been determined, it is important to understand if the funds allocated for any required repairs are sufficient to cover the costs. If there is a gap or potential gap understanding if there is a plan to address any anticipated shortfall is important.

Comment: The estimated reporting burden to complete HUD Form–9992 is 60 minutes per respondent. During the estimated 60 minutes, a respondent is expected to read and comprehend form instructions, conduct research to gather and document required information, complete the form, and review the form for submission accuracy. The estimated reporting burden for HUD Form–9991 for these same activities is 45 minutes

HUD Response: HUD increased the burden hours for the Form HUD–9992 to account for changes to the form and the addition of instructions. The Form HUD–9992 has been shortened from 13 to 8 pages and the requirement for the condominium association to complete a portion of the questionnaire has been removed. The burden estimate for condominium project approval included 1 hour for condominium package preparation and 1 hour to complete Form HUD–9992. The new burden estimate for the Form HUD–9992 is 1.5 hours. HUD recognizes that many condominium associations are not familiar with the FHA Condominium Project Approval guidelines and terminology. The Submitter is responsible for collecting information from verifiable sources and confirming the Condominium Project complies with FHA Condominium Project Approval requirements. The burden hour estimate assumes that most of the information required to complete the form is used while operating the condominium project. HUD understands from the comments that the certification has an impact on the cost and completion time for condominium associations. To reduce the number of questions that must be answered, the first question of each section has structured to determine if more information is needed and to direct the respondent to the next question to answer. In addition, ''Not Applicable'' (N/A) checkboxes have been added throughout the Form HUD–9992 where appropriate.

Comment: The commenter indicated that requiring the HUD–9991 to be submitted on each individual loan in an FHA-approved condominium project after going through the condominium project approval process and completing the HUD–9992 is not efficient.

HUD response: HUD has eliminated the required documents sections from form 9991 to streamline completion on the form. While the ''required documents'' section is no longer part of the form, the mortgagee will still be responsible for submission of the required docs as applicable. Form HUD–9991 is now 4 pages, includes instructions, and is now only required to be completed by the mortgagee. Streamlining this form should reduce the burden of completing the form. The Form HUD–9992 is part of the FHA Condominium Project Approval package, which is used to determine the Condominium Project's compliance with FHA requirements for project approval. The Form HUD–9991 is used to determine the continued eligibility of a Unit for FHA-insured financing. HUD has reduced the information collected on both the Form HUD–9992 and the Form HUD–9991. In addition, HUD extended the period that data collected is valid to 90 days and removed the requirement that the condominium association complete the form. A mortgagee can submit both forms using the same data.

Comment: Several commenters noted the recertification requirements seemed as burdensome as initial certification. A commenter noted that requiring the use of one form to apply for project approval and project recertification imposes an equal burden for condominium project approval and project recertification. Several commenters requested the short form questionnaire or checklist be developed for recertification. A commenter noted that it is very time-consuming to complete the Form HUD–9992 when many of the sections do not apply. Another commenter asked for clarification on the recertification requirements for recorded legal documents.

HUD Response: HUD has streamlined the information collection process for Condominium Project Approval certification and recertification. The extension of certification from two to three years reduces the frequency of the recertification. HUD expects the additional revisions to the form and to the structure of the questions to lower the number of responses required for most Condominium Projects seeking recertification. Form HUD–9992 collects critical information about the financial and operating status of the Condominium Project. For each section of the Form HUD–9992, the Submitter will answer the question to determine if additional information is required or move to the next question. In addition, N/A boxes have been incorporated throughout Form HUD–9992, which allow the respondent to bypass sections that do not apply. Condominium Projects are not required to submit the governing and legal documents for recertification unless there have been amendments. To assist respondents, a question has been added to the form to determine if the legal documents have been amended since the last FHA approval. Some projects will be able to complete recertification easily, while condominium projects with more features or recently completed Legal Phases will take more effort. The Form HUD–9992 is required. At this time, HUD does not have plans to create a separate form for recertification but will take this into consideration in the

future. HUD is developing a checklist that shows the required documentation for Full Approval, Recertification and Legal Phasing. In addition, the instructions address recertification and include a reference to the Recertification Review in Handbook 4000.1, Section II.C.3.

Dated: July 20, 2020.

Anna Guido,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2020–16588 Filed 7–30–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7024–N–33]

30-Day Notice of Proposed Information Collection: Federal Labor Standards Questionnaire(s); Complaint Intake Form 0MB Control No. 2501–0018

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 30 days of public comment.

DATES: *Comments Due Date:* August 31, 2020.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806, Email: *OIRA_Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Anna P. Guido, Reports Management Officer, QMAC, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email her at *Anna.P.Guido@hud.gov* or telephone 202–402–5535. This is not a toll-free number. Person with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on January 6, 2020 at 85 FR 524.

A. Overview of Information Collection

Title of Information Collection: Federal Labor Standards Questionnaire(s); Complaint Intake Form.

OMB Approval Number: 2501–0018.

Type of Request: Reinstatement.

Form Number: HUD FORM 4730, 4730 SP, 4731.

Description of the need for the information and proposed use: The information is used by HUD to fulfill its obligation to enforce Federal labor standards provisions, especially to act upon allegations of labor standards violations.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden	Hourly cost per response	Annual cost
HUD–4730 Federal Labor Standards Questionnaire	1,500.00	1.00	1,500.00	.50	750.00	$43.71	$32,782.50
HUD–4730SP Cuestionario De Estándares Federales De Trabajo	500.00	1.00	500.00	.50	250.00	43.71	10,927.50
HUD–4731 Compliant Intact Form	500.00	1.00	500.00	.50	250.00	43.71	10,927.50
Total			2,500.00		1,250.00	4371	54,637.50

*Estimated cost per hour (based on GS–13, Step 1 rate) for contract monitors to compare formation collected to certified payroll reports (includes time required records retention). The Form HUD–4730E, On-Line Employee Questionnaire will be eliminated, as it asked the same questions as the 4730. HUD determined that removing this form will have no impact on enforcement of the law.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Anna P. Guido,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2020–16641 Filed 7–30–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7024–N–31]

30-Day Notice of Proposed Information Collection: Office of Lead Hazard Control and Healthy Homes "Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally-Owned Residential Properties and Housing Receiving Federal Assistance" OMB Control No. #2539–0009

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 30 days of public comment.

DATES: *Comments Due Date: August 31, 2020.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806, Email: *OIRA Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Anna P. Guido, Reports Management Officer, QMAC, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email her at *Anna.P.Guido@hud.gov* or telephone 202–402–5535. This is not a toll-free number. Person with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on March 24, 2020.

A. Overview of Information Collection

Title of Information Collection: Office of Lead Hazard Control and Healthy Homes ''Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally-Owned Residential Properties and Housing Receiving Federal Assistance''.

OMB Approval Number: 2539–0009.

Type of Request: Revision of a currently approved collection.

Form Number: None.

Description of the need for the information and proposed use: Required notifications under the Lead Safe Housing Rule, 24 CFR 35.

EXHIBIT 1. HOUR AND COST BURDEN ESTIMATES

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hours per response	Annual burden hours	Hourly cost per response	Annual cost
Requirements for Lead-Based Paint Hazards in Federally Owned Residential Properties and Housing Receiving Federal Assistance	62,295.00	18.76305	1,168,844.20	0.13999045	163,627.03	$15.85	$2,593,488.43
Total or *Average* ...	62,295.00	18.76305	1,168,844.20	0.13999045	163,627.03	15.85	2,593,488.43

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Anna P. Guido,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2020–16611 Filed 7–30–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7024–N–32]

30-Day Notice of Proposed Information Collection: Federal Labor Standards Payee Verification and Payment Processing; OMB Control No. 2501–0021

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 30 days of public comment.

DATES: *Comments Due Date:* August 31, 2020.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806, Email: *OIRA Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Anna P. Guido, Reports Management Officer, QMAC, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email her at *Anna.P.Guido@hud.gov* or telephone 202–402–5535. This is not a toll-free number. Person with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is

seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on January 6, 2020 at 85 FR 521.

A. Overview of Information Collection

Title of Information Collection: Federal Labor Standards Payee Verification and Payment Processing.

OMB Approval Number: 2501–0021.

Type of Request: Reinstatement.

Form Number: HUD FORM 4734.

Description of the need for the information and proposed use: HUD, State, Local and Tribal housing agencies administrating HUD-assisted programs must enforce Federal Labor Standards requirements, including the payment of prevailing wage rates to laborers and mechanics employed on HUD-assisted construction and maintenance work that is covered by these requirements. Enforcement activities include securing funds to ensure the payment of wage restitution that has been or may be found due to laborers and mechanics who were employed on HUD-assisted projects. Also, for the payment to the U.S. Treasury of liquidated damages that were assessed for violations of Contract Work Hours and Safety Standards Act (CWHSSA). If the labor standards discrepancies are resolved, HUD refunds associated amounts to the depositor. As underpaid laborers and mechanics are located, HUD sends wage restitution payments to the workers.

Information collection	Number of respondents	Frequency of response	Responses per annum	Total burden hours per response	Burden hours	Hourly cost per response	Total cost
4734 Deposit Voucher	15.00	1.00	1.00	.10	1.50	$43.71	$65.57
Total	15.00	.....	1.00	.10	1.50	43.71	65.57

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Anna P. Guido,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2020–16613 Filed 7–30–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R8–ES–2020–0073; FXES11120800000–201–FF08E00000]

Sierra Pacific Industries Final Habitat Conservation Plan for Northern and California Spotted Owl and Final Environmental Impact Statement; Klamath, Cascade, and Sierra Nevada Mountains, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of final environmental impact statement and final habitat conservation plan.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of a final environmental impact statement (EIS) under the National Environmental Policy Act. We also announce the availability of the final Habitat Conservation Plan for the Northern and California Spotted Owl (HCP). The documents were prepared in support of an application for an incidental take permit (ITP) under the Endangered Species Act (ESA). We will use these documents to inform our decision regarding issuance of the permit.

DATES: This notice makes available the final EIS. A record of decision will be signed no sooner than 30 days after the publication of this notice in the **Federal Register**.

ADDRESSES: *Obtaining Documents:* You may obtain copies of the final EIS and HCP in Docket No. FWS–R8–ES–2020–0073 at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Kim S. Turner, Deputy Assistant Field Supervisor, by phone at 916–414–6600; via the Federal Information Relay Service at 800–877–8339; or via U.S. mail to U.S. Fish and Wildlife Service, 2800 Cottage Way, Suite 2605, Sacramento, CA 95825.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service (Service), received an application submitted by Sierra Pacific Industries of Anderson, California (Applicant), for an incidental take permit under section 10(a)(1)(B) of the Endangered Species Act, as amended (16 U.S.C. 1531 *et seq.*), along with a habitat conservation plan to support the ITP application. We are making the ITP application, HCP, and final environmental impact statement available for public comment. The final EIS analyzes the impacts of a issuing an ITP under the Endangered Species Act for implementation of the HCP for Northern and California Spotted Owl.

Habitat Conservation Plan

The proposed ITP would cover two bird subspecies, the northern spotted owl (*Strix occidentalis caurina*), which is federally listed as threatened, and the California spotted owl (*Strix occidentalis occidentalis*), which is not federally listed.

The HCP covers forest management, species management, and monitoring activities on commercial timberland in Amador, Butte, Calaveras, El Dorado, Lassen, Modoc, Nevada, Placer, Plumas, Shasta, Sierra, Siskiyou, Tehama, Trinity, Tuolumne, and Yuba Counties, California. The HCP area encompasses 1,565,707 acres of commercial timberland in these counties.

The HCP proposes conservation measures considered necessary to minimize and mitigate the impacts, to

the maximum extent practicable, of the potential taking of federally listed species to be covered by the HCP.

Final Environmental Impact Statement

The EIS was developed in compliance with the Service's decision-making requirements under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) and analyzes several alternatives, including the proposed action alternative involving implementation of the HCP submitted by the applicant.

The EIS analyzes the direct, indirect, and cumulative impacts of several land management alternatives related to the Service's decision whether to issue an ITP in response to the SPI's application.

Background

Section 9 of the ESA prohibits the ''take'' of fish and wildlife species federally listed as endangered; by regulation, the Service has extended the take prohibitions to certain species listed as threatened. Take of federally listed fish or wildlife is defined under the ESA as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed species, or attempt to engage in such conduct (16 U.S.C. 1538). ''Harm'' includes significant habitat modification or degradation that actually kills or injures listed wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, and sheltering (50 CFR 17.3). Under limited circumstances, we may issue permits to authorize incidental take that is incidental to and not the purpose of, otherwise lawful activities.

National Environmental Policy Act Compliance

The EIS analyzes three land management alternatives. These include a ''no action'' alternative, under which the current management practices would be assumed to continue as guided by the California Forest Practice Rules. The proposed action consists of a two-subspecies HCP and associated permit with a 50-year term. One other ''action'' alternative is included. The Northwest Forest Plan (NWFP)/Sierra Nevada Forest Plan (SNFPA) Alternative (NWFP/SNFPA alternative) proposes the development of a different two-subspecies HCP that would manage known and suspected nest stands according to the NWFP within the range of the NSO and the SNFPA within the range of the CSO.

EPA's Role in the EIS Process

In addition to this notice, the Environmental Protection Agency (EPA) is publishing a notice in the **Federal Register** announcing this EIS, as required under section 309 of the Clean Air Act. The publication date of EPA's notice of availability is the official beginning of the public comment period. EPA's notices are published on Fridays.

EPA serves as the repository (EIS database) for EISs prepared by Federal agencies. All EISs must be filed with EPA. You may search for EPA comments on EISs, along with EISs themselves, at *https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.*

Public Review

Any comments we receive will become part of the decision record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can request in your comment that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Next Steps

Issuance of an ITP is a Federal proposed action subject to compliance with NEPA. We will evaluate the application, associated documents, and the public comments we receive to determine whether the requirements of the NEPA regulations and section 10(a) of the ESA have been met. If we determine that those requirements are met, we will issue a record of decision no sooner than 30 days after the EPA publishes notice of the final EIS in the **Federal Register** and will issue a permit to the applicant for the incidental take of the covered species.

Authority

We provide this notice under section 10(c) of the ESA (16 U.S.C. 1531 *et seq.*) and its implementing regulations (50 CFR 17.32), and NEPA (42 U.S.C. 4321 *et seq.*) and NEPA implementing regulations (40 CFR 1506.6).

Daniel Cox,

Acting Assistant Regional Director, California-Great Basin Region, Sacramento, California.

[FR Doc. 2020–16505 Filed 7–30–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[201A2100DD/AAKC001030/A0A501010.999900 253G]

Spirit Lake Tribe Liquor Control Ordinance

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the Spirit Lake Tribe's Liquor Control Ordinance (Ordinance). This Ordinance regulates and controls the possession, sale, manufacture, and distribution of alcohol in conformity with the laws of the State of North Dakota for the purpose of generating new Tribal revenues. Enactment of this Ordinance will help provide a source of revenue to strengthen Tribal government, provide for the economic viability of Tribal enterprises, and improve delivery of Tribal government services.

DATES: This Ordinance shall take effect on July 31, 2020.

FOR FURTHER INFORMATION CONTACT: Todd Gravelle, Supervisory Tribal Operations Specialist, Great Plains Regional Office, Bureau of Indian Affairs, 115 Fourth Avenue South East, Suite 400, Aberdeen, South Dakota 57401, telephone: (605) 226–7376, fax: (605) 226–7379.

SUPPLEMENTARY INFORMATION: Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner,* 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor control laws for the purpose of regulating liquor transactions in Indian country. The Spirit Lake Tribe duly adopted the Liquor Control Ordinance on March 13, 2020.

This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary–Indian Affairs. I certify that the Spirit Lake Tribe duly adopted by Resolution this Liquor

Control Ordinance by Resolution No. A05–20–122, on March 13, 2020.

Tara Sweeney,

Assistant Secretary–Indian Affairs.

The Spirit Lake Tribe's Liquor Control Ordinance shall read as follows:

TITLE 22. LIQUOR CONTROL

ARTICLE I

GENERAL PROVISIONS

CHAPTER 1 GENERALLY

Sec. 22–1101 Authority and Purpose

The purpose of this Title is to regulate and control the distribution, possession and sale of liquors and other intoxicating beverages within lands subject to the jurisdiction of the Spirit Lake Tribe in North Dakota, and authorize sales of such at the Spirit Lake Casino and Resort property. The authority for enactment of this Title is as follows:

(1) Tribal control over liquor within Tribal reservations is provided for in the Act of August 15, 1953, 67 Stat. 586, codified at 18 U.S.C. 1161, through which the federal government recognizes the authority of Indian Tribes to regulate acts or transactions involving liquor in Indian Country, provided that such acts or transactions are in conformity with the laws of the State in which the Tribe is located.

(2) The United States government is committed to fostering and encouraging Tribal self-government, economic development and self-sufficiency under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 5301–5332.

(3) This title is enacted pursuant to Articles 6(3), 6(4), 6(9), 6(10), and 7 of the Spirit Lake Constitution and pursuant to 18 U.S.C. 1161.

Sec. 22–1102 Public Policy

It is the policy of the Tribe to strictly limit the sale of liquor on Tribal Lands. The Tribal Council has determined that the regulated sale and consumption of Alcoholic Beverages at the site of the Casino Property is an appropriate activity that will enhance the revenues of the Tribe's Casino Enterprise. Accordingly, sales of Alcoholic Beverages shall be permitted, but shall be geographically limited to Casino Property and strictly regulated in accordance with this Title and the Regulations.

Sec. 22–1103 Title

This Title shall be cited as the ''Spirit Lake Tribe Liquor Control Act.''

Sec. 22–1104 Effective Date

This Title is effective as of the date of publication in the **Federal Register**.

Sec. 22–1105 Definitions

Unless the context requires otherwise, as used in this Title:

(1) ''Alcoholic Beverage'' means any Intoxicating Liquor, Beer or any Wine as defined under the provisions of this Title.

(2) ''Application'' means a formal written request for the issuance of a Liquor License, supported by a verified statement of facts, as described in detail at Section 22–3109 of this Title.

(3) ''Beer'' means any liquid capable of being used for beverage purposes made by the fermentation of an infusion in potable water of barley, malt, and hops, with or without unmalted grains or decorticated and degerminated grains or made by the fermentation of or by distillation of the fermented products of fruit, fruit extracts, or other agricultural products, containing more than one-half of one percent of alcohol by volume but not more than five percent of alcohol by weight but not including mixed drinks or cocktails mixed on the premises.

(4) ''Casino Property'' means all real property, including the buildings, adjacent parking lots and all related infrastructure that comprise the Casino Enterprise known as the Spirit Lake Casino and Resort at 7889 Hwy 57, St. Michael, ND 58370.

(5) ''Code'' means the Code of the Spirit Lake Tribe of North Dakota, including any amendments thereto.

(6) ''Director'' means the Director of Liquor Control as described in detail at Section 22–2102 of this Title.

(7) ''Distributor'' means a Person duly licensed by the State and the Tribe who is entitled to purchase, sell, manufacture, deliver and/or distribute all forms of Alcoholic Beverages to licensed retail establishments within the State, including the Casino Enterprise.

(8) ''Intoxicating Liquor'' means any liquid either commonly used, or reasonably adopted to use for beverage purposes, containing in excess of three and two-tenths percentum of alcohol by weight. This shall include any type of Wine, regardless of alcohol content.

(9) ''Liquor License'' means a Tribal liquor license issued in accordance with Chapter 3 of this Title.

(10) ''Person'' means any individual, partnership, or corporate entity.

(11) ''Qualified Sponsor'' means the sponsor of a Special Event, which may be (i) a duly authorized representative of the Tribal Entities, (ii) a State licensed distributor, wholesaler or manufacturer of Alcoholic Beverages; or (iii) other Person possessing the requisite license and other legal authority to conduct the proposed activity on Tribal Lands.

(12) ''Regulations'' means all regulations adopted under this Title in accordance with Section 22–2103 hereof.

(13) ''Sale'' or ''Sell'' means and includes the exchange, barter, and traffic, including selling, supplying, or distributing by any means whatsoever, of any Intoxicating Liquor or Beer.

(14) ''Special Event'' means any social, charitable or for-profit discreet activity or event (i) licensed hereunder; (ii) conducted on Casino Property by a Qualified Sponsor; and (iii) overseen by Casino Enterprise management, at which Alcoholic Beverages are sold by a vendor, wholesaler or distributor licensed by the State and/or the Tribe, as applicable.

(15) ''State'' means the State of North Dakota.

(16) ''Tribal Constitution'' means the Spirit Lake Constitution.

(17) ''Tribal Council'' means the duly elected governing body of the Tribe.

(18) ''Tribal Entity'' means any business or quasi-business operation which is owned and operated by the Spirit Lake Tribe, with its profits remaining therein.

(19) ''Tribal Lands'' means all land owned by the Tribe over which the Tribe exercises jurisdiction, whether held in trust for the Tribe by the United States of America for the benefit of the Tribe, owned in fee simple by the Tribe, or otherwise.

(20) ''Tribe'' means the Spirit Lake Tribe.

(21) ''Wholesaler'' means any person, other than a vintner, brewer or bottler of Beer or Wine, who shall sell barter, exchange, offer for sale, have in possession with intent to sell, deal or traffic in Intoxicating Liquor, Wine, or Beer. A wholesaler shall not sell for consumption upon Tribal Lands.

(22) ''Wine'' means any beverage containing more than five percent of alcohol by weight but not more than seventeen percent of alcohol by weight or twenty-one and twenty-five hundredths percent of alcohol by volume obtained by the fermentation of the natural sugar.

Sec. 22–1106 Construction

This Title shall be interpreted and applied in a manner consistent with all other laws, ordinances, resolutions, and regulations of the Tribe.

Sec. 22–1107 Severability

If a court of competent jurisdiction finds any provision of this Title to be invalid or illegal under applicable

Federal or Tribal law, such provision shall be severed from this Title and the remainder of this Title shall remain in full force and effect.

Sec. 22–1108 Headings

Headings contained herein shall not be deemed to govern, limit, modify, or in any manner affect the scope, meaning, or intent of the provisions of any portion of this Title.

Sec. 22–1109 Amendments

This Title may be amended only upon an affirmative vote of a majority of the Tribal Council, the approval of the Secretary, and the publication of the approved amendment in the **Federal Register**.

CHAPTER 2 REGULATION OF INTOXICATING LIQUOR

Sec. 22–2101 General Prohibition

It shall be unlawful to manufacture for sale, sell, offer, or keep for sale, possess or transport all forms of Intoxicating Liquor or Beer except upon the terms, conditions, limitations, and restrictions specified in this Title and the Regulations.

Sec. 22–2102 Director Appointment and Authority

The Tribal Council shall appoint a Director of Liquor Control who shall have the following duties and authority:

(1) To publish and enforce this Title and the rules and Regulations governing the sale, manufacture, and distribution of Intoxicating Liquor and Beer on Tribal Lands;

(2) To employ or procure the services of managers, accountants, security personnel, inspectors, and such other persons as shall be reasonably necessary to allow the Director and/or the Tribal Council to perform their respective functions under this Title;

(3) To issue Liquor Licenses, with the approval of the Tribal Council, permitting the sale or distribution of liquor on Tribal Lands;

(4) To convene and facilitate Tribal Council hearings on violations of this Title for the issuance or revocation of licenses hereunder;

(5) To bring suit in the appropriate court to enforce this Title as necessary;

(6) To determine and seek damages for violation of this Title;

(7) To make such reports as may be required;

(8) To compile information and conduct background investigations to determine the suitability of an applicant for a Liquor License;

(9) To collect fees levied or set in accordance with this Title, and to keep accurate records, books and accounts;

(10) To develop forms for applications, licenses, and other matters covered by this Title;

(11) To take or facilitate all action necessary to follow or implement applicable provisions of State law, as required;

(12) To coordinate with other departments and agencies of the Tribe to ensure the effective enforcement of this Title and the Regulations; and

(13) To exercise such other powers as are necessary and appropriate to fulfill the purposes of this Title.

Sec. 22–2103 Promulgation of Regulations

The Director is hereby authorized to make Regulations not inconsistent with this Title to the end that this Title shall be applied and administered uniformly throughout Tribal Lands. All such proposed Regulations shall be first submitted to the Tribal Council for consideration, possible revision and final approval. Following approval by the Tribal Council, copies of all Regulations shall be made available to all persons subject to this Title.

Sec. 22–2104 Director as Employee of Tribe

The Director and other individuals employed under the Director's supervision shall be employees of the Tribe. The Director may be removed for cause at any time by vote of the Tribal Council.

Sec. 22–2105 Interim Appointment

As of the Effective Date, the Tribal Council designates the Tribe's Gaming Commission Executive Director to serve as the Director of Liquor Control until such time as a permanent appointment is made in accordance with this Title.

Sec. 22–2106 Inspection Rights

The premises on which Intoxicating Liquor and Beer is sold or distributed shall be open for inspection by the Director or his designee at all reasonable times for the purpose of ascertaining whether this Title and the Regulations promulgated hereunder are being strictly followed.

Sec. 22–2107 Tribal Control of Importation and Sale of Intoxicating Liquor

The Tribal Council shall have the sole and exclusive right to control and restrict the importation of all forms of Intoxicating Liquor and Beer, except as otherwise provided in this Title, and no person or organization shall so import any such Intoxicating Liquor or Beer into the Tribal Lands, unless authorized by a Liquor License issued under this Title. No licensed distributor, wholesaler or distillery shall sell any form of Intoxicating Liquor or Beer within the Tribal Lands to any person or organization unless licensed hereunder and except as otherwise provided in this Title. It is the intent of this Section to retain in the Tribal Council exclusive control within Tribal Lands as the sole authorizer and controller of all forms of Intoxicating Liquor and Beer sold by retailers, distributors, wholesalers or vendors within the Tribal Lands or imported therein, and except as otherwise provided in this Title. The powers of the Director under this Title are by express delegation of the Tribal Council.

Sec. 22–2108 Limitation on Powers

In the exercise of their respective powers and duties under this Title, the Director, the Tribal Council, and their individual members, representatives and employees, shall not accept any gratuity, compensation or other thing of value from any liquor wholesaler, retailer, or distributor or from any licensee or applicant under this Title.

Sec. 22–2109 Possession of Liquor Contrary to This Title

All forms of Intoxicating Liquor and Beer which are possessed contrary to the terms of this Title are declared to be contraband. Any Tribal agent, employee, or officer who is authorized by this Title and the Regulations to enforce this Section shall have the authority to and shall seize all contraband.

Sec. 22–2110 Disposition of Seized Contraband

Any officer, employee or agent of the Tribe seizing contraband shall preserve the contraband in accordance with applicable law. Upon being found in violation of this Title, the party shall forfeit all right, title and interest in the items seized which shall become the property of the Tribe.

CHAPTER 3 LIQUOR LICENSES

Sec. 22–3101 Power to License and Tax

The power to establish licenses and levy taxes under the provisions of this Title is vested exclusively with the Tribal Council. The Tribal Council has delegated certain authority and responsibilities to the Director of Liquor Control and to the Tax Director, each in accordance with the express provisions in this Title and Title 7 (Taxation). The Tribal Council retains primary responsibility for implementation, oversight and enforcement of this Title.

Sec. 22–3102 Types of Licenses

There is hereby authorized three categories of Liquor Licenses, as follows:

Class I—Retail,

Class II—Special Event, and

Class III—Distributor.

Sec. 22–3103 Class I—Retail License Description

Only one Class I Retail License shall be permitted under this Title. Such license shall be approved subject to the Director's determination, with the concurrence of the Tribal Council, that all of the conditions set forth at Section 22–3108 have been fully satisfied.

Upon recommendation of the Director, the Tribal Council may, on or following the Effective Date, issue a Class I—Retail License to the business operation of the Tribe known as the ''Spirit Lake Casino & Resort.'' The Class I—Retail License shall entitle the Tribal Entity to sell at retail in restaurants, bars, and other areas designated by Regulation, any Alcoholic Beverages permitted hereunder. All such sales shall be strictly limited to the physical area defined herein as the Tribal Entity. All purchases, deliveries and retail sales of Alcoholic Beverages on the Tribal Entity shall be in strict compliance with this Title, the terms of the Liquor License and the Regulations promulgated hereunder.

Sec. 22–3104 Class II—Special Event License Description

Upon (i) request of the General Manager of the Casino Enterprise or his designee, and recommendation of the Director, a Class II—Special Event License may be issued by the Tribal Council to the Qualified Sponsor of a Special Event. The duration of such license shall be established at the time of issuance; provided, however, the duration shall not be longer than five (5) days. The license shall entitle the Qualified Sponsor to sell at retail the type(s) of Alcoholic Beverages specified in the license. All Alcoholic Beverage sales approved under the terms of the Class II—Special Event License shall comply in all respects with this Title and the Regulations promulgated hereunder. All intoxicating beverages and all service employees for an event granted a Class II license shall be provided by a Tribal Entity. These events shall be under the law enforcement jurisdiction of the Tribe pursuant to Title 3 of the Law & Order Code (Criminal Actions).

Sec. 22–3105 Class III—Distributor License Description

A Class III—Distributor License may be issued to an applicant who (i) is licensed by the State to purchase all forms of Intoxicating Liquor and Beer at wholesale and to distribute to retail outlets in the State, and (ii) who meets the criteria under this Title and the Regulations to sell Intoxicating Liquor and Beer to the Tribal Entities.

Sec. 22–3106 Term of Licenses

The terms of the various Liquor Licenses are as follows:

Class I—Retail: two years;
Class II—Special Events: one to five days; and
Class III—Distributor: two years.

Sec. 22–3107 Procedure for Obtaining Licenses

(1) The Class I—Retail License authorized hereunder shall be issued to Tribal entities subject to a recommendation by the Director and a determination by the Tribal Council that said Tribal Entity has satisfied the criteria described in Section 22–3108 of this Title.

(2) A Class II—Special Event License may be issued upon recommendation of the Director to an applicant who meets the definition of a Qualified Sponsor. The process for application shall be established by Regulation and shall include proof that the applicant holds all necessary State licenses.

(3) A Class III—Distributor License may be issued upon recommendation of the Director to an applicant who meets the criteria for a Distributor. The process for application shall be established by Regulation and shall include proof that the Applicant holds all necessary State licenses.

In the event dual Tribal and State licenses are required by State law, no Person shall be allowed or permitted to sell, distribute or provide Intoxicating Liquor or Beer on Tribal Lands unless such person is also licensed by the State, as required, to sell or provide such Intoxicating Liquor and Beer.

Sec. 22–3108 Conditions to Issuance of Class I—Retail License

In addition to requirements established by Regulation and other provisions of this Title, Tribal Council may, upon recommendation of the Director, issue the Class I—Retail License to the Casino Enterprise only after the Tribal Council has determined to its satisfaction that the Casino Enterprise has adopted and is prepared to implement the following procedures and requirements, as necessary to ensure compliance with this Title and the Regulations:

(1) Security and surveillance procedures ensuring the proper use and handling of all forms of Alcoholic Beverages;

(2) Appropriate revenue and accounting procedures pertaining to the purchase and sale of Alcoholic Beverages;

(3) Inventory control procedures and adequate storage, dispensing, service, management, pricing and security measures relating to the purchase and sale of Alcoholic Beverages;

(4) Identification procedures to ensure that no person under the age of twenty-one will be served any form of Alcoholic Beverage;

(5) Procedures ensuring that all aspects of Alcoholic Beverage management, purchase and sale comply with Tribal and any applicable State laws;

(6) Casino personnel have received appropriate training relating to compliance with this Title and the Regulations, service of Alcoholic Beverages, safety, health, revenue management and patron management issues;

(7) The Gaming Commission has reviewed the procedures for Alcoholic Beverage sales and has determined that such sales are not in violation of any provision of the Tribal-State Compact, the Gaming Code, the Gaming Regulations or other applicable law relating to gaming; and

(8) Such other requirements as the Director and the Tribal Council shall impose by regulation.

Sec. 22–3109 Content of Liquor License Application

(a) No Class II or Class III Liquor License shall issue under this Title except upon a sworn Application filed with the Director containing a full and complete showing of the following:

(1) Satisfactory proof that the applicant is licensed by the State to sell, distribute, manufacture or transport, as applicable, Intoxicating Liquor and/or Beer.

(2) Agreement by the applicant to accept and abide by Tribal law and all conditions of the Tribal license.

(3) Payment of a license fee as prescribed by the Director.

(4) Satisfactory proof that the applicant has not been convicted of a felony or had his/her/its State license revoked or suspended.

(5) Satisfactory proof that notice of the Application has been posted in a prominent, noticeable place on the premises where intoxicating beverages are to be sold for at least 30 days prior

to consideration by the Tribal Council and has been published at least once in the Tribal newspaper. The notice shall state the date, time, and place when the application shall be considered by the Tribal Council pursuant to Section 22–3110 of this Title.

(b) Any holder of a Tribal Liquor License shall be required to comply, as a condition of retaining such license, with all applicable Tribal laws and regulations.

Sec. 22–3110 Hearing on Application for Tribal Liquor License

(a) All Applications for a Tribal Liquor License shall, upon recommendation of the Director, be considered by the Tribal Council in open session at which the applicant, his/her attorney, and any person protesting the application shall have the right to be present, and to offer sworn oral or documentary evidence relevant to the Application. After the hearing, the Tribal Council, by vote and resolution, shall determine whether to grant or deny the Application based on:

(1) Whether the requirements of this Title and the Regulations have been met; and

(2) Whether the Director, with the approval of the Tribal Council, in its discretion, determines that granting the license is in the best interest of the Tribe.

(b) In the event the applicant for the Class II—Special Event License is a duly authorized representative of the Tribal Entities, the requirements of this Section may be modified upon a showing by the applicant that all safety, health, security, inventory control, management and other matters pertaining to the Special Event conform in all respects with this Title and the Regulations.

Sec. 22–3111 License Fees

The fee schedule for Liquor Licenses shall be established by the Director with the approval of the Tribal Council.

Sec. 22–3112 License Not a Property Right

Notwithstanding any other provision of this Title, a Tribal Liquor License is a mere permit for a fixed duration of time. A Tribal Liquor License shall not be deemed a property right or vested right of any kind, nor shall the granting of a Tribal Liquor License give rise to a presumption of legal entitlement to a license in a subsequent time period.

Sec. 22–3113 No Transfer or Assignment

No Tribal Liquor License issued under this Title may be assigned or transferred without the prior written approval of the Tribal Council, as expressed by formal resolution.

Sec. 22–3114 Revocation of License

Upon recommendation of the Director, the Tribal Council may revoke a Liquor License for reasonable cause upon notice and hearing at which the licensee shall be given an opportunity to respond to any charges against it and to demonstrate why the Liquor License should not be suspended or revoked.

CHAPTER 4 REGULATION OF LIQUOR SALES AND DISTRIBUTION

Sec. 22–4101 Retail Sales Limited to Tribal Casino Enterprise

The retail sale of Intoxicating Liquor on Tribal Lands shall be prohibited except for (i) retail sales that comply with this Title and (ii) retail sales that occur within the Casino Property.

Sec. 22–4102 Importation and Delivery of Liquor

No Intoxicating Liquor or Beer may be imported for resale or otherwise distributed on Tribal Lands except in conformance with this Title.

Sec. 22–4103 Additional Prohibitions

(1) A person shall not sell or dispense any Alcoholic Beverage on the premises covered by the Tribal Liquor License except in conformance with the days and hours established by the State during which Alcoholic Beverages may be sold at retail for consumption on the premises.

(2) Any person who shall sell or offer for sale or distribute or transport in any manner, any liquor in violation of this ordinance, or who shall operate a motor vehicle or shall have any Alcoholic Beverage in his/her possession with intent to sell or distribute without a license, shall be guilty of a violation of this Title and shall be subject to criminal and/or civil penalties under this Title, the Law and Order Code, and the Regulations.

(3) Any person who sells any form of Intoxicating Liquor or Beer to a person apparently under the influence of liquor shall be guilty of a violation of this Title and shall be subject to criminal and/or civil penalties under this Title, the Law and Order Code, and the Regulations.

Sec. 22–4104 Use and Consumption

All Alcoholic Beverage sales shall be for the personal use and consumption of the purchaser while on the Casino property. Resale of any Alcoholic Beverage purchased within Tribal Lands is prohibited. Any person who is not licensed pursuant to this Title who purchases an Alcoholic Beverage within Tribal Lands and sells it, whether in the original container or not, shall be guilty of a violation of this Title and shall be subject to criminal and/or civil penalties under this Title, the Law and Order Code, and the Regulations.

Sec. 22–4105 Cash Sales Only

All sales of Alcoholic Beverages within Tribal Lands shall be on a cash only basis and no credit shall be extended to any person, organization, or entity, except that this provision does not prevent the use of major credit cards.

Sec. 22–4106 Tribal Sales Tax

(1) The Tribal Tax Director shall have jurisdiction over all matters pertaining to a sales tax on Alcoholic Beverages sold on Tribal Lands. The amount of such tax shall be determined by the Tribal Tax Director with the approval of the Tribal Council, all in accordance with Title 17 (Taxation) of the Code.

(2) The Tribal Treasurer shall establish a tax revenue account for the Tribe. The money received by the Tax Department from the taxes imposed by this Title shall be credited by the Treasurer to the tax revenue account of the Tribe to be used in the provision of tribal governmental services, including, but not limited to health, education, safety and welfare.

CHAPTER 5 AGE AND OTHER RESTRICTIONS

Sec. 22–5101 Sales to Persons Under 21

It shall be unlawful to sell or give any Alcoholic Beverage to any person under the age of twenty-one (21) years. Any Person who violates this section shall be guilty of a Class 4 Offense as described at Section 13–51107 of the Law and Order Code of the Tribe. Violations of this Section by persons or entities which are not subject to the criminal jurisdiction of the Tribe may, following notice and a hearing, be subject to a civil penalty in accordance with the Regulations promulgated hereunder. The levy of a civil penalty by the Director under this Section is in addition to the power to suspend or revoke any Liquor License and to report such violation to the appropriate State authorities.

Sec. 22–5102 Purchase, Possession by Minor

It shall be unlawful for any person under the age of twenty-one (21) years to purchase, attempt to purchase or possess or consume any form of Alcoholic Beverage, or to misrepresent his age for the purpose of purchasing or attempting to purchase such Alcoholic

Beverage. Any person who violates any of the provisions of this section shall be guilty of a Liquor Violation offense as described at Section 3–7–44 of the Law and Order Code of the Tribe. Violations of this Section by persons or entities which are not subject to the criminal jurisdiction of the Tribe may, following notice and a hearing, be subject to a civil penalty in accordance with the Regulations promulgated hereunder. The levy of a civil penalty by the Director under this Section is in addition to the power to suspend or revoke any license and to report such violation to the appropriate State authorities.

Sec. 22–5103 Evidence of Legal Age Demanded

Upon attempt to purchase any Alcoholic Beverage at a site licensed under this Title by any person who appears to the seller to be under legal age, such seller shall demand, and the prospective purchaser upon such demand, shall present satisfactory evidence that he or she is of legal age. Any person under legal age who presents to any seller falsified evidence as to his or her age shall be guilty of a Liquor Violation offense as described at Section 3–7–44 of the Law and Order Code of the Tribe.

CHAPTER 6 JURISDICTION, PENALTIES AND ENFORCEMENT

Sec. 22–6101 Jurisdiction

All licensees and others who voluntarily enter onto Tribal Lands and transact business or otherwise engage in activity governed by this Title voluntarily submit to the jurisdiction of the Tribe and the personal jurisdiction of the Tribal Court System for purposes of enforcement of this Title and the Regulations.

Sec. 22–6102 Civil Penalties

The Director shall recommend to the Tribal Council a schedule of civil penalties and administrative fines as he/she deems necessary for the effective enforcement of this Title. Such schedule shall be considered and adopted by the Tribal Council in the form of a Regulation in accordance with Section 22–2103 of this Title. The imposition of any civil penalty or administrative fine shall not limit the ability of the Tribal Council, upon recommendation of the Director, to suspend or revoke any license issued hereunder for the violation of any of the provisions of this Title or the Regulations. The Director shall also propose Regulations relating to the process for administrative hearings before the Tribal Council. All final administrative orders may be appealed to the Tribal Court.

Sec. 22–6103 Criminal Violations

All criminal violations hereunder shall be prosecuted in accordance with laws of the Tribe, and applicable federal law. In the event a criminal act is committed by a person over whom the Tribe does not exercise criminal jurisdiction, then the matter may be referred to appropriate State authorities for prosecution under State law.

CHAPTER 7 USE OF PROCEEDS AND INTERPRETATION

Sec. 22–7101 Application of Proceeds

The gross proceeds collected by the Director from all licensing activities under this Title and from fines imposed as a result of violations of this Title, shall be applied as follows:

(1) First, for the payment of all necessary personnel, administrative costs, and legal fees incurred in the enforcement of this Title; and

(2) Second, the remainder shall be deposited in the operating fund of the Tribe and expended by the Tribal Council for governmental services and programs on Tribal Lands.

Sec. 22–7102 Consistency with State Law

All provisions and transactions under this Title shall be in conformity with State law regarding alcohol to the extent required by 18 U.S.C. 1161 and with all federal laws regarding alcohol in Indian Country, as defined at 18 U.S.C. 1151.

Sec. 22–7103 No Impact on Tribal Sovereignty

Nothing in this Title shall be implied or interpreted to in any manner limit the immunity of the Tribe from uncontested suit or to otherwise limit the sovereign status of the Tribe.

Sec. 22–7104 Prior Enactments Repealed

All prior Tribal enactments, laws, ordinances, resolutions or provisions thereof that are repugnant or inconsistent to any provision of this Title are hereby repealed.

[FR Doc. 2020–16605 Filed 7–30–20; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCO956000 L14400000.BJ0000 20X]

Notice of Filing of Plats of Survey, Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of official filing.

SUMMARY: The plats of survey of the following described lands are scheduled to be officially filed in the Bureau of Land Management (BLM), Colorado State Office, Lakewood, Colorado, 30 calendar days from the date of this publication. The surveys, which were executed at the request of the BLM, are necessary for the management of these lands.

DATES: Unless there are protests of this action, the plats described in this notice will be filed on August 31, 2020.

ADDRESSES: You may submit written protests to the BLM Colorado State Office, Cadastral Survey, 2850 Youngfield Street, Lakewood, CO 80215–7210.

FOR FURTHER INFORMATION CONTACT: Randy Bloom, Chief Cadastral Surveyor for Colorado, (303) 239–3856; *rbloom@blm.gov.* Persons who use a telecommunications device for the deaf may call the Federal Relay Service at 1–800–877–8339 to contact the above individual during normal business hours. The Service is available 24 hours a day, seven days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The plat, in 2 sheets, and field notes of the dependent resurvey and survey in Township 14 South, Range 100 West, Sixth Principal Meridian, Colorado, was accepted on May 29, 2020.

The plat, in 2 sheets, incorporating the field notes of the dependent resurvey and subdivision of section 31 in Township 6 South, Range 90 West, Sixth Principal Meridian, Colorado, was accepted on June 25, 2020.

A person or party who wishes to protest any of the above surveys must file a written notice of protest within 30 calendar days from the date of this publication at the address listed in the **ADDRESSES** section of this notice. A statement of reasons for the protest may be filed with the notice of protest and must be filed within 30 calendar days after the protest is filed. If a protest against the survey is received prior to the date of official filing, the filing will be stayed pending consideration of the

protest. A plat will not be officially filed until the day after all protests have been dismissed or otherwise resolved. Before including your address, phone number, email address, or other personal identifying information in your protest, please be aware that your entire protest, 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: 43 U.S.C. Chap. 3.

Randy A. Bloom,

Chief Cadastral Surveyor.

[FR Doc. 2020–16560 Filed 7–30–20; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWYP06000.LL13100000.DB0000]

Notice of Availability of a Proposed Resource Management Plan Amendment and Final Environmental Impact Statement for the Converse County Oil and Gas Project, Converse County, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended (NEPA), the Bureau of Land Management (BLM) has prepared a Proposed Resource Management Plan (RMP) Amendment and Final Environmental Impact Statement (EIS) that evaluates, analyzes, and discloses to the public direct, indirect, and cumulative environmental impacts of the project proposal and the amendment for the Casper RMP to allow relief from timing stipulations for non-eagle raptors within the Converse County Oil and Gas Project Area (CCPA) in Converse County, Wyoming. This notice announces a 30-day protest period pursuant to 43 CFR 1610.

DATES: This notice initiates a 30-day protest period for the Proposed RMP Amendment. In accordance with 43 CFR 1610.5–2, protests on the Proposed RMP Amendment must be submitted on or before August 31, 2020. The BLM will issue a Record of Decision no earlier than 30 days from the date of the Notice of Availability published by the Environmental Protection Agency.

ADDRESSES: The Proposed RMP Amendment and Final EIS may be examined online at *https://go.usa.gov/xdYhv* or at the following offices:

- BLM Casper Field Office, 2987 Prospector Drive, Casper, Wyoming 82604;
- BLM Wyoming State Office, 5353 Yellowstone Road, Cheyenne, Wyoming 82009.

All protests on the Proposed RMP Amendment must be submitted in writing by any of the following methods:

Website: https://go.usa.gov/xdYhv.

Regular Mail: BLM Director (210), Attention: Protest Coordinator, P.O. Box 71383, Washington, DC 20024–1383.

Overnight Delivery: BLM Director (210), Attention: Protest Coordinator, 20 M Street SE, Room 2134LM, Washington, DC 20003.

FOR FURTHER INFORMATION CONTACT: Mike Robinson, Project Manager, telephone: 307–261–7520; address: 2987 Prospector Drive, Casper, Wyoming 82604; email: *blm_wy_casper_wymail@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 Mr. Robinson during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: An operator group (OG) comprised of Chesapeake Energy Corporation, Devon Energy, EOG Resources, Inc., Northwoods Energy and Occidental Petroleum, propose to develop oil and gas leases within the CCPA in Converse County, Wyoming.

The CCPA encompasses approximately 1.5 million acres of land, of which approximately 88,466 surface acres (6 percent of the CCPA) are public lands administered by the BLM and approximately 63,911 surface acres (4 percent of the CCPA) are administered by the United States Forest Service. The remaining surface estate consists of approximately 101,012 surface acres (7 percent) administered by the State of Wyoming and approximately 1,247,477 surface acres (83 percent) that are privately owned. The BLM administers approximately 964,525 acres of mineral estate (64 percent) within the CCPA. Split estate lands, lands with private surface and Federal mineral ownership, comprise approximately 812,189 acres of those 964,525 acres (54 of the 64 percent) of the mineral ownership within the CCPA.

The Final EIS describes and analyzes the impacts of Alternative A, the No Action Alternative, Alternative B, the OG's Proposed Action including six options as amendments to the Casper RMP and Alternative C. The Supplement to the Draft EIS detailed options 1 through 5 for Alternative B. Option 6, the Proposed RMP Amendment, was developed to incorporate comments from the Governor of the State of Wyoming and the OG.

The agency preferred alternative and proposed plan amendment was identified in the Final EIS as Alternative B and Option 6. These presented the best means to allow for continued development in the area while minimizing impacts to resources.

Any person who participated in the planning process and has an interest which is, or may be, adversely affected by the approval or amendment of the RMP may protest such approval or amendment. A protest may raise only those issues which were submitted for the record during the planning process. Instructions for filing a protest with the Director of the BLM regarding the Proposed RMP Amendment/Final EIS may be found in the ''Dear Reader'' Letter of the Final EIS and Proposed RMP Amendment and at 43 CFR 1610.5–2. All protests must be in writing and mailed to the appropriate address, as set forth in the **ADDRESSES** section above. Emailed protests will not be accepted as valid protests unless the protesting party also provides the original letter by either regular mail or overnight delivery postmarked by the close of the protest period. Under these conditions, the BLM will consider the email as an advanced copy, and it will receive full consideration. If you wish to provide the BLM with such advance notification, please direct emails to: *protest@blm.gov.*

Before including your address, phone number, email address or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 40 CFR 1506.6, 40 CFR 1506.10, 43 CFR 1610.2)

Duane Spencer,

State Director, Wyoming.

[FR Doc. 2020–16563 Filed 7–30–20; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–VRP–WS–NPS0028481; PPWOWMADL3, PPMPSAS1Y.TD0000 (200); OMB Control Number 1024–0022]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Backcountry/Wilderness Use Permit

AGENCY: National Park Service, Interior.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the National Park Service (NPS) are proposing to renew an information collection with revisions.

DATES: Interested persons are invited to submit comments on or before August 31, 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 30-day Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to Phadrea Ponds, NPS Information Collection Clearance Officer, 1201 Oakridge Drive, Fort Collins, CO 80525; or by email at *phadrea_ponds@nps.gov.* Please reference OMB Control Number 1024–0022 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Roger Semler, Chief, Wilderness Stewardship Division by email at *roger_semler@nps.gov;* or by telephone at 406–542–3247. Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day comment period soliciting comments on this collection of information was published on March 18, 2020 (85 FR 15494). We received one response from the State of Alaska on May 18, 2020, requesting the following changes to the application form:

Comment: Should OBM continue to authorize NPS Form 10–404 for use in Alaska park units, to improve clarity and eliminate misinformation and confusion for a significant number of park visitors and Alaskan residents, the form needs to be revised to clarify:

(1) It only applies to Alaska park units that have regulatory requirements for backcountry wilderness permits;

(2) not all park units require an entrance fee; and

(3) exceptions apply where enabling legislation, such as ANILCA, allows for motorized and mechanized access in designated wilderness.''

NPS Response/Action Taken: The National Park Service accepted the suggested revisions and has created the 10–404AK *Alaska Backcountry/Wilderness Use Permit Application* specifically for National Park Service units in Alaska (*i.e.,* Denali National Park and Preserve and Glacier Bay National Park and Preserve).

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the NPS, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the NPS minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The Backcountry/Wilderness Use Permit is an extension of the NPS statutory authority and responsibility to protect the park areas it administers and to manage the public use thereof (54 U.S.C. 100101, 100751, 320102). NPS regulations codified in 36 CFR parts 1 through 7, 12 and 13 are designated to implement statutory mandates that provide for resource protection and public enjoyment. In 1976, the NPS initiated a backcountry registration system in accordance with the regulations codified in 36 CFR 1.5, 1.6 and 2.10. The objective of the registration system is to provide users access to backcountry and wilderness areas of national parks with continuing opportunities for solitude. These areas provide primitive and unconfined recreation, while enhancing protection of natural and cultural resources and providing a means of disseminating public safety and outdoor ethics messages regarding backcountry/wilderness travel and camping. The objectives of the permit system carried out by park managers are to ensure:

(1) Requests by backcountry users are evaluated by park managers in accordance with applicable statutes and NPS regulations.

(2) The use of consistent standards and permitting criteria throughout the agency.

(3) To the extent possible, the use of a single and efficient permitting document.

The NPS uses the registration system as a means of ensuring backcountry/wilderness users receive up-to-date information on outdoor ethics which minimize social and resource impacts. The information collected is an important source of information for first responders in the event of an emergency requiring search and rescue operations backcountry/wilderness areas. NPS Forms 10–404 *Backcountry/Wilderness Use Permit Application* and 10–404A *Backcountry/Wilderness Use Permit Hangtag* are used to provide access into NPS backcountry areas, including areas that require a reservation to enter where use limits are imposed in accordance with other NPS regulations.

In response to a public comment on the 60-day **Federal Register** Notice, we

are seeking approval for a new form, 10–404AK *Alaska Backcountry/Wilderness Use Permit Application* specifically for National Park Service units in Alaska (*i.e.,* Denali National Park and Preserve and Glacier Bay National Park and Preserve). This form does not request any new information not already approved by OMB for collection in Form 10–404. It serves to clarify the legal authorities governing permitted activities only allowable within Alaskan park units, removes permit application fees which are not collected in these parks, and includes additional permitted methods of travel as regulated by ANILCA Section 1110(a).

Title of Collection: Backcountry/Wilderness Use Permit, 36 CFR 1.5, 1.6, and 2.10.

OMB Control Number: 1024–0022.

Form Number: NPS Forms 10–404 *Backcountry/Wilderness Use Permit Application,* 10–404A *Backcountry/Wilderness Use Permit Hangtag,* and 10–404AK Alaska Backcountry/Wilderness Use Permit Application.

Type of Review: Revision of a currently approved collection.

Respondents/Affected Public: Individuals, private sector, and state, local, or tribal government entities applying to use backcountry and wilderness areas within units of the national park system.

Total Estimated Number of Annual Responses: 351,121.

Estimated Completion Time per Response: Varies from 5 minutes to 8 minutes depending on activity.

Total Estimated Number of Annual Burden Hours: 39,116.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: None.

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

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Phadrea Ponds,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2020–16654 Filed 7–30–20; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NCR–NAMA–NPS0028997; PPNCNAMAN70, PPMPSPD1Z.YM00000 (200); OMB Control Number 1024–0021]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; National Capital Area Application for Public Gathering

AGENCY: National Park Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, we, the National Park Service (NPS) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before August 31, 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 30-day Review—Open for Public Comments'' or by using the search function. Please provide a copy of your comments to Phadrea Ponds, NPS Information Collection Clearance Officer, 1201 Oakridge Drive Fort Collins, CO 80525; or by email at *phadrea_ponds@nps.gov.* Please reference OMB Control Number 1024–0021 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR contact Martin Torres, Senior Policy Advisor National Capital Area by email at *martin_torres@nps.gov;* or by telephone at 202–245–4715. Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the PRA 44 U.S.C. 3501 *et seq.* and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on March 12, 2020 (85 FR 14502). No public comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the NPS, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the NPS minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: The Division of Permits Management of the National Mall and Memorial Parks is authorized by regulations codified in 36 CFR 7.96(g) to issue permits for public gatherings, including special events and demonstrations, held on NPS property within the National Capital Area. The regulations reflect the special demands on many urban National Capital Area parks used as sites for demonstrations and special events. A special event is defined as any presentation, program, or display that is recreational, entertaining, or celebratory in nature (*e.g.,* sports events, pageants, celebrations, historical reenactments, regattas, entertainments, exhibitions, parades, fairs, festivals and similar events). The term

''demonstration'' includes demonstrations, picketing, speechmaking, marching, holding vigils or religious services and all other like forms of conduct that involve the communication or expression of views or grievances. We use information from NPS Form 10–941 to determine:

- Identity of the person(s) or organization(s) requesting authorization to conduct a demonstration or special event, and to determine whether the applicant(s) meets statutory requirements to conduct the activity.
- Nature of the proposed activity and whether there is statutory authority to grant permission to engage in it.
- Whether the proposed activity is in derogation from park values or purposes.
- Relationship between the proposed activity and the primary purpose(s) for which the park area was established and relevant park planning documents.
- Whether there is a legitimate NPS need or interest in the proposed activity.
- Whether the proposed activity would require a commitment of public resources or facilities, whether such commitments are legitimate and appropriate, and whether they are available.
- Long-term or short-term adverse effects caused by the proposed activity on park resources, facilities, or programs.
- Need for attaching special conditions or mitigating measures to the permit, if issued.
- Total cost to the park of monitoring proposed activity.
- Whether a waiver of numerical limitations on the White House sidewalk and/or Lafayette Park should be granted.
- Law enforcement resources needed to assure public safety and site security, especially at the White House, during the activity.

Depending on the size and complexity of the proposed activity, we may require applicants to submit supporting documents such as:

- *Site Plan:* A complete site plan must be submitted if tents, stages, or any other type of structure are to be placed on parkland.
- *Sign Plan:* The plan will provide the overall size, number, and design of any signs or banners.
- *Risk Management Plan:* For events with significant equipment use during set-up and tear-down.
- *Administrative Documents:* We may require applicants submit a portable toilet contract, evidence of liability insurance coverage, IRS W–9 form, or an electronic funds transfer form.

Title of Collection: National Capital Area Application for Public Gathering, 36 CFR 7.96(g).

OMB Control Number: 1024–0021.

Form Number: NPS Form 10–941, ''Application for a Permit to Conduct a Demonstration or Special Event in Park Areas''.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Individuals, organizations, businesses, and State, local, or tribal governments.

Total Estimated Number of Annual Respondents: 1,885.

Total Estimated Number of Annual Responses: 6,267.

Estimated Completion Time per Response: Varies from 0.5 hours to 1.5 hours, depending on activity.

Total Estimated Number of Annual Burden Hours: 5,221.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Non-hour Burden Cost: The estimated annual non-hour burden cost associated with this information collection is $105,840 ($120 × 882 applicants). A $120.00 application fee is submitted to recover the cost of processing the request. There is no application fee for permits to cover first amendment activities. Of the 1,209 (private and individual) applications received annually, approximately 68% (n=882) are for special events.

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

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Phadrea Ponds,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2020–16658 Filed 7–30–20; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR01313000, 18XR0680A1, RX.00036916.5002000]

Notice of Availability of the Draft Environmental Impact Statement and Public Open Houses for the Boise River Basin Feasibility Study, Elmore County, Idaho

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of availability.

SUMMARY: The Bureau of Reclamation (Reclamation) has made available for public review and comment the Boise River Basin Feasibility Study Draft Environmental Impact Statement (EIS). The Draft EIS describes the potential environmental effects of a dam raise at Anderson Ranch Dam.

DATES: Reclamation will be conducting virtual public involvement beginning in August 2020 with written comments on the Draft EIS due on or before September 14, 2020. The public will have the opportunity to participate in the process by providing input through a web-based virtual meeting room from July 31, 2020, to September 14, 2020.

ADDRESSES: Provide written comments, requests to be added to the mailing list, or requests for sign language interpretation for the hearing impaired or other special assistance needs to Ms. Selena Moore, Project Manager, Bureau of Reclamation, Snake River Area Office, 230 Collins Road, Boise, Idaho 83702 or via email to *BOR-SRA-BoiFeasibility@usbr.gov.* For comments related to project activities that must be authorized by the U.S. Forest Service, be sure to write ''ATTN: Tawnya Brummett'' to the previously provided address if providing a comment through the mail. If sending an email comment, include ''ATTN: Tawnya Brummett'' in the subject line.

FOR FURTHER INFORMATION CONTACT: Ms. Selena Moore, Bureau of Reclamation, Snake River Area Office, 230 Collins Road, Boise, Idaho 83702; telephone (208) 383–2207; facsimile (208) 383–2210; email *BOR-SRA-BoiFeasibility@usbr.gov.* Persons who use a telecommunications device for the deaf may call the Federal Relay Service (FedRelay) at 1–800–877–8339 TTY/ASCII to contact the above individual during normal business hours or to leave a message or question after hours. You will receive a reply during normal business hours. Information on this project may also be found at: *https://www.usbr.gov/pn/studies/boisefeasibility/index.html.*

SUPPLEMENTARY INFORMATION: Reclamation is issuing this notice pursuant to the National Environmental Policy Act of 1969, as amended (NEPA), 42 U.S.C. 4321 *et seq.;* the Council on Environmental Quality's regulations for implementing NEPA, 43 CFR parts 1500 through 1508; U.S. Forest Service (USFS) NEPA regulations, 36 CFR part 220; USFS pre-decisional review regulations, 36 CFR part 218; and the Department of the Interior's NEPA regulations, 43 CFR part 46.

Background

Under the Omnibus Public Land Management Act of 2009 (Omnibus Act), Public Law 111–11, Section 9001, Congress authorized Reclamation to conduct feasibility studies on projects that address water shortages within the Boise River Basin System and that are considered appropriate for study by Reclamation's 2006 Boise/Payette Water Storage Assessment Report (2006

Assessment Report). The action proposed was identified in the 2006 Assessment Report as appropriate for study and is the subject of an ongoing feasibility study pursuant to the Omnibus Act and the Water Infrastructure Improvements for the Nation (WIIN) Act of 2016. The WIIN Act authorizes Reclamation to enter into agreements with requesting states or subdivisions thereof to design, study, construct, or expand federally owned storage projects, and Congress has specified that this project be studied under WIIN Act authority. Public Law 114–322, Section 4007.

The Draft EIS analyzes three alternatives. Alternative A is the No Action. Alternative B is a 6-foot Dam Raise at Anderson Ranch Dam. Alternative C is a 3-foot Dam Raise at Anderson Ranch Dam. Reclamation, in partnership with the Idaho Water Resource Board (IWRB), proposes to raise Anderson Ranch Dam allowing the ability to capture and store additional water. This new space would allow Reclamation to capture additional water when available during wet years for supplemental supply and to hold over for use during dry years. Potential spaceholders include existing Reclamation contractors and the IWRB, which could in turn contract water to existing Water District 63 water users and/or may offer water through the Idaho water supply bank's Water District 63 rental pool.

Proposed dam structure modifications include:

- Demolish existing spillway crest structure and bridge;
- Construct new crest structure;
- Remove, rehabilitate, and re-install the existing radial gates;
- Construct a new two-lane road across the dam; and
- Widen right abutment to improve turning radius for traffic.

The existing road across the dam would be closed during construction. An alternative route has been identified that would provide safe public transport. There would likely be a reservoir restriction of 6–10 feet during spillway construction.

In addition to work on the dam, the project would include modification to structures around the reservoir such as culverts, bridges, and recreation sites.

Reclamation is not presently aware of any known or possible Indian Trust Assets or environmental justice issues associated with the proposed action but requests any information relative to this issue be submitted during the comment period.

The Draft EIS review process and public open houses identified in this notice are intended to inform the public about the project and to request public and agency comment on the EIS.

The USFS is a cooperating agency. Cooperating agencies have jurisdiction by law or special expertise with respect to resources potentially affected by the proposal and participate in the NEPA analysis. The USFS provided input into the analyses, conclusions, and recommendations presented in the Draft EIS. Following issuance of the Final EIS, the USFS will issue a subsequent decision for the Project in accordance with Forest Service regulatory requirements.

The USFS would also use this Draft EIS to evaluate proposed actions and determine compliance with the 2010 Boise National Forest Land and Resources Plan that would make provisions for the project activities.

Public Disclosure

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may 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.

Lorri J. Gray,

Regional Director, Bureau of Reclamation, Interior Region 9—Columbia-Pacific Northwest.

[FR Doc. 2020–16512 Filed 7–30–20; 8:45 am]

BILLING CODE 4332–90–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1174]

Certain Toner Cartridges, Components Thereof, and Systems Containing Same; Notice of Request for Submissions on the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that on July 23, 2020, the presiding administrative law judge (''ALJ'') issued an Initial Determination on Violation of Section 337. The ALJ also issued a Recommended Determination on remedy and bonding should a violation be found in the above-captioned investigation. The Commission is soliciting submissions on public interest issues raised by the recommended relief should the Commission find a violation. This notice is soliciting comments from the public only. Parties are to file public interest submissions pursuant to 19 CFR 210.50(a)(4).

FOR FURTHER INFORMATION CONTACT: Panyin A. Hughes, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3042. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: Section 337 of the Tariff Act of 1930 provides that, if the Commission finds a violation, it shall exclude the articles concerned from the United States:

> unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

19 U.S.C. 1337(d)(1). A similar provision applies to cease and desist orders. 19 U.S.C. 1337(f)(1).

The Commission is soliciting submissions on public interest issues raised by the recommended relief should the Commission find a violation, specifically: (1) A general exclusion order directed to certain toner cartridges, components thereof, and systems containing same, or in the alternative, (2) a limited exclusion order directed to the same products imported, sold for importation, and/or sold after importation by respondents Aster Graphics, Inc. (''Aster''), An An Beauty Limited, AMI Brothers, Inc. (''AMI''), Aztech Enterprises Limited, Billiontree Technology USA Inc. (''Billiontree''), Carlos Imaging Supplies, Inc. (''Carlos Imaging), Do It Wiser, LLC (''Do It Wiser''), Eco Imaging Inc. (''Eco Imaging''), Ecoolmart Co. (''Ecoolmart''), Globest Trading Inc. (''Globest''), Greencycle Tech, Inc. (''Greencycle''), Hongkong Boze Co., Ltd. (''Hongkong Boze''), I8 International Inc. (''I8''), Ikong E-Commerce (''Ikong''), Intercon International Corp. (''Intercon''), IPrint Enterprises Limited (''IPrint''), LD

Products, Inc. (''LD Products''), Mangoket LLC (''Mangoket''), Smartjet E-Commerce Co., LLC (''Smartjet''), Solong E-Commerce Co., LLC (''Solong''), Super Warehouse Inc. (''Super Warehouse''), and Zhuhai Xiaohui E-Commerce Co., Ltd. (''Xiaohui''); and (3) cease and desist orders directed to Aster, AMI, Billiontree, Carlos Imaging, Do It Wiser, Eco Imaging, Ecoolmart, Globest, Greencycle, Hongkong Boze, I8, Ikong, Intercon, IPrint, LD Products, Mangoket, Smartjet, Solong, Super Warehouse, and Xiaohui.

The Commission is interested in further development of the record on the public interest in this investigation. Accordingly, members of the public are invited to file submissions of no more than five (5) pages, inclusive of attachments, concerning the public interest in light of the ALJ's Recommended Determination on Remedy and Bonding issued in this investigation on July 23, 2020. Comments should address whether issuance of the recommended remedial orders in this investigation, should the Commission find a violation, would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) explain how the articles potentially subject to the recommended remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the recommended orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third-party suppliers have the capacity to replace the volume of articles potentially subject to the recommended orders within a commercially reasonable time; and

(v) explain how the recommended orders would impact consumers in the United States.

Written submissions must be filed no later than by close of business on August 18, 2020.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number (''Inv. No. 337–TA–1174'') in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: July 28, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–16662 Filed 7–30–20; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Undersea Technology Innovation Consortium

Notice is hereby given that, on July 13, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Undersea Technology Innovation Consortium (''UTIC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ARMADA Marine Robotics, Falmouth, MA; Autonomous Surface Vehicles, LLC, Broussard, LA; Aviation & Missile Solutions, Huntsville, AL; Boston Fusion Corp., Lexington, MA; Constellation Software Engineering, Corp., dBA CS Engineering, Annapolis, MD; Critical Frequency Design, Melbourne, FL; Curtiss-Wright Electro-Mechanical Corporation, Bethlehem, PA; Deloitte Consulting LLP, Arlington, VA; Design Interactive, Orlando, FL; Hybrid Design Services, Inc., Troy, MI; I-Assure, LLC, Mandeville, LA; Intellisense Systems, Inc., Torrance, CA; Kenautics, Inc., Encinitas, CA; Kord Technologies, LLC, Huntsville, AL; Long Wave Inc., Oklahoma City, OK; NetApp US Public Sector, Inc., Vienna, VA; Omni Federal, Gainesville, VA; Opal Soft, Inc., Sunnyvale, CA; Palantir USG, Inc., Palo Alto, CA; Peraton Inc., Herndon, VA; Polaris Alpha Advanced Systems, Fredericksburg, VA; Problem Solutions, LLC, Johnstown, PA; Probus Test Systems Inc., Lincroft, NJ; QuickFlex Inc., San Antonio, TX; R2C Support Services, Huntsville, AL; Saltenna, LLC, McClean, VA; Savant Financial Technologies Inc., dba Ariel Partners, New York, NY; Sedna Digital Solutions, LLC, Manassas, VA; SimVentions, Inc., Fredericksburg, VA; SRI International, Menlo Park, CA; Terradepth, Inc., Austin, TX; Tridentis, LLC, Alexandria, VA; Voltaiq, Inc., Berkeley, CA; W.S. Darley and Company, Itasca, IL; and WPI Services, LLC DBA Systecon North America, Juno Beach, FL have been added as parties to this venture.

Also, Platron Manufacturing, Pflugerville, TX has withdrawn as a party from this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and UTIC intends to file additional written notifications disclosing all changes in membership.

On October 9, 2018, UTIC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 2, 2018 (83 FR 55203).

The last notification was filed with the Department on April 22, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on May 6, 2020 (85 FR 26989).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–16638 Filed 7–30–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—DVD Copy Control Association

Notice is hereby given that, on July 10, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), DVD Copy Control Association (''DVD CCA'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, I–O Data Device, Inc., Ishikawa, JAPAN; Fluendo SA, Barcelona, SPAIN; and Willete Acquisition Corp dba Allied Vaughn, Aurora, IL, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and DVD CCA intends to file additional written notifications disclosing all changes in membership.

On April 11, 2001, DVD CCA filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on August 3, 2001 (66 FR 40727).

The last notification was filed with the Department on May 27, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on June 8, 2020 (85 FR 34765).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–16660 Filed 7–30–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—National Armaments Consortium

Notice is hereby given that, on July 14, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), National Armaments Consortium (''NAC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Adsys Controls, Inc., Irvine, CA; Aerobotix, Inc., Madison, AL; Affordable Engineering Services, Inc., San Diego, CA; American Rheinmetall Vehicles, LLC, Sterling Heights, MI; Amherst Systems, Inc., Buffalo, NY; Analyst Warehouse, LLC, Hanover, MD; Applied Systems Engineering, Inc., Niceville, FL; Ball Aerospace & Technologies, Corp., Boulder, CO; Caelum Innovations, LLC, Raleigh, NC; Casey Corp Defense, LLC, Stillwater, OK; Cherokee Engineering Services, LLC, Los Lunas, NM; Cutting Edge Machining Solutions, Inc., Drifting, PA; Data Intelligence Technology, Inc., Washington, DC; Davis Strategic Innovations, Inc., Huntsville, AL; DigiFlight Incorporated, Columbia, MD; Diversified Technologies, Inc., Bedford, MA; E&G Associates, Inc., Chattanooga, TN; Exyn Technologies, Inc., Philadelphia, PA; Firefly Photonics, Coralville, IA; Gray Analytics, Huntsville, AL; Harkind Dynamics, LLC, Denver, CO; Innovative Microwave Devices, LLC, Lutherville Timonium, MD; JM Carriere Enterprises, LLC, Sanbornville, NH; KODA Technologies, Inc., Madison, AL; Kopis Mobile, Flowood, MS; Kratos Space and Missile Defense Systems, Glen Burnie, MD; LSINC Corporation, Huntsville, AL; Microwave Applications Group, Santa Maria, CA; MilDef, Inc., Brea, CA; Mobile Frontiers, LLC, Vienna, VA; MSI Defense Solutions, LLC, Mooresville, NC; Nahsai, LLC, Houston, TX; NAVSYS Corporation, Colorado Springs, CO; Orolia Government Systems, Inc., Rochester, NY; Presagis USA, Inc., Orlando, FL; RIX Industries, Benicia, CA; Spark Insights, LLC, Tampa, FL; Tech Wizards, Inc., Newburg, MD; The Intelligence & Security Academy, LLC, (ISA), Arlington, VA; TMD Defense and Space, LLC, El Paso, TX; Trident World Systems, Inc., Madison, AL; University of Arizona Applied Research Corporation, Tucson, AZ; and Zmicro, San Diego, CA, have been added as parties to this venture.

Also, Advanced Technology and Research Corporation, Columbia, MD; Alakai Defense Systems, Inc., Largo, FL; Cincinnati Automation & Mechatronics, LLC, Beavercreek, OH; Elbit Systems of America-Night Vision, Roanoke, VA; Equinox Corporation, New York, NY; Eutectix, LLC, Troy, MI; Fairlead Integrated, LLC, Portsmouth, VA; Global Tungsten and Powders Corporation, Towanda, PA; Hydroid, Inc., Pocasset, MA; JM Carriere Enterprises, LLC, Sanbornville, NH; New Horizons Foundation, Hobbs, NM; nMeta, LLC, New Orleans, LA; Optical Coating Laboratory, LLC, aka Viavi Solutions, Santa Rosa, CA; Plus Designs, Inc., Haveford, PA; Redstone Aerospace Corporation, Longmont, CO; River Front Services, Incorporated, Chantilly, VA; Solid Innovations, LLC, East Stroudsburg, PA; Space Vector Corporation, Chatsworth, CA; and Virtual Sandtable, LLC, (vST), Las Vegas, NV, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and NAC intends to file additional written notifications disclosing all changes in membership.

On May 2, 2000, NAC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 30, 2000 (65 FR 40693).

The last notification was filed with the Department on April 15, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on May 5, 2020 (85 FR 26712).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–16661 Filed 7–30–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—National Spectrum Consortium

Notice is hereby given that, on July 13, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), National Spectrum Consortium (''NSC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Ciena Government Solutions, Inc., Hanover, MD; NetScout Systems, Inc. Westford, MA; Device Solutions Inc., Hillsborough, NC; Rodriguez, Jonathan, La Habra, CA; Wind River Systems, Alameda, CA; Science Applications International Corporation (SAIC), Reston, VA; Dualos, LLC, Tacoma, WA; Federal Data Systems LLC (FEDDATA), Columbia, MD; MicroHealth, LLC, Vienna, VA; Textron Systems Corporation, Hunt Valley, MD; NVIDIA Corporation, Santa Clara, CA; Spirent Communications, Inc., San Jose, CA; BANC3, Inc., Princeton, NJ; Wyle Laboratories, Inc., Huntsville, AL; Aqsacom Incorporated, Irving, TX; Mimyr, LLC, Torrance, CA; Trex Enterprises Corporation, San Diego, CA; Waterleaf International LLC, Fort Myers, FL; Axellio Inc., Colorado Springs, CO; Rakuten USA, Inc., San Mateo, CA; Bear Systems, Boulder, CO; Cybernet Systems Corporation, Anna Arbor, MI; IT Consulting Partners, LLC (ITC), Chagrin Falls, OH; Novaa Ltd., Dublin, OH; Sabre Systems, Inc., Warrington, PA; Tilson Technology Management Inc., Portland, ME; TLC Solutions, Inc., Saint Augustine, FL; ComSovereign Corp., Tucson, AZ; University at Albany, Albany, NY; Vectrona, LLC, Virginia Beach, VA; Celona Inc., Cupertino, CA; Tribalco, LLC, Bethesda, MD; Accenture Federal Services LLC, Arlington, VA; CGI Federal Inc., Fairfax, VA; Garou Inc., New York, NY; Innovative Power LLC, Sterling, VA; Pinnacle Solutions, Inc., Huntsville, AL; Rajant Corporation Malvern, PA; Resonant Sciences LLC, Dayton, OH; Hewlett Packard Enterprise Company (HP), Reston, VA; Arizona State University Tempe, AZ; General Dynamics Information Technology, Inc., Falls Church, VA; Mobilestack Inc, Dublin, CA; Opex Systems LLC, Marietta, GA; Ravenswood Solutions, Fremont, CA; Trabus Technologies, Inc., San Diego, CA; AT&T Government Solutions, Inc., Oakton, VA, Cole Engineering Services, Inc. (CESI), Orlando, FL; JANUS Research Group, LLC, Evans, GA; Microsoft Corporation, Redmond, WA; Nexagen Networks Inc., Morganville, NJ; Palo Alto, Networks Public Sector, LLC, Reston, VA; Pn Automation, Inc., Halethorpe, MD; RDA Technical Services (Robert Doto Associates, LLC), Ft. Myers, FL; Southern Methodist University Dallas, TX; Undergrid Networks, Inc., Atlanta GA; and SecureG, Inc., Herndon, VA have been added as parties to this venture.

Ciyis LLC, Atlanta, GA; Infinite Dimensions Integration, Inc., West Plains, MO; Spectronn, Holmdel, NJ; Genesys Technologies, Ltd., Langhorne, PA; Oceanit Laboratories, Inc., Honolulu, HI; The University of Chicago, Chicago, IL; SAZE Technologies, LLC, Silver Spring, MD; C–3 Comm Systems, LLC, Arlington, VA; D–TA Systems Corporation, Centennial, CO; DataSoft Corporation, Tempe, AZ; Fregata Systems LLC, St. Louis, MO; Quantum Dimension, Inc., Huntington Beach, CA; Innovation Finance Group, Bethesda, MD; General Dynamics SATCOM Technologies, Inc., State College, PA; C6I Services Corp., Chesterfield, NJ; Comtech EF Data, Tempe, AZ; SCI Technology, Inc., Huntsville, AL; Applied Engineering Concepts, Inc., Eldersburg, MD; Armaments Research Company, Inc., Bethesda, MD; Raven Defense Corporation, Albuquerque, NM; and Solvaren, LLC, Wall, NJ, have been added as parties to this venture.

Also, Expedition Technology, Inc., Dulles, VA; Telspan Data, LLC, Concord, CA; and Red Balloon Security, Inc., New York, NY, have withdrawn as parties from this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and NSC intends to file additional written notifications disclosing all changes in membership.

On September 23, 2014, NSC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 4, 2014 (72 FR 65424).

The last notification was filed with the Department on April 22, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on May 6, 2020 (85 FR 26988).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–16650 Filed 7–30–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Telemanagement Forum

Notice is hereby given that, on July 21, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), TM Forum, A New Jersey Non-Profit Corporation (''The Forum'') filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, the following entities have become members of the Forum: Sedicii Innovations Limited, Carriganore, IRELAND; Istanbul University Informatics Department, Istanbul, TURKEY; Université de Paris, Paris, FRANCE; Devapo Sp. z o. o., Warsaw, POLAND; Glasfaser NordWest GmbH & Co .KG, Oldenburg, GERMANY; Honne Services, Monterrey, MEXICO; Akademia Górniczo Hutnicza, Kraków, POLAND; Institute for Problems in Mechanics of the Russian Academy of Sciences, Moscow, RUSSIA; Ladoke Akintola University of Technology, Oyo State Nigera, NIGERIA; Mageda, Sao Paulo, BRAZIL; SENAC, Sao Paulo, BRAZIL; GuoChuang Cloud Technology Co., Ltd., Hefei, PEOPLES' REPUBLIC OF CHINA; OSSEra, Sacramento, CA; ETI Software Solutions, Norcross, GA; LotusFlare, Santa Clara, CA; National Broadband Ireland, Dublin, IRELAND; Pak Telecom Mobile Limited, Islamabad, PAKISTAN; PT Telkomunikasi Indonesia, Bandung, INDONESIA; Sparkle, Rome, ITALY; Turknet, Istanbul, TURKEY; Dhivehi Raajjeyge Gulhun Plc, Male, MALDIVES; Kyivstar JSC, Kyiv, UKRAINE.

Also, the following members have changed their names: Altech ISIS, a Division of Altech Information Technologies (Pty) Limited to Bytes Systems Integration a division of Altron TMT (Pty) Ltd, Cape Town, SOUTH

AFRICA; CSG International to CSG, Greenwood Village, CO; JSC ALFASATCOM to ALFASATCOM JSC, Moscow, RUSSIA; PJSC Rostelecom to Rostelecom PJSC, Moscow, RUSSIA; Fair Isaac Corporation to FICO, San Diego, CA.

In addition, the following parties have withdrawn as parties to this venture: Abdatis, Regina, CANADA; AN10, Chevy Chase, MD; Arago, New York, NY; C–DOT, Bangalore, INDIA; Clarebourne Consultancy Ltd, Bristol, UNITED KINGDOM; EC4U Expert Consulting AG, Karlsruhe, GERMANY; Fluxicon, Eindhoven, NETHERLANDS; Hansen Technologies Denmark A/S, Sonderborg, DENMARK; iD Mobile, London, UNITED KINGDOM; InfoVista, Ashburn, VA; Internexa, S.A., Bogotá, COLOMBIA; J. Rosen Consulting KG, Vienna, AUSTRIA; Jamii Telecommunications Ltd, Nairobi, KENYA; KBZ Gateway SI Company Limited, Yangon, MYANMAR; KPMG.com.au, Sydney, AUSTRALIA; New Zealand Government, Wellington, NEW ZEALAND; Nice Cote d'Azur Metropolis, Nice, FRANCE; Nuevatel PCS de Bolivia, La Paz, BOLIVIA; Pole Star, London, UNITED KINGDOM; Safe Data Matters, Cork, IRELAND; Somos, Herndon, VA; TIMWETECH, Lisbon, PORTUGAL; Town of Austin, Austin, CANADA; Unlimit IoT Private Ltd., Mumbai, INDIA; Valo Networks, Calgary, CANADA.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open and The Forum intends to file additional written notifications disclosing all changes in membership.

On October 21, 1988, The Forum filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on December 8, 1988 (53 FR 49615).

The last notification was filed with the Department on May 20, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on June 18, 2020 (85 FR 36879).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–16665 Filed 7–30–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Naval Surface Technology & Innovation Consortium

Notice is hereby given that, on July 7, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Naval Surface Technology & Innovation Consortium (''NSTIC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Adaptive Intelligence (AI) Corporation, Hillsboro, OR; Applied Research Institute, Inc. d/b/a Indiana Innovation Institute, Indianapolis, IN; Assurity Group, LLC, Tampa, FL; Ayon Cybersecurity, Inc. dba VDC, Cocoa, FL; BAE Systems Land & Armaments L.P., Minneapolis, MN; BML Tool & Mfg. Corp., Monroe, CT; CineMassive Displays, LLC. dba CineMassive, Atlanta, GA; COLSA Corporation, Huntsville, AL; Commonwealth Computer Research, Inc., Charlottesville, VA; Creative Microsystems Corporation, Waitsfield, VT; Cubic Defense Applications, Inc., San Diego, CA; CUBRC, Inc., Buffalo, VA; Curtiss-Wright Defense Solutions, Ashburn, VA; DCS Corporation, Alexandria, VA; DroneShield LLC, Warrenton, VA; DRS Power Technology, Inc., Fitchburg, MA; Engin LLC, Charleston, SC; Equinox Corporation, New York, NY; Excella, Incorporated, Arlington, VA; Firefly Photonics, Coralville, IA; Geodesicx, Inc., Chesapeake, VA; Global Circuit Innovations, Colorado Springs, CO; Harkind Dynamics, LLC, Denver, CO; I-Assure, LLC, Mandeville, LA; KNC Strategic Services, Oceanside, CA; Kratos Space & Missile Defense Systems, Inc., Glen Burnie, MD; L3 Harris-CSW (Communication Systems West), Salt Lake City, UT; Maritime Arresting Technologies LLC, Tarpon Springs, FL; MicroHealth LLC, Vienna, VA; Mimyr, LLC., Torrance, CA; National Instruments Corporation, Austin, TX; On-Point Defense Technologies, LLC, Fort Walton Beach, FL; QorTek, Inc., Linden, PA; Radiant Logic Inc., Novato, CA; Rafael Systems Global Sustainment (RSGS), Bethesda, MD; Redhorse Corp, San Diego, CA; Rockwell Collins, Cedar Rapids, IA; Saab Defense and Security USA LLC, East Syraucse, NY; Sierra Nevada Corporation, Sparks, NV; Silicon Forest Electronics, Vancouver, WA; Systems and Proposal Engineering Company dba SPEC Innovations, Manassas, VA; Tableau Software, LLC, Seattle, WA; Tech Wizards Inc., Newburg, MD; Technovative Applications, Brea, CA; The University of Central Florida Board of Trustees (UCF), Orlando, FL; TimkenSteel Corporation, Canton, OH; Tkelvin Corp, Henderson, NV; TLC Solutions, Inc., Saint Augustine, FL; Tomahawk Robotics, Inc., Melbourne, FL; Victory Solutions, Inc., Huntsville, AL, have been added as parties to this venture and the members of the National Armaments Consortium (NAC), whose last filing can be found at (85 FR 26712).

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and NSTIC intends to file additional written notifications disclosing all changes in membership.

On October 8, 2019, NSTIC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 12, 2019 (84 FR 61071).

The last notification was filed with the Department on April 7, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on May 5, 2020 (85 FR 26712).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–16635 Filed 7–30–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Petroleum Environmental Research Forum

Notice is hereby given that, on July 08, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Petroleum Environmental Research Forum (''PERF'') has filed written notifications simultaneously the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the

purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Jacobs Engineering Group Inc., 1999 Bryan Street, Suite 1200, Dallas, Texas 75201, USA has become a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and PERF intends to file additional written notifications disclosing all changes in membership.

On February 10, 1986, PERF filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 14, 1986 (51 FR 8903).

The last notification was filed with the Department on May 13, 2020. A notice was published in the **Federal Register** pursuant to Section 6(h) of the Act on June 8, 2020 (85 FR 34764).

Suzanne Morris,

Chief, Premerger and Division Statistics Unit, Antitrust Division.

[FR Doc. 2020–16664 Filed 7–30–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to The National Cooperative Research and Production Act of 1993—Vehicle to Infrastructure Consortium

Notice is hereby given that, on July 13, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Vehicle to Infrastructure Consortium (''V2I Consortium'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Mazda Motor of America, Inc., Irvine CA; Fuji Heavy Industries USA, Inc., Subaru, Cherry Hill NJ; and Volvo Group North America, Costa Mesa CA have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and V21 intends to file additional written notifications disclosing all changes in membership.

On December 3, 2014, V21 filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on December 31, 2014 (79 FR 78908).

The last notification was filed with the Department on June 28, 2017. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on July 31, 2017 (82 FR 35546).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2020–16647 Filed 7–30–20; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (OJP) Docket No. 1783]

Notice of Charter Renewal of the Global Justice Information Sharing Initiative Advisory Committee (GAC)

AGENCY: Global Justice Information Sharing Initiative Advisory Committee (GAC).

ACTION: Notice of charter renewal.

SUMMARY: Notice that the charter of the Global Justice Information Sharing Initiative Advisory Committee (GAC) has been renewed.

FOR FURTHER INFORMATION CONTACT: Visit the website for the Advisory Committee at *https://it.ojp.gov/global/* or contact Tracey Trautman, Designated Federal Official (DFO), BJA, by telephone at (202) 305–1491 (not a toll-free number) or via email: *tracey.trautman@ojp.usdoj.gov.*

SUPPLEMENTARY INFORMATION: This **Federal Register** notice notifies the public that the Charter of the Global Justice Information Sharing Initiative Advisory Committee (GAC) has been renewed in accordance with the Federal Advisory Committee Act, Section 14(a)(1). The renewal Charter was signed by U.S. Attorney General William P. Barr on July 7, 2020. One can obtain a copy of the renewal Charter by accessing the Global Justice Information Sharing Initiative Advisory Committee (GAC)'s website at *https://it.ojp.gov/global.*

Michael Costigan,

Acting Director, Bureau of Justice Assistance, Office of Justice Programs.

[FR Doc. 2020–16596 Filed 7–30–20; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Administrator of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing provided such request is filed in writing with the Administrator, Office of Trade Adjustment Assistance, at the address shown below, no later than August 10, 2020.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Administrator, Office of Trade Adjustment Assistance, at the address shown below, not later than August 10, 2020.

The petitions filed in this case are available for inspection at the Office of the Administrator, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue NW, Washington, DC 20210.

Signed at Washington, DC, this 9th day of July 2020.

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

Appendix

77 TAA PETITIONS INSTITUTED BETWEEN 6/1/20 AND 6/30/20

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
95949	American Woodmark Corporation (State/One-Stop)	Gas City, IN	06/01/20	05/29/20
95950	Kountry Wood Products (State/One-Stop)	Nappanee, IN	06/01/20	05/29/20
95951	MasterBrand Cabinets, Inc. (State/One-Stop)	Jasper, IN	06/01/20	05/29/20
95952	MasterBrand Cabinets, Inc. (State/One-Stop)	Grants Pass, OR	06/01/20	05/29/20
95953	Nokia of America Corporation (State/One-Stop)	Naperville, IL	06/01/20	05/29/20
95954	ClosetMaid (Company)	Belle Vernon, PA	06/02/20	05/28/20
95955	Gerdau Ameristeel US Inc. (State/One-Stop)	Saint Paul, MN	06/02/20	06/01/20
95956	Halliburton Energy Services (Workers)	Duncan, OK	06/02/20	05/28/20
95957	Woodcraft Industries, Inc. (State/One-Stop)	Foreston, MN	06/02/20	06/01/20
95958	Cambria Fabshop—Indianapolis LLC (State/One-Stop)	Greenfield, IN	06/04/20	06/03/20
95959	Masterbrand Cabinets, Inc. (State/One-Stop)	Cottonwood, MN	06/04/20	06/03/20
95960	Woodmont Cabinetry, Inc. (State/One-Stop)	Dallas, TX	06/04/20	06/03/20
95961	Allscripts Healthcare Solutions Inc. (State/One-Stop)	Broomfield, CO	06/05/20	05/04/20
95962	Bridgewood Cabinets (State/One-Stop)	Chanute, KS	06/05/20	06/04/20
95963	Donaldson (State/One-Stop)	Frankfort, IN	06/05/20	06/04/20
95964	Medallion (ACPI Wood Product, LLC, FKA Elkay Cabinetry) (State/One-Stop).	Waconia, MN	06/05/20	06/04/20
95965	United States Steel (Union)	Lorain, OH	06/05/20	06/03/20
95966	BT Americas (State/One-Stop)	Westminster, CO	06/08/20	06/04/20
95967	Manchester Tank (State/One-Stop)	Elkhart, IN	06/08/20	06/05/20
95968	MasterBrand Cabinets, Inc. (State/One-Stop)	Lynchburg, VA	06/08/20	06/05/20
95969	Piramal Glass USA, Inc. (State/One-Stop)	Park Hills, MO	06/08/20	06/05/20
95970	Pittsburgh Glass Works LLC (Union)	Evansville, IN	06/08/20	06/05/20
95971	WhiteFront Cafe, Grandma's Place LLC (Workers)	Barberton, OH	06/08/20	06/07/20
95972	Masco Cabinetry (State/One-Stop)	Mount Jackson, VA	06/09/20	06/08/20
95973	Dell Corporation (State/One-Stop)	Eden Prairie, MN	06/10/20	06/08/20
95974	Dura Supreme LLC (State/One-Stop)	Howard Lake, MN	06/10/20	06/08/20
95975	Kimberly Clark Corporation—Conway Facility (Workers)	Conway, AR	06/10/20	06/03/20
95976	Mednax Health Solutions (State/One-Stop)	Arlington, TX	06/10/20	06/09/20
95977	MSSC US, Inc—Hopkinsville Manufacturing Operations (State/One-Stop).	Hopkinsville, KY	06/10/20	06/09/20
95978	Agrati Inc. (State/One-Stop)	Valparaiso, IN	06/11/20	06/10/20
95979	Canyon Creek Cabinet Company (State/One-Stop)	Monroe, WA	06/11/20	06/10/20
95980	Tektronix Inc. (State/One-Stop)	Beaverton, OR	06/11/20	06/10/20
95981	Aludyne-New York (State/One-Stop)	Batavia, NY	06/12/20	06/11/20
95982	Gannett Publishing Services (State/One-Stop)	Indianapolis, IN	06/12/20	06/11/20
95983	HomeAdvisor (State/One-Stop)	Indianapolis, IN	06/12/20	06/11/20
95984	IBM (Workers)	Armonk, NY	06/12/20	06/11/20
95985	Liberty Oilfield Services (State/One-Stop)	Henderson, CO	06/12/20	06/11/20
95986	Flexsteel Industries (State/One-Stop)	Dubuque, IA	06/15/20	06/12/20
95987	MasterBrand Cabinets, Inc. (State/One-Stop)	Aurthur, IL	06/15/20	06/12/20
95988	Team Industries (Workers)	Andrews, NC	06/15/20	06/12/20
95989	Capgemini Inc. (Workers)	Burbank, CA	06/16/20	06/15/20
95990	Medallion Cabinetry (ACPI Wood Product, LLC) (State/One-Stop).	Culver, IN	06/16/20	06/15/20
95991	Lacava LLC (State/One-Stop)	Chicago, IL	06/17/20	06/12/20
95992	Nortech Graphics Inc. (State/One-Stop)	Lead Hill, AR	06/17/20	06/16/20
95993	PTC Alliance—Beaver Falls 1 (Union)	Beaver Falls, PA	06/17/20	06/16/20
95994	Seagate Technology (State/One-Stop)	Bloomington, MN	06/17/20	06/16/20
95995	Technicolor Home Entertainment Services Southeast, LLC (Company).	Huntsville, AL	06/17/20	06/16/20
95996	Georgica Pine Clothiers DBA J.McLaughlin (State/One-Stop)	Brooklyn, NY	06/18/20	06/17/20
95997	Panther Creek Mining (Workers)	Dawes, WV	06/18/20	06/17/20
95998	Sonova USA formerly Unitron US Inc. (State/One-Stop)	Plymouth, MN	06/18/20	06/17/20
95999	TouchSensor Technologies, LLC, a subsidiary of Methode Electronics (Workers).	Wheaton, IL	06/18/20	06/17/20
96000	IBM, Jones Lang LaSalle Incorporated (JLL), and Allied Universal Security S (State/One-Stop).	Rochester, NY	06/18/20	06/17/20
96001	Cabinetworks Group (Company)	Mount Union, PA	06/19/20	06/18/20
96002	The Homer Laughlin China Company (Union)	Newell, WV	06/19/20	06/19/20
96003	Thyssen Krupp Aerospace (State/One-Stop)	Hutchinson, KS	06/19/20	06/18/20
96004	Allianz Global Corporate and Specialty SE (State/One-Stop)	O'Fallon, MO	06/22/20	06/19/20
96005	Bank of New York Mellon (State/One-Stop)	Oriskany, NY	06/22/20	06/19/20
96006	Bed Bath & Beyond Inc. (State/One-Stop)	Layton, UT	06/22/20	06/19/20
96007	Nikki America Fuel Systems, LLC (Company)	Auburn, AL	06/22/20	06/19/20
96008	Meta Coaters (Union)	Ambridge, PA	06/23/20	04/22/20
96009	PCC Structurals, Inc. (State/One-Stop)	Portland, OR	06/23/20	06/22/20
96010	PCC Structurals SSBO (State/One-Stop)	Clackamas, OR	06/23/20	06/22/20
96011	Truck-Lite (Company)	Falconer, NY	06/23/20	05/28/20
96012A	TE Connectivity (Company)	Winston Salem, NC	06/24/20	06/23/20
96012	TE Connectivity (Company)	Greensboro, NC	06/24/20	06/23/20

77 TAA PETITIONS INSTITUTED BETWEEN 6/1/20 AND 6/30/20—Continued

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
96013	Pacific (State/One-Stop)	Cheriton, VA	06/26/20	06/25/20
96014	Bank of New York Mellon (State/One-Stop)	Oriskany, NY	06/29/20	06/26/20
96015	Conversant (State/One-Stop)	San Francisco, CA	06/29/20	06/26/20
96016	Daltile Corporation (Company)	Lewisport, KY	06/29/20	06/26/20
96017	FXI a subsidiary of FXI Holdings, Inc. (State/One-Stop)	Corry, PA	06/29/20	06/26/20
96018	Lee Hecht Harrison, LLC (Workers)	Maitland, FL	06/29/20	06/10/20
96019	Verso Corporation—Duluth Mill (State/One-Stop)	Duluth, MN	06/29/20	06/26/20
96020	Abbco Service Corporation (Company)	Evansville, IN	06/30/20	06/29/20
96021	Dayco Products, LLC (Company)	Roseville, MI	06/30/20	06/29/20
96022	Exacta Aerospace (State/One-Stop)	Wichita, KS	06/30/20	06/29/20
96023	Pratt & Larson Ceramics (State/One-Stop)	Portland, OR	06/30/20	06/29/20
96024	Winoa USA (State/One-Stop)	Bedford, VA	06/30/20	06/29/20

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DEPARTMENT OF LABOR

Employment and Training Administration

Post-Initial Determinations Regarding Eligiblity To Apply for Trade Adjustment Assistance

In accordance with Sections 223 and 284 (19 U.S.C. 2273 and 2395) of the Trade Act of 1974 (19 U.S.C. 2271, *et seq.*) (''Act''), as amended, the Department of Labor herein presents Notice of Affirmative Determinations Regarding Application for Reconsideration, summaries of Negative Determinations Regarding Applications for Reconsideration, summaries of Revised Certifications of Eligibility, summaries of Revised Determinations (after Affirmative Determination Regarding Application for Reconsideration), summaries of Negative Determinations (after Affirmative Determination Regarding Application for Reconsideration), summaries of Revised Determinations (on remand from the Court of International Trade), and summaries of Negative Determinations (on remand from the Court of International Trade) regarding eligibility to apply for trade adjustment assistance under Chapter 2 of the Act (''TAA'') for workers by (TA–W) number issued during the period of *June 1, 2020 through June 30, 2020.* Post-initial determinations are issued after a petition has been certified or denied. A post-initial determination may revise a certification, or modify or affirm a negative determination.

Affirmative Determinations Regarding Applications for Reconsideration

The following Applications for Reconsideration have been received and granted. See 29 CFR 90.18(d). The group of workers or other persons showing an interest in the proceedings may provide written submissions to show why the determination under reconsideration should or should not be modified. The submissions must be sent no later than ten days after publication in **Federal Register** to the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue NW, Washington, DC 20210. See 29 CFR 90.18(f).

TA–W No.	Subject firm	Location
95,355	Morgantown Machine & Hydraulics of West Virginia	Morgantown, WV.

Notice of Revised Certifications of Eligibility

Revised certifications of eligibility have been issued with respect to cases where affirmative determinations and certificates of eligibility were issued initially, but a minor error was discovered after the certification was issued. The revised certifications are issued pursuant to the Secretary's authority under section 223 of the Act and 29 CFR 90.16. Revised Certifications of Eligibility are final determinations for purposes of judicial review pursuant to section 284 of the Act (19 U.S.C. 2395) and 29 CFR 90.19(a).

Revised Certifications of Eligibility

The following revised certifications of eligibility to apply for TAA have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination, and the reason(s) for the determination.

The following revisions have been issued.

TA–W No.	Subject firm	Location	Impact date	Reason(s)
93,585	Lufkin Industries LLC	Lufkin, TX	5/2/2017	Wages Reported Under Different FEIN Number.

I hereby certify that the aforementioned determinations were issued during the period of *June 1, 2020 through June 30, 2020.* These determinations are available on the Department's website *https://www.doleta.gov/tradeact/petitioners/taa_search_form.cfm* under the searchable listing determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Signed at Washington, DC, this 9th day of July 2020.

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

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DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Trade Adjustment Assistance

In accordance with the Section 223 (19 U.S.C. 2273) of the Trade Act of 1974 (19 U.S.C. 2271, *et seq.*) (''Act''), as amended, the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance under Chapter 2 of the Act (''TAA'') for workers by (TA–W) number issued during the period of June 1, 2020 through June 30, 2020. (This Notice primarily follows the language of the Trade Act. In some places however, changes such as the inclusion of subheadings, a reorganization of language, or ''and,'' ''or,'' or other words are added for clarification.)

Section 222(a)—Workers of a Primary Firm

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for TAA, the group eligibility requirements under Section 222(a) of the Act (19 U.S.C. 2272(a)) must be met, as follows:

(1) The first criterion (set forth in Section 222(a)(1) of the Act, 19 U.S.C. 2272(a)(1)) is that a significant number or proportion of the workers in such workers' firm (or ''such firm'') have become totally or partially separated, or are threatened to become totally or partially separated; AND (2(A) or 2(B) below)

(2) The second criterion (set forth in Section 222(a)(2) of the Act, 19 U.S.C. 2272(a)(2)) may be satisfied by either (A) the Increased Imports Path, or (B) the Shift in Production or Services to a Foreign Country Path/Acquisition of Articles or Services from a Foreign Country Path, as follows:

(A) Increased Imports Path:

(i) the sales or production, or both, of such firm, have decreased absolutely; AND (ii and iii below)

(ii)(I) imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased; OR

(II)(aa) imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased; OR

(II)(bb) imports of articles like or directly competitive with articles which are produced directly using the services supplied by such firm, have increased; OR

(III) imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased; AND

(iii) the increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; OR

(B) Shift in Production or Services to a Foreign Country Path OR Acquisition of Articles or Services from a Foreign Country Path:

(i) (I) There has been a shift by such workers' firm to a foreign country in the production of articles or the supply of services like or directly competitive with articles which are produced or services which are supplied by such firm; OR

(II) such workers' firm has acquired from a foreign country articles or services that are like or directly competitive with articles which are produced or services which are supplied by such firm; AND

(ii) the shift described in clause (i)(I) or the acquisition of articles or services described in clause (i)(II) contributed importantly to such workers' separation or threat of separation.

Section 222(b)—Adversely Affected Secondary Workers

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for TAA, the group eligibility requirements of Section 222(b) of the Act (19 U.S.C. 2272(b)) must be met, as follows:

(1) a significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated; AND

(2) the workers' firm is a supplier or downstream producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act (19 U.S.C. 2272(a)), and such supply or production is related to the article or service that was the basis for such certification (as defined in subsection 222(c)(3) and (4) of the Act (19 U.S.C. 2272(c)(3) and (4)); AND

(3) either—

(A) the workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; OR

(B) a loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation determined under paragraph (1).

Section 222(e)—Firms Identified by the International Trade Commission

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for TAA, the group eligibility requirements of Section 222(e) of the Act (19 U.S.C. 2272(e))must be met, by following criteria (1), (2), and (3) as follows:

(1) the workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) an affirmative determination of serious injury or threat thereof under section 202(b)(1) of the Act (19 U.S.C. 2252(b)(1)); OR

(B) an affirmative determination of market disruption or threat thereof under section 421(b)(1)of the Act (19 U.S.C. 2436(b)(1)); OR

(C) an affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A)); AND

(2) the petition is filed during the 1-year period beginning on the date on which—

(A) a summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) of the Trade Act (19 U.S.C. 2252(f)(1)) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3) (19 U.S.C. 2252(f)(3)); OR

(B) notice of an affirmative determination described in subparagraph (B) or (C)of paragraph (1) is published in the **Federal Register**; AND

(3) the workers have become totally or partially separated from the workers' firm within—

(A) the 1-year period described in paragraph (2); OR

(B) notwithstanding section 223(b) of the Act (19 U.S.C. 2273(b)), the 1-year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (Increased Imports Path) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
95,120	Trelleborg Sealing Solutions El Segundo, Inc., Trelleborg Sealing Solutions US, Inc.	El Segundo, CA	August 23, 2018.
95,405	Golden Star, Inc	Atchison, KS	November 22, 2018.
95,447	El Dorado Paper Bag Manufacturing Company, Inc.	El Dorado, AR	December 4, 2018.
95,499	Castwell Products, LLC	Skokie, IL	December 19, 2018.
95,685	Armstrong Flooring, Inc., Affiliated Temporary Help.	South Gate, CA	February 12, 2019.
95,805	Russell Stover Chocolates, LLC, Chocoladefabriken Lindt & Sprüngli, Express Employment Professionals, etc.	Montrose, CO	March 10, 2019.
95,902	American Crafts, LLC	Lindon, UT	April 27, 2019.
95,902A	American Crafts, LLC	Kansas City, MO	April 27, 2019.
95,914	The Boeing Company, Boeing Commercial Aircraft (BCA), Dunhill Staffing Systems Inc., etc.	Tukwila, WA	May 5, 2019.
95,914A	Leased workers from American Cybersystems Inc., etc., Apollo Professional Solutions, Aquent, Artech Information Systems, etc.	Tukwila, WA	February 28, 2020.
95,914B	The Boeing Company, Boeing Commercial Aircraft (BCA), Dunhill Staffing Systems Inc., etc.	Portland, OR	May 5, 2019.
95,914C	Leased workers from Apollo Professional Solutions Inc., etc., The Boeing Company, Boeing Commercial Aircraft (BCA).	Portland, OR	February 28, 2020.
95,935	The Boeing Company, Boeing Commercial Aircraft, American Cybersystems, etc.	Huntsville, AL	May 21, 2019.
95,935A	The Boeing Company, Boeing Commercial Aircraft (BCA).	Anchorage, AK	May 21, 2019.
95,935AA	The Boeing Company, Boeing Commercial Aircraft (BCA), CTS Technical Services Inc., etc.	Working in Multiple Cities Throughout S. Carolina, SC.	September 6, 2019.
95,935B	The Boeing Company, Boeing Commercial Aircraft (BCA), American Cybersystems, etc.	Working in Multiple Cities Throughout Arizona, AZ.	May 21, 2019.
95,935BB	The Boeing Company, Boeing Commercial Aircraft (BCA), Strom Aviation Inc., Volt Services.	Ellsworth Air Force Base, SD	May 21, 2019.
95,935C	The Boeing Company, Boeing Commercial Aircraft (BCA), American Cybersystems, Ateeca, etc.	Working in Multiple Cities Throughout California, CA.	May 21, 2019.
95,935CC	The Boeing Company, Boeing Commercial Aircraft (BCA).	Memphis, TN	May 21, 2019.
95,935D	The Boeing Company, Boeing Commercial Aircraft, American Cybersystems, Ateeca, etc.	Colorado Springs, CO	May 21, 2019.
95,935DD	The Boeing Company, Boeing Commercial Aircraft (BCA), American Cybersystems, Ateeca, etc.	Working in Multiple Cities Throughout Texas, TX	May 21, 2019.
95,935E	The Boeing Company, Boeing Commercial Aircraft (BCA), Ateeca Inc., Triad Systems International.	Working in Multiple Cities Throughout Connecticut, CT.	May 21, 2019.
95,935EE	The Boeing Company, Boeing Commercial Aircraft, Chipton Ross, CTS Technical Services, etc.	Working in Multiple Cities Throughout Utah, UT ..	May 21, 2019.
95,935F	The Boeing Company, Boeing Commercial Aircraft (BCA), Apollo Professional Solution, etc.	Working in Multiple Cities Throughout Florida, FL	May 21, 2019.
95,935FF	The Boeing Company, Boeing Commercial Aircraft (BCA), Aerotek Inc., Chipton Ross Inc., etc.	Working in Multiple Cities Throughout Virgnia, VA.	May 21, 2019.
95,935G	The Boeing Company, Boeing Commercial Aircraft (BCA), Apollo Professional Solutions, etc.	Working in Multiple Cities Throughout Georgia, GA.	May 21, 2019.
95,935GG	Leased workers from American Cybersystems, etc., The Boeing Company, Boeing Commercial Aircraft (BCA).	Working in Multiple Cities Throughout S. Carolina, SC.	May 21, 2019.
95,935H	The Boeing Company, Boeing Commercial Aircraft (BCA), Chipton Ross Inc. (Nevada).	Joint Base Pearl Harbor-Hickam, HI	May 21, 2019.
95,935I	The Boeing Company, Boeing Commercial Aircraft (BCA).	Mountain Home Air Force Base, ID	May 21, 2019.
95,935J	The Boeing Company, Boeing Commercial Aircraft (BCA), Moseley Technical Services Inc., etc.	Chicago, IL	May 21, 2019.

TA–W No.	Subject firm	Location	Impact date
95,935K	The Boeing Company, Boeing Commercial Aircraft (BCA), Ateeca Inc., PDS Technical Services, etc.	Wichita, KS	May 21, 2019.
95,935L	The Boeing Company, Boeing Commercial Aircraft (BCA).	Fort Campbell, KY	May 21, 2019.
95,935M	The Boeing Company, Boeing Commercial Aircraft (BCA), American Cybersystems, etc.	Working in Multiple Cities Throughout Louisiana, LA.	May 21, 2019.
95,935N	The Boeing Company, Boeing Commercial Aircraft, Aerotek Inc, Moseley Technical Services Inc.	Working in Multiple Cities Throughout Maryland, MD.	May 21, 2019.
95,935O	The Boeing Company, Boeing Commercial Aircraft (BCA).	Waterford Township, MI	May 21, 2019.
95,935P	The Boeing Company, Boeing Commercial Aircraft (BCA).	Eagan, MN	May 21, 2019.
95,935Q	The Boeing Company, Boeing Commercial Aircraft (BCA), PDS Technical Services, Volt Services.	Working in Multiple Cities Throughout Mississippi, MS.	May 21, 2019.
95,935R	The Boeing Company, Boeing Commercial Aircraft, ALKU Technologies, American Cybersystems, etc.	Working in Multiple Cities Throughout Missouri, MO.	May 21, 2019.
95,935S	The Boeing Company, Boeing Commercial Aircraft (BCA).	Helena, MT	May 21, 2019.
95,935T	The Boeing Company, Boeing Commercial Aircraft (BCA), PDS Technical Services.	Working in Multiple Cities Throughout New Jersey, NJ.	May 21, 2019.
95,935U	The Boeing Company, Boeing Commercial Aircraft (BCA), Moseley Technical Services, etc.	Working in Multiple Cities Throughout New Mexico, NM.	May 21, 2019.
95,935V	The Boeing Company, Boeing Commercial Aircraft (BCA).	New York, NY	May 21, 2019.
95,935W	The Boeing Company, Boeing Commercial Aircraft, Chipton Ross Inc., Chipton Ross Inc. (Nevada).	Working in Multiple Cities Throughout N. Carolina, NC.	May 21, 2019.
95,935X	The Boeing Company, Boeing Commercial Aircraft, Chipton Ross, Chipton Ross (Nevada), ICONMA LLC.	Working in Multiple Cities Throughout Ohio, OH	May 21, 2019.
95,935Y	The Boeing Company, Boeing Commercial Aircraft (BCA), American Cybersystems, etc.	Working in Multiple Cities Throughout Oklahoma, OK.	May 21, 2019.
95,935Z	The Boeing Company, Boeing Commercial Aircraft (BCA), Aerotek, American Cybersystems, etc.	Working in Multiple Cities Throughout Pennsylvania, PA.	May 21, 2019.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (Shift in Production or Services to a Foreign Country Path or Acquisition of Articles or Services from a Foreign Country Path) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
95,460	The Nielsen Company (US) LLC, Nielsen Holdings PLC, Adecco, TCS (Tata Consultancy Services).	Green Bay, WI	May 20, 2019.
95,460A	The Nielsen Company (US) LLC, Nielsen Holdings PLC, Adecco, TCS (Tata Consultancy Services).	Fond Du Lac, WI	December 6, 2018.
95,478	McKesson Medical-Surgical, Inc., Credit Group, McKesson Corporate.	Farmington, CT	December 13, 2018.
95,507	NortonLifeLock, Inc., Symantec, Albers & Company, PRO Unlimited, Adams St. Advocates, etc.	Herndon, VA	December 20, 2018.
95,645	State Street Bank & Trust Co., Income Processing COE Division, State Street Corporation, Robert Half.	North Quincy, MA	February 3, 2019.
95,748	Aclara Meters LLC, Aclara Technologies, Hubbell Inc., NESC Staffing.	Somersworth, NH	February 28, 2019.
95,768	State Street Bank & Trust Co., Investible Cash, USIS Global Operation, Cash & Custody, State Street.	North Quincy, MA	March 3, 2019.
95,792	Littelfuse, Inc., Symcom Division, Adecco, Kelly Services	Rapid City, SD	March 6, 2019.
95,808	Dispensing Dynamics International, Inc., Hunter Industries, Inc., Aerotek, 1020 Bixby Drive.	City of Industry, CA	March 11, 2019.
95,808A	Dispensing Dynamics International, Inc., Hunter Industries, Inc., Aerotek, 16425 Gale Avenue.	City of Industry, CA	March 11, 2019.
95,845	Danfoss, LLC, CC division, SMX—Temporary Staffing	Arkadelphia, AR	March 24, 2019.
95,871	H&R Block Network Operations Center, HRB Professional Resources, LLC.	Kansas City, MO	April 3, 2019.
95,900	Startek	Greenwood Village, CO	April 23, 2019.
95,900A	Startek	Grand Junction, CO	April 23, 2019.

TA–W No.	Subject firm	Location	Impact date
95,903	Powerohm Resistors, Hubbell Industrial Controls, Adecco, Randstad Manufacturing and Logistics.	Katy, TX	April 27, 2019.
95,905	Donaldson Company, Inc., Stevens Point Manufacturing Plant, ABR Employment Services, etc.	Stevens Point, WI	April 29, 2019.
95,913	JCPenney Corporate/Home Office, Technology Operations & Support.	Plano, TX	May 5, 2019.
95,922	Caterpillar Inc., Construction Industries segment, Excavation, Aditi Consulting, etc..	Victoria, TX	May 14, 2019.
95,981	Aludyne-New York, Aludyne	Batavia, NY	June 11, 2019.
96,007	Nikki America Fuel Systems, LLC, Nikki America, Inc., Surge Staffing.	Auburn, AL	June 19, 2019.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date.
95,658	LEDVANCE LLC, LEDVANCE Holdings, LLC	Bethlehem, PA	February 16, 2020.
95,658A	National Freight (NFI) and Vangaurd Cleaning, LEDVANCE LLC, LEDVANCE Holdings, LLC.	Bethlehem, PA	February 5, 2019.

The following certifications have been issued. The requirements of Section 222(e) (firms identified by the International Trade Commission) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
95,630	Elite Comfort Solutions LLC, Tec Staffing Services, WorkSource, Inc..	Fort Smith, AR	December 12, 2018.
95,896	Blue Bell Mattress Co., LLC	Roseville, MI	December 12, 2018.
95,940	FXI, Inc., Auburn Plant, FXI Holdings, Adecco, Peoplelink Staffing, etc.	Auburn, IN	December 12, 2018.
95,958	Cambria Fabshop—Indianapolis LLC	Greenfield, IN	July 5, 2018.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for TAA have not been met for the reasons specified.

The investigation revealed that the requirements of Trade Act section 222 (a)(1) and (b)(1) (significant worker total/partial separation or threat of total/partial separation), or (e) (firms identified by the International Trade Commission), have not been met.

TA–W No.	Subject firm	Location	Impact date
95,326	Jaguar Land Rover North America, LLC, Network Development, Jaguar Land Rover Limited.	Mahwah, NJ.	

The investigation revealed that the criteria under paragraphs(a)(2)(A) (increased imports), (a)(2)(B) (shift in production or services to a foreign country or acquisition of articles or services from a foreign country), (b)(2) (supplier to a firm whose workers are certified eligible to apply for TAA or downstream producer to a firm whose workers are certified eligible to apply for TAA), and (e) (International Trade Commission) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
95,110	Black & Decker (U.S.) Inc., Stanley Black & Decker, Inc., Nesco, Kelly Services.	Georgetown, OH.	
95,229	StarMark Cabinetry, ProForce Services	Sioux Falls, SD.	
95,294	Gardner Denver Petroleum Pumps, LLC, Altoona Plant, Gardner Denver Inc.	Altoona, PA.	
95,321	Merit Gear LLC, Rexnord Industries, LLC	Antigo, WI.	
95,340	Realogy Operations LLC, Technology and Data, Realogy Group, Realogy Holdings Corp., etc.	Danbury, CT.	
95,359	Arrow Electronics, Inc., Global Asset Disposition division	Windsor, CT.	
95,400	Gibson County Coal, LLC, Gibson South Mine, Alliance Resource Partners, L.P., etc.	Owensville, IN.	

TA–W No.	Subject firm	Location	Impact date
95,400A	Gibson County Coal, LLC, Gibson North Mine, Alliance Resource Partners, L.P., etc.	Princeton, IN.	
95,415	Integrity Bio-Fuels, LLC	Morristown, IN.	
95,444	EGS Financial Care, Inc., Alorica, Inc.	Jackson, MI.	
95,508	Ubiquiti Inc., Research and Development Group, EdgeLink LLC	Portland, OR.	
95,522	Wildcat Hills, Peabody Energy, Custom Staffing Solutions, GMS Mine Repair, etc.	Equality, IL.	
95,699	Bank Of America, N.A., Global Technology and Operations, Trust Banking, Pontoon Solutions, etc.	Riverside, RI.	

Determinations Terminating Investigations of Petitions for Trade Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's website, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the petitioner has requested that the petition be withdrawn.

TA–W No.	Subject firm	Location	Impact date
95,505	LinkOne Solutions, LLC	Stanfield, OR.	
95,794	Saint-Gobain Ceramics and Plastics, Inc., Corhart Refractories, SEFPRO division.	Buckhannon, WV.	
95,907	Larco, Inc	Crossett, AR.	
96,005	Bank of New York Mellon, Project Management Office, CSD Division.	Oriskany, NY.	

The following determinations terminating investigations were issued because the worker group on whose behalf the petition was filed is covered under an existing certification.

TA–W No.	Subject firm	Location	Impact date
95,258	Lufkin Industries, LLC	Lufkin, TX.	

The following determinations terminating investigations were issued because the petitioning group of workers is covered by an earlier petition that is the subject of an ongoing investigation for which a determination has not yet been issued.

TA–W No.	Subject firm	Location	Impact date
95,904	Utility Trailer Manufacturing Company, Express Employment Professionals, Hometown Employment.	Paragould, AR.	

I hereby certify that the aforementioned determinations were issued during the period of *June 1, 2020 through June 30, 2020.* These determinations are available on the Department's website *https://www.doleta.gov/tradeact/petitioners/taa_search_form.cfm* under the searchable listing determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Signed at Washington, DC, this 9th day of July 2020.

Hope D. Kinglock,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2020–16633 Filed 7–30–20; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Information Collection Activities; Comment Request

AGENCY: Bureau of Labor Statistics, Department of Labor.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed revision of the ''National Longitudinal Survey of Youth 1997.'' A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the Addresses section of this notice.

DATES: Written comments must be submitted to the office listed in the Addresses section of this notice on or before September 29, 2020.

ADDRESSES: Send comments to Carol Rowan, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue NE, Washington, DC 20212. Written comments also may be transmitted by email to *BLS_PRA_Public@bls.gov.*

FOR FURTHER INFORMATION CONTACT: Carol Rowan, BLS Clearance Officer, 202–691–7268 (this is not a toll free number). (See **ADDRESSES** section.)

SUPPLEMENTARY INFORMATION:

I. Background

The National Longitudinal Survey of Youth 1997 (NLSY97) is a nationally representative sample of persons who were born in the years 1980 to 1984. These respondents were ages 12–17 when the first round of annual interviews began in 1997; starting with round sixteen, the NLSY97 is conducted on a biennial basis. Interim supplemental interviews will occur from February 2021 to April 2021. The Bureau of Labor Statistics (BLS) contracts with a vendor to conduct the NLSY97. The primary objective of the interim supplement is to collect information about labor market and health disruptions due to the novel coronavirus pandemic and its effects on the establishment and development of careers and families. The longitudinal focus of this survey requires information to be collected from the same individuals over many years in order to trace their education, training, work experience, fertility, income, and program participation.

One of the goals of the Department of Labor (DOL) is to produce and disseminate timely, accurate, and relevant information about the U.S. labor force. The BLS contributes to this goal by gathering information about the labor force and labor market and disseminating it to policymakers and the public so that participants in those markets can make more informed, and thus more efficient, choices. Research based on the NLSY97 contributes to the formation of national policy in the areas of education, training, work experience, fertility, income, and program participation. In addition to the reports that the BLS produces based on data from the NLSY97, members of the academic community publish articles and reports based on NLSY97 data for the DOL and other funding agencies. To date, approximately 750 articles examining NLSY97 data have been published in scholarly journals. The survey design provides data gathered from the same respondents over time to form the only dataset that contains this type of information for this important population group. Without the collection of these data, an accurate longitudinal dataset could not be provided to researchers and policymakers, thus adversely affecting the DOL's ability to perform its policy- and report-making activities.

II. Current Action

The BLS seeks Office of Management and Budget approval to conduct interim supplement interviews between rounds 19 and 20 of the NLSY97. Respondents of the NLSY97 will undergo an interview of approximately 12 minutes on average, during which they will answer questions about labor market experiences, health, and income.

The interim supplemental survey will be a conducted by internet and by telephone. We anticipate that approximately one-third of interviews will be self-administered by internet, with the remaining interviews being interviewer-administered by telephone.

The BLS plans to record randomly selected segments of the interviews collected by telephone. Recording interviews helps the BLS and its contractors to ensure that the interviews actually took place and interviewers are reading the questions exactly as worded and entering the responses properly. Recording also helps to identify parts of the interview that might be causing problems or misunderstanding for interviewers or respondents. Each respondent will be informed that the interview may be recorded for quality control, testing, and training purposes. If the respondent objects to the recording of the interview, the interviewer will confirm to the respondent that the interview will not be recorded and then proceed with the interview.

The interim supplemental survey will consist of approximately 35 questions. Similar questions have appeared in previous rounds of the NLSY97, the Current Population Survey, or the Census Household Pulse survey. The content covers household composition, current employment for the respondent and spouse/partner, changes in employment/earnings during the past 12 months due to the coronavirus pandemic, time spent teaching children under age 18, health, health insurance, having contracted the coronavirus, medical care deferred due to the coronavirus pandemic, mental health, income, and earnings.

During the fielding period for the interim supplemental interviews, no more than 2 percent of respondents will be asked to participate in a brief validation interview a few weeks after the initial interview. The purpose of the validation interview is to verify that the initial interview took place as the interviewer reported and to assess the data quality of selected questionnaire items.

III. Desired Focus of Comments

The Bureau of Labor Statistics 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.
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Title of Collection: National Longitudinal Survey of Youth 1997.

OMB Number: 1220–0157.

Type of Review: Revision of a currently approved collection.

Affected Public: Individuals or households.

Form	Total respondents	Frequency	Total responses	Average time per response (minutes)	Estimated total burden (hours)
Main NLSY97: September 2017–May 2018	5,220	One-time	5,220	12	1,044
Validation interview: October 2017–June 2018	105	One-time	105	2	3.5

Form	Total respondents	Frequency	Total responses	Average time per response (minutes)	Estimated total burden (hours)
Totals *	5,220		5,325		1047.5

* The difference between the total number of respondents and the total number of responses reflects the fact that about 5,220 are expected to complete the main interview. In addition, about 105 respondents may be interviewed twice, once in the interim supplemental survey and a second time in the 2-minute validation interview.

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 also will become a matter of public record.

Signed at Washington, DC, this 28th day of July 2020.

Mark Staniorski,

Chief, Division of Management Systems.

[FR Doc. 2020–16653 Filed 7–30–20; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Information Collection Activities; Comment Request

AGENCY: Bureau of Labor Statistics, Department of Labor.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, provides the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the new information collection of the ''U.S. Business Response Survey and Job Openings and Labor Turnover Survey Supplement.'' A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section of this notice on or before September 29, 2020.

ADDRESSES: Send comments to Carol Rowan, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue NE, Washington, DC 20212. Written comments also may be transmitted by email to *BLS_PRA_Public@bls.gov.*

FOR FURTHER INFORMATION CONTACT: Carol Rowan, BLS Clearance Officer, 202–691–7628 (this is not a toll free number). (See **ADDRESSES** section.)

SUPPLEMENTARY INFORMATION:

I. Background

On July 9, 2020, the Office of Management and Budget (OMB) granted approval under the emergency approval provisions of the Paperwork Reduction Act for the Bureau of Labor Statistics (BLS) to begin collecting the U.S. Business Response Survey (BRS) and Job Openings and Labor Turnover Survey (JOLTS) Supplement. The BRS and JOLTS Supplement capture information about changes to businesses since the onset of the novel coronavirus pandemic. The same questionnaire will be conducted as a large, one-time survey as well as a one-time supplemental survey to March 2020 JOLTS sample members. The large sample will allow the BLS to quickly collect and disseminate information related to how businesses have changed since the onset of the novel coronavirus pandemic. The supplemental survey to March 2020 JOLTS sample members will allow for specific business changes related to the coronavirus pandemic to be directly linked to JOLTS data.

The BRS and JOLTS Supplement seeks to identify changes to business operations, employment and workforce flexibilities, and benefits that occurred from the onset of the coronavirus pandemic to when the survey is fielded. This collection will provide critical information that will complement the standard economic data BLS and the federal statistical system will publish for the same time period and provide policy makers and data users additional information that could help to inform decisions.

II. Method of Collection

The BRS will use the BLS business register, based on the Quarterly Census of Employment and Wages, maintained by BLS as its sampling frame. The register contains employment information on establishments in the U.S. subject to unemployment insurance taxes. This register covers 98 percent of U.S. jobs, available at the county, Metropolitan Statistical Area, State, and national levels by industry. The main BRS will go to a nationally representative sample of the U.S. economy and be large enough to allow for state and industry estimates.

The supplemental JOLTS collection will offer valuable context to the responses about employment and hiring decisions made at the industry and state-level. The sample will allow an analysis of the BRS collected information with the longitudinal JOLTS establishment staffing patterns prior to and after completing the BRS. This is a unique analysis from the primary sample, and adds a valuable dimension to understanding business responses to the coronavirus pandemic. These data will be used separately from the BRS sample.

The collection is being conducted entirely on-line, using the existing data collection instrument of the Annual Refiling Survey as a platform for conducting the BRS. The use of existing information technology will minimize government costs and respondent burden.

Collection of the BRS and JOLTS Supplement will enable the BLS to facilitate a collection of information on how the coronavirus pandemic has changed American businesses and the U.S. economy. BLS expects to publish survey results nationally, by state, by sector, and where possible by state and sector.

The BRS, in combination with data collected by current BLS surveys, could help in understanding how businesses responded during the pandemic. Specifically, other BLS statistics could provide indications of changes in employment, wages, job openings and terminations, employer-provided benefits, and safety and health, but will not be able to determine if any changes in levels were related to the coronavirus pandemic. Only by asking employers directly what they experienced, and how they responded to the pandemic, can data users be able to draw meaningful conclusions.

The additional collection of the JOLTS Supplement will benefit the JOLTS program by offering valuable context to the responses about employment and hiring decisions made at the industry and state-level. These

data will be used separately from the BRS sample in analyzing and understanding the job openings and closings data reported in the JOLTS survey and will make it unnecessary for the JOLTS program to request emergency clearance to add questions to the existing survey.

III. Desired Focus of Comments

The Bureau of Labor Statistics 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.
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Title of Collection: U.S. Business Response Survey.

OMB Number: 1220–0197.

Type of Review: New collection.

Affected Public: Businesses or other for profits; Farms; Non-profit institutions.

Total Respondents: 152,698.

Frequency: One time.

Total Responses: 152,698.

Average Time per Response: 10 minutes.

Estimated Total Burden Hours: 25,450 hours.

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 also will become a matter of public record.

Signed at Washington, DC, on July 28, 2020.

Mark Staniorski,

Division of Management Systems.

[FR Doc. 2020–16639 Filed 7–30–20; 8:45 am]

BILLING CODE 4510–24–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Modification Issued Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of permit modifications issued.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

FOR FURTHER INFORMATION CONTACT: Nature McGinn, ACA Permit Officer, Office of Polar Programs, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; 703–292–8030; email: *ACApermits@nsf.gov.*

SUPPLEMENTARY INFORMATION: On September 19, 2019 the National Science Foundation published a notice in the **Federal Register** of a permit modification request received. The permit modification was issued on October 18, 2019 to:

Linnea Pearson, Permit No. 2018–013

On October 7, 2019 the National Science Foundation published a notice in the **Federal Register** of a permit modification request received. The permit modification was issued on November 20, 2019 to:

Ron Naveen, Oceanites Inc., Permit No. 2019–001

Erika N. Davis,

Program Specialist, Office of Polar Programs.

[FR Doc. 2020–16603 Filed 7–30–20; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Modification Received Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of Permit Modification Request Received and Permit Issued.

SUMMARY: The National Science Foundation (NSF) is required to publish a notice of requests to modify permits issued to conduct activities regulated and permits issued under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act in the Code of Federal Regulations. This is the required notice of a requested permit modification and permit issued.

FOR FURTHER INFORMATION CONTACT: Nature McGinn, ACA Permit Officer, Office of Polar Programs, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; 703–292–8224; email: *ACApermits@nsf.gov.*

SUPPLEMENTARY INFORMATION: The National Science Foundation (NSF), as directed by the Antarctic Conservation Act of 1978 (Public Law 95–541, 45 CFR 671), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas a requiring special protection.

1. NSF issued a permit (ACA 2018–025) to Bill Davis, VP Operations, Quark Expeditions Inc., on November 24, 2017. Under that permit, Quark Expeditions is permitted to conduct waste management associated with the operation and activities of multiple tour vessels in the Antarctic Peninsula region. Activities including shore excursions by Zodiac, kayaking, day paddling, stand-up paddle boarding, polar plunges, cross-country skiing, ice climbing and mountaineering, downhill skiing, and vessel-supported short overnight stays (camping) may be conducted on selected voyages. The permit holder may also operate a small, battery-operated remotely piloted aircraft system (RPAS) consisting, in part, of a quadcopter equipped with a camera to collect footage for commercial and educational purposes. The permit expires March 31, 2022.

On August 27, 2019 (revised November 3, 2019), Quark Expeditions provided NSF an update based on activities planned for the 2019–2020 field season. The activities are the same or similar as those detailed in the original permit. Allison Kean now holds the position of Operations Manager and is the primary contact for the permit holder. The Environmental Officer has reviewed the modification request and has determined that the amendment is not a material change to the permit, and it will have a less than a minor or transitory impact.

Dates of Permitted Activities: November 4, 2019–March 31, 2022.

The permit modification was issued on November 4, 2019.

2. NSF issued a permit (ACA 2016–020) to Laura K.O. Smith, Owner, Operator Quixote Expeditions, on December 23, 2015. The issued permit allows the permit holder to conduct waste management activities associated with the operation of the ''Ocean Tramp,'' a reinforced ketch rigged sailing yacht in the Antarctic Peninsula region. Activities to be conducted by Quixote include: passenger landings, hiking, photography, wildlife viewing, and possible station visits.

A recent modification to this permit, dated November 22, 2017, permitted coastal camping activities in select locations and resupply of fresh food to the Quixote Expeditions vessel as part of fly/cruise operations. Another modification, dated November 6, 2018, allowed the permit holder to add a second vessel to support Quixote Expeditions activities, to conduct ship-to-ship fuel transfers, to release comminuted food waste (excepting poultry) at sea, and to operate a remotely piloted aircraft for educational and commercial purposes.

On October 3, 2019, the permit holder submitted an update of provided NSF an update based on activities planned for the 2019–2020 field season. Quixote's activities are similar as those detailed in the original permit and earlier modifications, excepting the support of different research projects. Estimates for the waste generated by this season's activities were provided in the update. The Environmental Officer has reviewed the modification request and has determined that the amendment is not a material change to the permit, and it will have a less than a minor or transitory impact.

Dates of Permitted Activities: November 20, 2019–February 6, 2021.

The permit modification was issued on November 20, 2019.

3. NSF issued a permit (ACA 2019–012) Conrad Combrink, Senior Vice President, Strategic Development Expeditions and Experiences, Silversea Cruises, Ltd., for waste management activities associated with operating remotely piloted aircraft systems (RPAS). Silversea Cruises engages experienced pilots to fly small, battery-operated, remotely controlled quadcopter equipped with cameras to capture aerial footage for commercial and educational uses.

On September 18, 2019, Bill Davis, Vice President, Expeditions Operations and Development, Silversea Cruises, Ltd., provided NSF an update based on activities planned for the 2019–2020 field season. Silversea's activities are the same or similar as those detailed in the original permit. The Environmental Officer has reviewed the modification request and has determined that the amendment is not a material change to the permit, and it will have a less than a minor or transitory impact.

Dates of Permitted Activities: November 20, 2019–March 30, 2022.

The permit modification was issued on November 20, 2019.

Erika N. Davis,

Program Specialist, Office of Polar Programs.

[FR Doc. 2020–16604 Filed 7–30–20; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0001]

Sunshine Act Meetings

TIME AND DATE: Weeks of August 3, 10, 17, 24, 31, September 7, 14, 21, 28, October 5, 12, 19, 2020.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public.

Week of August 3, 2020

There are no meetings scheduled for the week of August 3, 2020.

Week of August 10, 2020—Tentative

There are no meetings scheduled for the week of August 10, 2020.

Week of August 17, 2020—Tentative

There are no meetings scheduled for the week of August 17, 2020.

Week of August 24, 2020—Tentative

There are no meetings scheduled for the week of August 24, 2020.

Week of August 31, 2020—Tentative

There are no meetings scheduled for the week of August 31, 2020.

Week of September 7, 2020—Tentative

There are no meetings scheduled for the week of September 7, 2020.

Week of September 14, 2020—Tentative

Tuesday, September 15, 2020

10:00 a.m. Agency's Response to the COVID–19 Public Health Emergency (Public Meeting)
(Contact: Luis Betancourt: 301–415–6146)

This meeting will be webcast live at the Web address—*https://www.nrc.gov/*.

Thursday, September 17, 2020

10:00 a.m. Transformation at the NRC—Milestones and Results (Public Meeting)
(Contact: Maria Arribas-Colon: 301–415–6026)

This meeting will be webcast live at the Web address—*https://www.nrc.gov/.*

Week of September 21, 2020—Tentative

There are no meetings scheduled for the week of September 21, 2020.

Week of September 28, 2020—Tentative

Wednesday September 30, 2020

9:00 a.m. Strategic Programmatic Overview of the Operating Reactors and New Reactors Business Lines and Results of the Agency Action Review Meeting (Public Meeting)
(Contact: Candace de Messieres: 301–415–8395)

This meeting will be webcast live at the Web address—*https://www.nrc.gov/.*

Week of October 5, 2020—Tentative

Thursday, October 8, 2020

10:00 a.m. Meeting with the Organization of Agreement States and the Conference of Radiation Control Program Directors (Public Meeting)
(Contact: Celimar Valentin-Rodriquez: 301–415–7124)

This meeting will be webcast live at the Web address—*https://www.nrc.gov/.*

Week of October 12, 2020—Tentative

There are no meetings scheduled for the week of October 12, 2020.

Week of October 19, 2020—Tentative

Wednesday, October 21, 2020

10:00 a.m. Briefing on Human Capital and Equal Employment Opportunity (Public Meeting)
(Contact: Randi Neff: 301–287–0583)

This meeting will be webcast live at the Web address—*https://www.nrc.gov/.*

1:00 p.m. All Employees Meeting with the Commissioners (Public Meeting)

CONTACT PERSON FOR MORE INFORMATION: For more information or to verify the status of meetings, contact Denise McGovern at 301–415–0681 or via email at *Denise.McGovern@nrc.gov.* The schedule for Commission meetings is subject to change on short notice.

The NRC Commission Meeting Schedule can be found on the internet at: *https://www.nrc.gov/public-involve/public-meetings/schedule.html.*

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.,* braille, large print), please notify Anne Silk, NRC Disability Program Specialist,

at 301–287–0745, by videophone at 240–428–3217, or by email at *Anne.Silk@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555 (301–415–1969), or by email at *Wendy.Moore@nrc.gov* or *Tyesha.Bush@nrc.gov.*

The NRC is holding the meetings under the authority of the Government in the Sunshine Act, 5 U.S.C. 552b.

Dated: July 29, 2020.

For the Nuclear Regulatory Commission.

Denise L. McGovern,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2020–16862 Filed 7–29–20; 4:15 pm]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0160]

Changes to Subsequent License Renewal Guidance Documents; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft interim staff guidance; correction; extension of comment period.

SUMMARY: On July 2, 2020, the U.S. Nuclear Regulatory Commission (NRC) solicited comments on three draft interim staff guidance documents (ISGs) that propose changes to the NRC's subsequent license renewal guidance documents. Several aging management review (AMR) line items were inadvertently omitted from the draft mechanical ISG. These omitted AMR line items are provided in an errata document. The public comment period was originally scheduled to close on August 3, 2020. The NRC has decided to extend the public comment period to allow more time for members of the public to develop and submit their comments.

DATES: The due date of comments requested in the document published on July 2, 2020 (85 FR 39938) is extended. Comments should be filed no later than August 10, 2020. Comments received after this date will be considered, if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

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

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0160. Address questions about NRC docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: William (Butch) Burton, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6332; email: *William.Burton@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0160 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0160.
- *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 reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.

B. Submitting Comments

Please include Docket ID NRC–2020–0160 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. Discussion

On July 2, 2020, the NRC solicited comments on three draft interim staff guidance documents (ISGs) that propose changes to the NRC's subsequent license renewal guidance documents (85 FR 39938). The purpose of the ISGs is to incorporate lessons learned from the NRC staff's safety reviews of the first three Subsequent License Renewal Applications (SLRAs) for Turkey Point Nuclear Generating Units 3 and 4, Peach Bottom Atomic Power Station, Units 2 and 3, and Surry Power Station, Units 1 and 2. Specifically, the ISGs revise guidance contained in NUREG–2191, ''Generic Aging Lessons Learned for Subsequent License Renewal (GALL–SLR) Report,'' and NUREG 2192, ''Standard Review Plan for Review of Subsequent License Renewal Applications for Nuclear Power Plants.'' NUREG–2191 and NUREG–2192 were published in July 2017 and are not scheduled to be updated for several years. The proposed changes to these documents are contained in the three draft ISGs that update aging management criteria for mechanical, structures, and electrical portions of the guidance. Several aging management review (AMR) line items were inadvertently omitted from the draft mechanical ISG. These omitted AMR line items are provided in an errata document. The public comment period was originally scheduled to close on August 3, 2020. The NRC has decided to extend the public comment period on this document until August 10, 2020, to allow more time for members of the public to submit their comments.

III. Availability of Documents

The documents identified in the following table are available to

interested persons in ADAMS, as indicated.

Document	ADAMS accession No.
NUREG–2191, ''Generic Aging Lessons Learned for Subsequent License Renewal (GALL–SLR) Report''	ML16274A389 ML16274A399
NUREG–2192, ''Standard Review Plan for Review of Subsequent License Renewal Applications for Nuclear Power Plants''	ML16274A402
Draft SLR–ISG–MECHANICAL–2020–XX; Updated Aging Management Criteria for Mechanical Portions of Subsequent License Renewal Guidance.	ML20156A330
Draft SLR–ISG–STRUCTURES–2020–XX; Updated Aging Management Criteria for Structures Portions of Subsequent License Renewal Guidance.	ML20156A338
Draft SLR–ISG–ELECTRICAL–2020–XX; Updated Aging Management Criteria for Electrical Portions of Subsequent License Renewal Guidance.	ML20156A324
Errata for draft Mechanical ISG	ML20198M382

The NRC may post additional materials to the Federal Rulemaking website at *https://www.regulations.gov* under Docket ID NRC–2020–0160. The Federal Rulemaking website allows you to receive alerts when changes or additions occur in a docket folder. To subscribe: (1) Navigate to the docket folder (NRC–2020–0160); (2) click the ''Sign up for Email Alerts'' link; and (3) enter your email address and select how frequently you would like to receive emails (daily, weekly, or monthly).

Dated: July 27, 2020.

For the Nuclear Regulatory Commission.

Robert Caldwell,

Deputy Director, Division of New and Renewed Licenses, Office of Nuclear Reactor Regulation.

[FR Doc. 2020–16565 Filed 7–30–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–1151; NRC–2015–0039]

Westinghouse Electric Company, LLC; Columbia Fuel Fabrication Facility

AGENCY: Nuclear Regulatory Commission.

ACTION: Intent to prepare an environmental impact statement and conduct a scoping process; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) will conduct a scoping process to gather information necessary to prepare an environmental impact statement (EIS) related to the review of Westinghouse Electric Company, LLC's (WEC) request to renew its operating license for its Columbia Fuel Fabrication Facility (CFFF) in Hopkins, South Carolina. The NRC had published a draft environmental assessment (EA) but determined it was not able to conclude the review in a finding of no significant impact. Therefore, the NRC staff will prepare an EIS to document the potential environmental impacts from the proposed action (*i.e.,* whether to renew WEC's CFFF operating license) and reasonable alternatives. As part of the EIS development process, the NRC is seeking comments on the scope of its environmental review.

DATES: Comments must be filed by August 31, 2020. Comments received after this date will be considered, if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

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

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2015–0039. Address questions about Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Email comments to: WEC_CFFF_EIS.resource@nrc.gov.*

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Diana Diaz-Toro, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–0930; email: *Diana.Diaz-Toro@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2015–0039 when contacting the NRC about the availability of information for this action. 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–2015–0039.
- *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 reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced is provided in a table at the end of this document.
- *Project Website:* Information related to the WEC project can be accessed on the NRC's project web page at: *https://www.nrc.gov/info-finder/fc/westinghouse-fuel-fab-fac-sc-lc.html.*

B. Submitting Comments

Please include Docket ID NRC–2015–0039 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 posts all comment submissions at *https://www.regulations.gov* and will 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 submissions into ADAMS.

II. Discussion

The NRC intends to prepare an EIS for the WEC license renewal application for its CFFF in accordance with part 51 of title 10 of the *Code of Federal Regulations* (10 CFR) ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions.'' The NRC will provide the public with an opportunity to participate in the environmental scoping process by inviting them to submit written comments in the scoping period.

III. Alternatives To Be Evaluated

The EIS will analyze the environmental impacts of the proposed action, the no-action alternative, and reasonable alternatives. A brief description of each is provided below.

Proposed action—The proposed Federal action is to renew WEC's CFFF operating license (SNM–1107) which will allow continued operation of the facility (*i.e.,* fabricating nuclear fuel for nuclear reactors) for an additional 40 years.

No-Action Alternative—The no-action alternative would be to not renew WEC's license. Under this alternative, the NRC would not issue the license renewal and CFFF would continue to operate under its current license until it expires in 2027.

Other Alternatives to the Proposed Action—The NRC is considering other alternatives to the proposed action, including the granting of WEC's license renewal request, but for a period of less than 40 years. Other alternatives not listed here may be identified during scoping or through the EIS development process.

IV. Scoping

The NRC staff is conducting a scoping process for the WEC CFFF EIS. In accordance with 10 CFR 51.29, the NRC seeks public input to help the NRC determine the appropriate scope of the EIS, including significant environmental issues to be analyzed in depth, as well as those that should be eliminated from detailed study because they are peripheral or are not significant.

The NRC previously accepted comments on the draft EA published in October 2019. Those comments can be found at *https://www.regulations.gov* under Docket ID NRC–2015–0039 or in NRC's ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html,* and will be considered in the development of the EIS.

After the close of the scoping period, the NRC staff will prepare a concise summary of its scoping process in accordance with 10 CFR 51.29(b). The scoping summary report will be sent to each participant in the scoping process for whom the staff has a physical or email address.

The WEC CFFF EIS will address the potential impacts from the proposed action, including both radiological and non-radiological impacts associated with the proposed project and its alternatives. The EIS will also consider unavoidable adverse environmental impacts, the relationship between short-term uses of resources and long-term productivity, and irreversible and irretrievable commitments of resources. The following resource areas were addressed in the draft EA and, thus, will be addressed in the EIS: Land use, transportation, geology and soils, water resources, ecological resources, air quality and climate change, noise, historical and cultural resources, visual and scenic resources, socioeconomics, public and occupational health, waste management, accidents, and environmental justice.

The NRC encourages members of the public, local, State, Tribal, and Federal government agencies to participate in the scoping process. Written comments may be submitted during the scoping period as described in the **ADDRESSES** and **SUPPLEMENTARY INFORMATION** sections of this document.

The NRC staff will continue its environmental review of WEC's license renewal application, and with an NRC contractor, prepare a draft EIS and publish it for public comment as soon as practicable. The NRC staff plans to have a public comment period for the draft EIS. Availability of the draft EIS and the dates of the public comment period will be announced in a future **Federal Register** notice. The final EIS will include NRC's responses to public comments received on the draft EIS.

V. Availability of Documents

The documents identified in this notice are accessible to interested persons by the means indicated in either the **SUPPLEMENTARY INFORMATION** section of this notice or in the table below.

Document	ADAMS accession No.
Westinghouse license renewal application (August 2019)	ML19234A077
Environmental Report (March 2019)	ML19088A100
NRC's Draft Environmental Assessment (October 2019)	ML19228A278
Final Interim Remedial Investigation Data Summary Report (February 2020)	ML20063P321
Letter to Westinghouse regarding decision to pursue an EIS (June 2020)	ML20150A289

Dated: July 20, 2020.

For the Nuclear Regulatory Commission.

Jessie M. Quintero,

Acting Chief, Environmental Review Materials Branch, Division of Rulemaking, Environmental and Financial Support, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2020–16150 Filed 7–30–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2019–0183]

Information Collection: NRC Form 749, ''Manual License Verification Report''/ License Verification System

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a request for renewal of an existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, ''NRC Form 749, ''Manual License Verification Report''/ License Verification System.''

DATES: Submit comments by August 31, 2020. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Written comments and recommendations 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 Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: David Cullison, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *INFOCOLLECTS.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2019–0183 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2019–0183.
- *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 reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The Supporting Statement and NRC Form 749 ''Manual License Verification Report'' are available in ADAMS under Accession Nos. ML20195B167 and ML20195B168.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *INFOCOLLECTS.Resource@NRC.GOV.*

B. Submitting Comments

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted a request for renewal of an existing collection of information to OMB for review entitled, ''NRC Form 749, ''Manual License Verification Report''/License Verification System.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on May 1, 2020 (85 FR 25479).

1. *The title of the information collection:* NRC Form 749, ''Manual License Verification Report''/License Verification System.
2. *OMB approval number:* 3150–0223.
3. *Type of submission:* Extension.
4. *The form number if applicable:* NRC Form 749.
5. *How often the collection is required or requested:* On occasion. Licensees subject to part 37 of title 10 of the *Code of Federal Regulations,* ''Physical Protection of Byproduct Material'' license verification requirements must verify the legitimacy of the license with the issuing agency prior to transferring radioactive materials in quantities of concern.
6. *Who will be required or asked to respond:* Licensees are required to complete a license verification under the circumstances noted in 5 above. A License Verification System (LVS) is available to provide an electronic method for fulfilling this requirement. In cases where a licensee is unable to use the LVS to perform a verification, they will provide NRC Form 749 for manual license verification.
7. *The estimated number of annual responses:* 587.
8. *The estimated number of annual respondents:* 587.
9. *An estimate of the total number of hours needed annually to comply with the information collection requirement or request:* 59.
10. *Abstract:* When a licensee is unable to use the LVS to perform their license verification prior to transferring radioactive materials in quantities of concern, a manual process is available, in which licensees submit the NRC Form 749, ''Manual License Verification Report.'' The form provides the information necessary for the license issuing agencies to perform the verification on behalf of the licensee transferring the radioactive materials.

Dated: July 27, 2020

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2020–16562 Filed 7–30–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

677th Meeting of the Advisory Committee on Reactor Safeguards (ACRS)

In accordance with the purposes of Sections 29 and 182b of the Atomic Energy Act (42 U.S.C. 2039, 2232b), the Advisory Committee on Reactor Safeguards (ACRS) will hold meetings on August 20–21, 2020. As part of the coordinated government response to combat COVID–19, the Committee will conduct virtual meetings. The public will be able to participate in any open sessions via 1–866–822–3032, pass code 8272423#.

Thursday, August 20, 2020

9:30 a.m.–9:35 a.m.: Opening Remarks by the ACRS Chairman (Open)—The ACRS Chairman will make opening remarks regarding the conduct of the meeting. The public will have an opportunity to comment after the Chairman's remarks.

9:45 a.m.–6:00 p.m.: Preparation of ACRS Reports (Open/Closed)—The Committee will continue its discussion of proposed ACRS reports. [*NOTE:* A portion of this session may be closed in order to discuss and protect information designated as proprietary, pursuant to 5 U.S.C 552b(c)(4)]. [*NOTE:* Portions of this meeting may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to internal personnel

rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.]

Friday, August 21, 2020

9:30 a.m.–9:35 a.m.: Opening Remarks by the ACRS Chairman (Open)—The ACRS Chairman will make opening remarks regarding the conduct of the meeting. The public will have an opportunity to comment after the Chairman's remarks.

9:45 a.m.–11:30 a.m.: Future ACRS Activities/Report of the Planning and Procedures Subcommittee and Reconciliation of ACRS Comments and Recommendations (Open/Closed)—The Committee will hear discussion of the recommendations of the Planning and Procedures Subcommittee regarding items proposed for consideration by the Full Committee during future ACRS meetings. [*NOTE:* A portion of this meeting may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.] [*NOTE:* A portion of this session may be closed in order to discuss and protect information designated as proprietary, pursuant to 5 U.S.C. 552b(c)(4)].

NOTE: Discussions are at the discretion of the Chairman and subject to the Committee's workload.

11:30 a.m.–6:00 p.m.: Preparation of ACRS Reports (Open/Closed)—The Committee will continue its discussion of proposed ACRS reports. [*NOTE:* A portion of this session may be closed in order to discuss and protect information designated as proprietary, pursuant to 5 U.S.C. 552b(c)(4)]. [*NOTE:* Portions of this meeting may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.]

Procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on June 13, 2019 (84 FR 27662). In accordance with those procedures, oral or written views may be presented by members of the public, including representatives of the nuclear industry. Persons desiring to make oral statements should notify Quynh Nguyen, Cognizant ACRS Staff and the Designated Federal Official (Telephone: 301–415–5844, Email: *Quynh.Nguyen@nrc.gov*), 5 days before the meeting, if possible, so that appropriate arrangements can be made to allow necessary time during the meeting for such statements. In view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the Cognizant ACRS staff if such rescheduling would result in major inconvenience.

An electronic copy of each presentation should be emailed to the Cognizant ACRS Staff at least one day before meeting.

In accordance with Subsection 10(d) of Public Law 92–463 and 5 U.S.C. 552b(c), certain portions of this meeting may be closed, as specifically noted above. Use of still, motion picture, and television cameras during the meeting may be limited to selected portions of the meeting as determined by the Chairman. Electronic recordings will be permitted only during the open portions of the meeting.

ACRS meeting agendas, meeting transcripts, and letter reports are available through the NRC Public Document Room (PDR) at *pdr.resource@nrc.gov,* or by calling the PDR at 1–800–397–4209, or from the Publicly Available Records System component of NRC's Agencywide Documents Access and Management System (ADAMS) which is accessible from the NRC website at *http://www.nrc.gov/reading-rm/adams.html* or *http://www.nrc.gov/reading-rm/doc-collections/#ACRS/.*

Video teleconferencing service is available for observing open sessions of ACRS meetings. Those wishing to use this service should contact Thomas Dashiell, ACRS Audio Visual Technician (301–415–7907), between 7:30 a.m. and 3:45 p.m. (Eastern Time), at least 10 days before the meeting to ensure the availability of this service. Individuals or organizations requesting this service will be responsible for telephone line charges and for providing the equipment and facilities that they use to establish the video teleconferencing link. The availability of video teleconferencing services is not guaranteed.

Dated: July 28, 2020.

Russell E. Chazell,

Federal Advisory Committee Management Officer, Office of the Secretary.

[FR Doc. 2020–16614 Filed 7–30–20; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee; Virtual Public Meeting

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: According to the provisions of section 10 of the Federal Advisory Committee Act, notice is hereby given that the August 20, 2020, meeting of the Federal Prevailing Rate Advisory Committee previously announced in the **Federal Register** on Monday, December 23, 2019, is being changed to a virtual meeting via teleconference. There will be no in-person gathering for this meeting. This meeting will be open to the public, with an audio option for listening. This notice sets forth the agenda for the meeting and the participation guidelines.

DATES: The virtual meeting will be held on August 20, 2020, beginning at 10:00 a.m. (EDT).

ADDRESS: The meeting will convene virtually.

FOR FURTHER INFORMATION CONTACT: Madeline Gonzalez, 202–606–2858, or email *pay-leave-policy@opm.gov.*

SUPPLEMENTARY INFORMATION:

Meeting Agenda. The tentative agenda for this meeting includes the following Federal Wage System items:

- The definition of Monroe County, PA
- The definition of San Joaquin County, CA
- The definition of the Salinas-Monterey, CA, wage area
- The definition of the Puerto Rico wage area
- Amendments to 5 CFR 532.201, 532.207, 532.235, and 532.247

Public Participation: The August 20, 2020, meeting of the Federal Prevailing Rate Advisory Committee is open to the public through advance registration. Public participation is available for the teleconference by audio access only. All individuals who plan to attend the virtual public meeting to listen must register by sending an email to *pay-leave-policy@opm.gov* with the subject line ''August 20 FPRAC Meeting'' no later than Tuesday, August 18, 2020.

The following information must be provided when registering:

- Name.
- Agency and duty station.
- Email address.
- Your topic of interest.

A confirmation email will be sent upon receipt of the registration. Audio teleconference information for

participation will be sent to registrants the morning of the virtual meeting.

Office of Personnel Management.

Stephen Hickman,

Deputy Executive Secretary.

[FR Doc. 2020–16555 Filed 7–30–20; 8:45 am]

BILLING CODE 6325–38–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IA–5549]

Notice of Intention To Cancel Registration Pursuant to Section 203(H) of the Investment Advisers Act of 1940

July 27, 2020.

Notice is given that the Securities and Exchange Commission (the ''Commission'') intends to issue an order, pursuant to Section 203(h) of the Investment Advisers Act of 1940 (the ''Act''), cancelling the registration of Europa Investment Bank Inc. [File No. 801–74257], hereinafter referred to as the ''*registrant.*''

Section 203(h) provides, in pertinent part, that if the Commission finds that any person registered under Section 203, or who has pending an application for registration filed under that section, is no longer in existence, is not engaged in business as an investment adviser, or is prohibited from registering as an investment adviser under section 203A, the Commission shall by order, cancel the registration of such person.

The registrant is not eligible for registration with the Commission under the Act and the rules issued under the Act. This belief is based on our understanding that registrant is relying on rule 203A–1(a)(1) to remain registered with the Commission, though it has insufficient regulatory assets under management.[1] Registrant does not currently have regulatory assets under management of $100 million or more; and it did not have regulatory assets under management of $90 million or more at the time of filing its most recent annual updating amendment. In addition, our belief also is based on our understanding that the registrant is no longer in existence or otherwise engaged in business as an investment adviser. Accordingly, the Commission believes that reasonable grounds exist for a finding that this registrant is no longer eligible to be registered with the Commission as an investment adviser and that the registration should be cancelled pursuant to section 203(h) of the Act.

Notice is also given that any interested person may, by August 21, 2020, at 5:30 p.m., submit to the Commission in writing a request for a hearing on the cancellation, accompanied by a statement as to the nature of his or her interest, the reason for such request, and the issues, if any, of fact or law proposed to be controverted, and he or she may request that he or she be notified if the Commission should order a hearing thereon. Any such communication should be emailed to the Commission's Secretary at *Secretarys-Office@sec.gov.*

At any time after August 21, 2020, the Commission may issue an order cancelling the registration, upon the basis of the information stated above, unless an order for a hearing on the cancellation shall be issued upon request or upon the Commission's own motion. Persons who requested a hearing, or who requested to be advised as to whether a hearing is ordered, will receive any notices and orders issued in this matter, including the date of the hearing (if ordered) and any postponements thereof. Any adviser whose registration is cancelled under delegated authority may appeal that decision directly to the Commission in accordance with rules 430 and 431 of the Commission's rules of practice (17 CFR 201.430 and 431).

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.*

FOR FURTHER INFORMATION CONTACT: Benjamin A. Tecmire, Senior Counsel at 202–551–6541 (Investment Adviser Regulation Office).

For the Commission, by the Division of Investment Management, pursuant to delegated authority.[2]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–16589 Filed 7–30–20; 8:45 am]

BILLING CODE 8011–01–P

[1] Rule 203A–1(a)(1) under the Act generally requires an adviser to have assets under management of at least $100 million or at least $90 million at the time of filing its most recent annual updating amendment.

[2] 17 CFR 200.30–5(e)(2).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89398; File No. SR–CBOE–2020–050]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, to Amend Rules 5.37 and 5.73

July 27, 2020.

On June 3, 2020, Cboe Exchange, Inc. (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Rules 5.37 and 5.73 to permit orders for the accounts of market makers with an appointment in SPX to be solicited for the initiating order submitted for execution against an agency order in SPX options into a simple Automated Improvement Mechanism (''AIM'') auction or a simple FLEX AIM auction. The proposed rule change was published for comment in the **Federal Register** on June 18, 2020.[3] On July 2, 2020, the Exchange submitted Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change in its entirety.[4] On July 22, 2020, the Exchange submitted Amendment No. 2 to the proposed rule change.[5]

Section 19(b)(2) of the Act[6] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89062 (June 12, 2020), 85 FR 36907. Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-cboe-2020-050/srcboe2020050.htm.*

[4] In Amendment No. 1, the Exchange: (1) Limited the scope of its original proposal, which would have permitted orders for the accounts of market makers with an appointment in any class to be solicited for the initiating order in an AIM or FLEX AIM auction in that class, to only allow market makers with an appointment in SPX to be solicited for the initiating order in an AIM or FLEX AIM auction in SPX; and (2) provided additional data, justification, and support for its modified proposal. The full text of Amendment No. 1 is available on the Commission's website at: *https://www.sec.gov/comments/sr-cboe-2020-050/srcboe2020050-7382058-218888.pdf.*

[5] In Amendment No. 2, the Exchange: (1) Provided additional data, justification, and support for its proposal; and (2) made technical corrections and clarifications to the description of the proposal. The full text of Amendment No. 2 is available on the Commission's website at: *https://www.sec.gov/comments/sr-cboe-2020-050/srcboe2020050-7464399-221161.pdf.*

[6] 15 U.S.C. 78s(b)(2).

designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is August 2, 2020. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change, as modified by Amendment Nos. 1 and 2, and the comments received. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[7] designates September 16, 2020 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change, as modified by Amendment Nos. 1 and 2 (File No. SR–CBOE–2020–050).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–16569 Filed 7–30–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89403; File No. SR–NASDAQ–2020–038]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Defer Entry Fees for Acquisition Companies

July 27, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1], and Rule 19b–4 thereunder,[2] notice is hereby given that on July 14, 2020, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to defer entry fees for Acquisition Companies for one year from the date of listing and to make minor attendant technical changes.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In 2009 Nasdaq adopted a rule (IM–5101–2) to impose additional listing requirements on a company whose business plan is to complete an initial public offering and engage in a merger or acquisition with one or more unidentified companies within a specific period of time (''Acquisition Companies'').[3] Based on experience listing these companies, Nasdaq proposes to modify the process of assessing entry fees applicable to them on all three tiers of Nasdaq. Specifically, for an Acquisition Company listed under IM–5101–2 on the Nasdaq Global or Global Select Market, Nasdaq proposes to defer the entry fee described in Listing Rule 5910(a)(1) for one year from the date of listing. Similarly, for an Acquisition Company listed under IM–5101–2 on the Nasdaq Capital Market, Nasdaq proposes to defer the entry fee described in Listing Rule 5920(a)(1) for one year from the date of listing. For the avoidance of doubt, in each case, such fee is owed to Nasdaq at the time of listing based on the fee schedule in effect on the date of listing but is assessed by Nasdaq on the first anniversary of the date of listing.

Acquisition Companies are formed to raise capital in an initial public offering (IPO) with the purpose of using the proceeds to acquire one or more unspecified businesses or assets to be identified after the IPO. However, unlike other types of listed companies that have pre-existing operations or that fund their operations by proceeds raised from the IPO, following the IPO, an Acquisition Company funds a trust account with an amount typically equal to 100% of the gross proceeds of the IPO.[4] As such, operating expenses are typically borne by the Acquisition Company's sponsors, particularly during the initial post-IPO period. The Acquisition Company's sponsor is the entity or management team that forms the Acquisition Company and, typically, runs the operations of the Acquisition Company until an appropriate target company is identified and the business combination is consummated. The funds in the trust account are typically invested in short-term U.S. government securities or held as cash, earning interest over time. Thus, Acquisition Company unique structure results in sponsor's extreme fee sensitivity, particularly during the initial post-IPO period before any substantial amount of interest is earned from the trust account. Nasdaq believes that the market practice of depositing 100% of the gross proceeds of the IPO in a trust account (rather than the minimum required 90%) benefits shareholders and is consistent with investor protection because it helps assure that shareholders exercising their right to redeem their shares for a pro rata share of the trust account will receive the full IPO price paid, rather than a lesser amount guaranteed by Nasdaq rules.[5] Accordingly, to encourage this market practice Nasdaq believes it is appropriate to defer the payment of the entry fees owed by an Acquisition Company listed on Nasdaq until the first anniversary of the date of listing.

Nasdaq believes that the proposed fee deferral would provide an incentive to sponsors to list Acquisition Companies

[7] *Id.*

[8] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 58228 (July 25, 2008), 73 FR 44794 (July 31, 2008) (adopting the predecessor to IM–5101–2).

[4] While under Nasdaq's rules an Acquisition Company could pay operating and other expenses, subject to a limitation that 90% of the gross proceeds of the company's offering must be retained in trust account, Nasdaq understands that marketplace demands typically dictate that 100% of the gross proceeds from the IPO be kept in the trust account and that only interest earned on that account be used to pay taxes and a limited amount of operating expenses. *See* Listing Rule IM–5101–2 (a).

[5] *See* Listing Rule IM–5101–2 (d) and (e).

on Nasdaq. Nasdaq also believes it is reasonable to balance its need to remain competitive with other listing venues, while at the same time ensuring adequate revenue to meet is regulatory responsibilities. Nasdaq notes that the fee deferral will not cause any reduction to Nasdaq's revenue and no other company will be required to pay higher fees as a result of the proposed amendments and represents that the proposed fee deferral will have no impact on the resources available for its regulatory programs.

Nasdaq also proposes to amend Listing Rules 5910(a)(11) and 5920(a)(11) to clarify that Acquisition Companies listed under IM–5101–2 are subject to the application fees described in these rules. This will also help assure that there is no impact on the resources available for Nasdaq's regulatory programs.

Finally, Nasdaq proposes to amend the reference in Listing Rule 5920(a)(1) to correctly cross reference Listing Rule 5920(a)(11), which describes the assessment of application fees on the Nasdaq Capital Market.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As a preliminary matter, Nasdaq competes for listings with other national securities exchanges and companies can easily choose to list on, or transfer to, those alternative venues. As a result, the fees Nasdaq can charge listed companies are constrained by the fees charged by its competitors and Nasdaq cannot charge prices in a manner that would be unreasonable, inequitable, or unfairly discriminatory.

Nasdaq believes that the proposed rule change to defer the entry fees described in Listing Rules 5910(a)(1) and 5920(a)(1) for one year from the date of listing is reasonable and not unfairly discriminatory because it recognizes the unique structure Acquisition Companies that results in sponsor's extreme fee sensitivity, particularly during the initial post-IPO period before any substantial amount of interest is earned from the trust account. Unlike other companies, which have pre-existing operations and immediate access to the IPO proceeds, Acquisition Companies are unique because at least 90%, and typically 100%, of the IPO proceeds are held in trust for the shareholders and are not available to fund their operations. Acquisition Companies also do not have any prior operations that generate cash that could be used to fund their operations. Nasdaq also believes that the proposed fee deferral is reasonable in that it will create a commercial incentive for sponsors to list Acquisition Companies on Nasdaq. Nasdaq competes for listings, in part, by the level of its listing fees, and the proposed deferral of the entry fees for Acquisition Companies based on the unique issues associated with their structure is similarly a reasonable basis on which for Nasdaq to distinguish itself from competitors.

Nasdaq also notes that no other company will be required to pay higher fees as a result of the proposed amendments. Therefore, Nasdaq believes that allowing an Acquisition Company to pay entry fees on a deferred basis is reasonable and not inequitable or unfairly discriminatory.

Finally, Nasdaq believes that the proposal to defer such fees is consistent with the investor protection objectives of Section 6(b)(5) of the Act in that they are designed to promote just and equitable principles of trade, to remove impediments to a free and open market and national market system, and in general to protect investors and the public interest. Specifically, the amount of revenue deferred by allowing Acquisition Companies to pay entry fees one year from the date of listing is not substantial, and the fee deferral may result in more Acquisition Companies listing on Nasdaq, thereby increasing the resources available for Nasdaq's listing compliance program, which helps assure that listing standards are properly enforced and investors are protected. In addition, Nasdaq believes that the market practice of depositing 100% of the gross proceeds of the IPO in a trust account for the benefit of shareholders (rather than the required 90%) benefits those shareholders and is consistent with the investor protection goals of the Act because it helps assure that shareholders exercising their right to redeem their shares for a pro rata share of the trust account will receive the full IPO price paid, rather than a lesser amount guaranteed by Nasdaq rules.

Nasdaq believes that the potential impact on revenue from the entry fee deferral, as proposed, will not hinder its ability to fulfill its regulatory responsibilities.

Nasdaq also believes that the proposed rule change to amend Listing Rules 5910(a)(11) and 5920(a)(11) to clarify that Acquisition Companies listed under IM–5101–2 are subject to the application fees described in these rules and to amend the reference in Listing Rule 5920(a)(1) to correctly cross reference Listing Rule 5920(a)(11), which describes the assessment of application fees, is designed to promote just and equitable principles of trade by eliminating potential confusion about Nasdaq rules by clarifying these rules and updating an inaccurate cross-reference, without changing the substance of the rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The market for listing services is extremely competitive and listed companies may freely choose alternative venues based on the aggregate fees assessed, and the value provided by each listing. This rule proposal does not burden competition with other listing venues, which are similarly free to set their fees. For these reasons, Nasdaq does not believe that the proposed rule change will result in any burden on competition for listings.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4) and (5).

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

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–2020–038 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–2020–038. 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 submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2020–038 and should be submitted on or before August 21, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–16572 Filed 7–30–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89401; File No. SR–CBOE–2020–068]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend Rule 10.3 by Extending the Credit Option Margin Pilot Program Through September 1, 2021

July 27, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 17, 2020, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend Rule 10.3 by extending the Credit Option Margin Pilot Program through September 1, 2021. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On February 2, 2011, the Commission approved the Exchange's proposal to establish a Credit Option Margin Pilot Program (''Program'').[5] The proposal became effective on a pilot basis to run on a parallel track with Financial Industry Regulatory Authority (''FINRA'') Rule 4240 that similarly operates on an interim pilot basis.[6]

On January 17, 2012, the Exchange filed a rule change to, among other things, decouple the Program with the FINRA program and to extend the expiration date of the Program to January 17, 2013.[7] The Program, however, continues to be substantially similar to the provisions of the FINRA program. Subsequently, the Exchange filed rule changes to extend the program until January 17, 2014, January 16, 2015, January 15, 2016, January 17, 2017, July 18, 2017, July 18, 2018, July 18, 2019 and July 20, 2020, respectively.[8] The

[5] *See* Securities Exchange Act Release No. 63819 (February 2, 2011), 76 FR 6838 (February 8, 2011) order approving (SR–CBOE–2010–106). To implement the Program, the Exchange amended Rule 10.3(l), *Margin Requirements,* to make Cboe Option's margin requirements for Credit Options consistent with Financial Industry Regulatory Authority (''FINRA'') Rule 4240, *Margin Requirements for Credit Default Swaps.* Cboe Options Credit Options (*i.e.,* Credit Default Options and Credit Default Basket Options) are analogous to credit default swaps.

[6] *See* Securities Exchange Act Release No. 59955 (May 22, 2009), 74 FR 25586 (May 28, 2009) (Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change; SR–FINRA–2009–012).

[7] *See* Securities Exchange Act Release No. 66163 (January 17, 2012), 77 FR 3318 (January 23, 2012) (SR–CBOE–2012–007).

[8] *See* Securities Exchange Act Release Nos. 68539 (December 27, 2012), 78 FR 138 (January 2, 2013) (SR–CBOE–2012–125), 71124 (December 18, 2013), 78 FR 77754 (December 24, 2013) (SR–CBOE–2013–123), 73837 (December 15, 2014), 79 FR 75850 (December 19, 2014) (SR–CBOE–2014–091), 76824 (January 5, 2016), 81 FR 1255 (January 11, 2016) (SR–CBOE–2015–118), 79621 (December 14, 2016)

Exchange believes that extending the expiration date of the Program further will allow for further analysis of the Program and a determination of how the Program should be structured in the future. Thus, the Exchange is now currently proposing to extend the duration of the Program for an additional period until September 1, 2021.[9]

Additionally, the Exchange believes that it is in the public interest to extend the expiration date of the Program because it will continue to allow the Exchange to list Credit Options for trading. As a result, the Exchange will remain competitive with the Over-the-Counter Market with respect to swaps and security-based swaps. In the future, if the Exchange proposes an additional extension of the Credit Option Margin Pilot Program or proposes to make the Program permanent, then the Exchange will submit a filing proposing such amendments to the Program.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[10] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[11] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitation transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[12] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that the proposed rule change will further the purposes of the Act because, consistent with the goals of the Commission at the initial adoption of the program, the margin requirements set forth by the proposed rule change will help to stabilize the financial markets. In addition, the proposed rule change is substantially similar to existing FINRA Rule 4240.

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. Specifically, the Exchange believes that, by extending the expiration of the Program, the proposed rule change will allow for further analysis of the Program and a determination of how the Program shall be structured in the future. In doing so, the proposed rule change will also serve to promote regulatory clarity and consistency, thereby reducing burdens on the marketplace and facilitating investor protection.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

A. Significantly affect the protection of investors or the public interest;

B. impose any significant burden on competition; and

C. become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[13] and Rule 19b–4(f)(6)[14] thereunder.

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange states that waiver of the 30-day operative delay will allow it to maintain the status quo, thereby reducing market disruption. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the Program to continue uninterrupted, thereby avoiding investor confusion that could result from a temporary interruption of the Program. For this reason, the Commission designates the proposed rule change to be operative upon filing.[15]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2020–068 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2020–068. 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

81 FR 95236 (December 27, 2016) (SR–CBOE–2016–089), 81083 (July 6, 2017) 82 FR 32219 (July 12, 2017) (SR–CBOE–2017–051), 83672 (July 19, 2018) 83 FR 35305 (July 25, 2018) (SR–CBOE–2018–052), and 86411 (July 18, 2019) 84 FR 35702 (July 24, 2019) (SR–CBOE–2019–037).

[9] The Exchange is filing the proposed rule change for immediate effectiveness. The Exchange is proposing that the implementation date of the proposed rule change will be July 20, 2020. The proposed rule change will expire on September 1, 2021, which is the same date FINRA's corresponding program expires. *See* Securities Exchange Act Release Nos. 89036 (June 10, 2020), 85 FR 36458 (June 16, 2020) (SR–FINRA–2020–016).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] *Id.*

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). In addition, as required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of the filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[15] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–CBOE–2020–068 and should be submitted on or before August 21, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–16571 Filed 7–30–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89399; File No. SR–CBOE–2020–051]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change, as Modified by Amendment No. 1, To Amend Its Automated Price Improvement Auction Rules in Connection With Agency Order Size Requirements

July 27, 2020.

On June 11, 2020, Cboe Exchange, Inc. (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Rules 5.37 and 5.38 to allow the Exchange to determine maximum size requirements for agency orders in SPX submitted though the Automated Improvement Mechanism (''AIM'') and Complex Automated Improvement Mechanism (''C–AIM'') auctions. The proposed rule change was published for comment in the **Federal Register** on June 18, 2020.[3] On July 23, 2020, the Exchange submitted Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change in its entirety.[4]

Section 19(b)(2) of the Act[5] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is August 2, 2020. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change, as modified by Amendment No. 1, and the comments received. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[6] designates September 16, 2020 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change, as modified by Amendment No. 1 (File No. SR–CBOE–2020–051).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–16570 Filed 7–30–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89400; File No. SR–CBOE–2020–052]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change, as Modified by Amendment No. 1, To Amend Rules 5.37, 5.38, and 5.73

July 27, 2020.

On June 3, 2020, Cboe Exchange, Inc. (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Rules 5.37, 5.38, and 5.73 to (1) allow the Exchange to determine to disseminate the stop price in auction notification messages for Automated Improvement Mechanism (''AIM''), Complex Automated Improvement Mechanism (''C–AIM''), and FLEX AIM auctions in SPX; and (2) modify the minimum increment for C–AIM and FLEX AIM auction responses in connection with index combo orders in SPX. The proposed rule change was published for comment in the **Federal Register** on June 18, 2020.[3] On July 22, 2020, the Exchange submitted Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change in its entirety.[4]

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89058 (June 12, 2020), 85 FR 36918. Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-cboe-2020-051/srcboe2020051.htm.*

[4] In Amendment No. 1, the Exchange: (1) Amended its proposal to modify the proposed maximum size requirement for AIM and C–AIM agency orders in SPX from 100 contracts to 10 contracts, specify that this size requirement would apply to all agency orders in SPX, and make related conforming changes to its proposed rule text; and (2) provided additional data, justification, and support for its modified proposal. The full text of Amendment No. 1 is available on the Commission's website at: *https://www.sec.gov/comments/sr-cboe-2020-051/srcboe2020051-7470738-221292.pdf.*

[5] 15 U.S.C. 78s(b)(2).

[6] *Id.*

[7] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89063 (June 12, 2020), 85 FR 36923. Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-cboe-2020-052/srcboe2020052.htm.*

[4] In Amendment No. 1, the Exchange: (1) Amended the proposal to add that, when the proposed stop price dissemination in auction notification messages is enabled for AIM, C–AIM, or FLEX AIM auctions in SPX, it would apply to all such AIM, C–AIM, or FLEX AIM auctions; (2) amended the proposal to specify that the proposed minimum increment modification applies to index combo orders in SPX, and to correct an internal cross-reference within the proposed rules; (3) provided additional detail to the description and examples of the proposed modification to the minimum increment for index combo orders in SPX; and (4) provided additional justification and support for the proposed rule change. The full text of Amendment No. 1 is available on the

Section 19(b)(2) of the Act [5] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is August 2, 2020. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change, as modified by Amendment No. 1, and the comments received. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[6] designates September 16, 2020 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change, as modified by Amendment No. 1 (File No. SR–CBOE–2020–052).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–16573 Filed 7–30–20; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m. on Wednesday, August 5, 2020.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.sec.gov.*

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matter of the closed meeting will consist of the following topic:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Resolution of litigation claims; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

CONTACT PERSON FOR MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Dated: July 29, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–16840 Filed 7–29–20; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89402; File No. SR–NYSEAMER–2020–52]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Adding the Consolidated Audit Trail Industry Member Compliance Rules to the List of Minor Rule Violations in Rule 9217

July 27, 2020.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on July 21, 2020, NYSE American LLC (''NYSE American'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to add the Consolidated Audit Trail (''CAT'') industry member compliance rules to the list of minor rule violations in Rule 9217. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to add NYSE American's CAT industry member compliance rules (the ''CAT Compliance Rules'') to the list of minor rule violations in Rule 9217. This proposal is based upon the Financial Industry Regulatory Authority, Inc. (''FINRA'') filing to amend FINRA Rule 9217 in order to add FINRA's corresponding CAT Compliance Rules to FINRA's list of rules that are eligible for minor rule violation plan treatment and the filing of the Exchange's affiliate the New York Stock Exchange LLC (''NYSE'') to add NYSE's corresponding CAT Compliance Rules to the list of minor rule violations in NYSE Rule 9217.[4]

Commission's website at: *https://www.sec.gov/comments/sr-cboe-2020-052/srcboe2020052-7464403-221166.pdf.*

[5] 15 U.S.C. 78s(b)(2).

[6] *Id.*

[7] 17 CFR 200.30–3(a)(31).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 88870 (May 14, 2020), 85 FR 30768 (May 20, 2020) (SR–FINRA–2020–013); Securities Exchange Act Release

Continued

Proposed Rule Change

The Exchange recently adopted the CAT Compliance Rules in the Rule 6800 Series in order to implement the National Market System Plan Governing the Consolidated Audit Trail (the ''CAT NMS Plan'' or ''Plan'').[5] The CAT NMS Plan was filed by the Plan Participants to comply with Rule 613 of Regulation NMS under the Exchange Act,[6] and each Plan Participant accordingly has adopted the same compliance rules in the Exchange's Rule 6800 Series. The common compliance rules adopted by each Plan Participant are designed to require industry members to comply with the provisions of the CAT NMS Plan, which broadly calls for industry members to record and report timely and accurately customer, order, and trade information relating to activity in NMS Securities and OTC Equity Securities.

Rule 9217 sets forth the list of rules under which a member organization or covered person may be subject to a fine under Rule 9216(b). Rule 9217 permits the Exchange to impose a fine of up to $5,000 on any member organization or covered person for a minor violation of an eligible rule. The Exchange proposes to amend Rule 9217 to add the CAT Compliance Rules in the Rule 6800 Series to the list of equities and options rules in Rule 9217 eligible for disposition pursuant to a minor fine under Rule 9216(b).[7]

The Exchange is coordinating with FINRA and other Plan Participants to promote harmonized and consistent enforcement of all the Plan Participants' CAT Compliance Rules. The Commission recently approved a Rule 17d–2 Plan under which the regulation of CAT Compliance Rules will be allocated among Plan Participants to reduce regulatory duplication for industry members that are members of more than one Participant (''common members'').[8] Under the Rule 17d–2 Plan, the regulation of CAT Compliance Rules with respect to common members that are members of FINRA is allocated to FINRA. Similarly, under the Rule 17d–2 Plan, responsibility for common members of multiple other Plan Participants and not a member of FINRA will be allocated among those other Plan Participants, including to the Exchange. For those non-common members who are allocated to NYSE American pursuant to the Rule 17d–2 Plan, if any, the Exchange and FINRA entered into a Regulatory Services Agreement (''RSA'') pursuant to which FINRA will conduct surveillance, investigation, examination, and enforcement activity in connection with the CAT Compliance Rules on the Exchange's behalf (with the exception of such matters once a complaint is filed which in such instance is no longer administered through the MRVP). We expect that the other exchanges would be entering into a similar RSA.

In order to achieve consistency with FINRA and the other Plan Participants, the Exchange proposes to adopt fines up to $2,500 in connection with minor rule fines for violations of the CAT Compliance Rules in the Rule 6800 Series of the Office Rules under Rule 9217 and the Exchange's MRVP.[9]

FINRA, in connection with its proposed amendment to FINRA Rule 9217 to make FINRA's CAT Compliance Rules MRVP eligible, has represented that it will apply the minor fines for CAT Compliance Rules in the same manner that FINRA has for its similar existing audit trail-related rules.[10] Accordingly, in order to promote regulatory consistency, the Exchange plans to do the same. Specifically, application of a minor rule fine with respect to CAT Compliance Rules will be guided by the same factors that FINRA referenced in its filing. However, more formal disciplinary proceedings may be warranted instead of minor rule dispositions in certain circumstances such as where violations prevent regulatory users of the CAT from performing their regulatory functions. Where minor rule dispositions are appropriate, the following factors help guide the determination of fine amounts:

- Total number of reports that are not submitted or submitted late;
- The timeframe over which the violations occur;
- Whether violations are batched;
- Whether the violations are the result of the actions of one individual or the result of faulty systems or procedures;
- Whether the firm has taken remedial measures to correct the violations;
- Prior minor rule violations within the past 24 months;
- Collateral effects that the failure has on customers; and
- Collateral effects that the failure has on the Exchange's ability to perform its regulatory function.[11]

Upon effectiveness of this rule change, the Exchange will publish a regulatory bulletin notifying its member organizations of the rule change and the specific factors that will be considered in connection with assessing minor rule fines described above.

For the foregoing reasons, the Exchange believes that the proposed rule change will result in a coordinated, harmonized approach to CAT compliance rule enforcement across Plan Participants that will be consistent with the approach FINRA has taken with the CAT rules.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Section 6(b)(5),[13] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster

No. 89123 (June 23, 2020), 85 FR 39016 (June 29, 2020) (SR–NYSE–2020–51).

[5] *See* Securities Exchange Act Release No. 80256 (March 15, 2017), 82 FR 14526 (March 21, 2017) (SR–NYSEMKT–2017–02).

[6] 17 CFR 242.613.

[7] FINRA's maximum fine for minor rule violations under FINRA Rule 9216(b) is $2,500. Like the NYSE, the Exchange will apply an identical maximum fine amount for eligible violations of the Rule 6800 Series to achieve consistency with FINRA and also to amend its minor rule violation plan (''MRVP'') to include such fines. Like FINRA and the NYSE, the Exchange would be able to pursue a fine greater than $2,500 for violations of the Rule 6800 Series in a regular disciplinary proceeding or an acceptance, waiver, and consent (''AWC'') under the Rule 9000 Series as appropriate. Any fine imposed in excess of $2,500 or not otherwise covered by Rule 19d–1(c)(2) of the Act would be subject to prompt notice to the Commission pursuant to Rule 19d–1 under the Act. As noted below, in assessing the appropriateness of a minor rule fine with respect to CAT Compliance Rules, the Exchange will be guided by the same factors that FINRA utilizes. *See* text accompanying notes 10–11, *infra*.

[8] *See* Securities Exchange Act Release No. 88366 (March 12, 2020), 85 FR 15238 (March 17, 2020) (File No. 4–618).

[9] To effectuate this change and make the Exchange's rules more like those of its affiliate the NYSE and more internally consistent, the Exchange proposes to add the following text before and after the fine chart applicable to equities rules violations, respectively:

These fines are intended to apply to minor violations, with the exception of fines pursuant to the Rule 6800 Series. For more serious violations, other disciplinary action may be sought.

For failures to comply with the Consolidated Audit Trail Compliance Rule requirements of the Rule 6800 Series, the Exchange may impose a minor rule violation fine of up to $2,500. For more serious violations, other disciplinary action may be sought.

The proposed change would conform the Exchange's equities fine chart to that of the NYSE. In addition, the proposed change would make the Exchange's rules more internally consistent since similar language appears in the Recommended Fine Schedule for options rule violations.

Further, the fine level in Rule 9217 for violations of the CAT Compliance Rules in the Rule 6800 Series applicable to ATP Holders would provide that a fine up to $2,500 could be sought.

[10] *See* SR–FINRA–2020–013; *see also* FINRA Notice to Members 04–19 (March 2004) (providing specific factors used to inform dispositions for violations of OATS reporting rules).

[11] *See id.*

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

Minor rule fines provide a meaningful sanction for minor or technical violations of rules when the conduct at issue does not warrant stronger, immediately reportable disciplinary sanctions. The inclusion of a rule in the Exchange's MRVP does not minimize the importance of compliance with the rule, nor does it preclude the Exchange from choosing to pursue violations of eligible rules through an AWC if the nature of the violations or prior disciplinary history warrants more significant sanctions. Rather, the Exchange believes that the proposed rule change will strengthen the Exchange's ability to carry out its oversight and enforcement responsibilities in cases where full disciplinary proceedings are unwarranted in view of the minor nature of the particular violation. Rather, the option to impose a minor rule sanction gives the Exchange additional flexibility to administer its enforcement program in the most effective and efficient manner while still fully meeting the Exchange's remedial objectives in addressing violative conduct. Specifically, the proposed rule change is designed to prevent fraudulent and manipulative acts and practices because it will provide the Exchange the ability to issue a minor rule fine for violations of the CAT Compliance Rules in the Rule 6800 Series where a more formal disciplinary action may not be warranted or appropriate consistent with the approach of other Plan Participants for the same conduct.

In connection with the fine level specified in the proposed rule change, adding language that minor rule fines for violations of the CAT Compliance Rules in the Rule 6800 Series shall not exceed $2,500 would further the goal of transparency and add clarity to the Exchange's rules. Adopting the same cap as FINRA and the NYSE for minor rule fines in connection with the CAT Compliance Rules would also promote regulatory consistency across self-regulatory organizations.

The Exchange further believes that the proposed amendments to Rule 9217 are consistent with Section 6(b)(6) of the Act,[14] which provides that members and persons associated with members shall be appropriately disciplined for violation of the provisions of the rules of the exchange, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction. As noted, the proposed rule change would provide the Exchange ability to sanction minor or technical violations of the Rule 6800 Series pursuant to the Exchange's rules.

Finally, the Exchange also believes that the proposed changes are designed to provide a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d) of the Act.[15] Rule 9217 does not preclude a member organization or covered person from contesting an alleged violation and receiving a hearing on the matter with the same procedural rights through a litigated disciplinary proceeding.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues but rather is concerned solely with making the CAT Compliance Rules in the Rule 6800 Series eligible for a minor rule fine disposition, thereby strengthening the Exchange's ability to carry out its oversight and enforcement functions and deter potential violative conduct.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEAMER–2020–52 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAMER–2020–52. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAMER–2020–52 and should be submitted on or before August 21, 2020.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[16] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[17] which requires that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments and to perfect the mechanism of a free and

[14] 15 U.S.C. 78f(b)(6).

[15] 15 U.S.C. 78f(b)(7) and 78f(d).

[16] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] 15 U.S.C. 78f(b)(5).

open market and a national market system, and, in general, to protect investors and the public interest. The Commission also believes that the proposal is consistent with Sections 6(b)(1) and 6(b)(6) of the Act [18] which require that the rules of an exchange enforce compliance with, and provide appropriate discipline for, violations of Commission and Exchange rules. Finally, the Commission finds that the proposal is consistent with the public interest, the protection of investors, or otherwise in furtherance of the purposes of the Act, as required by Rule 19d–1(c)(2) under the Act,[19] which governs minor rule violation plans.

As stated above, the Exchange proposes to add the CAT Compliance Rules to the list of minor rule violations in Rule 9217 to be consistent with the approach FINRA has taken for minor violations of its corresponding CAT Compliance Rules.[20] The Commission has already approved FINRA's treatment of CAT Compliance Rules violations when it approved the addition of CAT Compliance Rules to FINRA's MRVP.[21] As noted in that order, and similarly herein, the Commission believes that Exchange's treatment of CAT Compliance Rules violations as part of its MRVP provides a reasonable means of addressing violations that do not rise to the level of requiring formal disciplinary proceedings, while providing greater flexibility in handling certain violations. However, the Commission expects that, as with FINRA, the Exchange will continue to conduct surveillance with due diligence and make determinations based on its findings, on a case-by-case basis, regarding whether a sanction under the rule is appropriate, or whether a violation requires formal disciplinary action. Accordingly, the Commission believes the proposal raises no novel or significant issues.

For the same reasons discussed above, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[22] for approving the proposed rule change prior to the thirtieth day after the date of publication of the notice of the filing thereof in the **Federal Register**. The proposal merely adds the CAT Compliance Rules to the Exchange's MRVP and harmonizes its application with FINRA's application of CAT Compliance Rules under its own MRVP. Accordingly, the Commission believes that a full notice-and-comment period is not necessary before approving the proposal.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act [23] and Rule 19d–1(c)(2) thereunder,[24] that the proposed rule change (SR–NYSEAMER–2020–52) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–16568 Filed 7–30–20; 8:45 am]

BILLING CODE 8011–01–P

[18] 15 U.S.C. 78f(b)(1) and 78f(b)(6).

[19] 17 CFR 240.19d–1(c)(2).

[20] As discussed above, the Exchange has entered into a Rule 17d–2 Plan and an RSA with FINRA with respect to the CAT Compliance Rules. The Commission notes that, unless relieved by the Commission of its responsibility, as may be the case under the Rule 17d–2 Plan, the Exchange continues to bear the responsibility for self-regulatory conduct and liability for self-regulatory failures, not the self-regulatory organization retained to perform regulatory functions on the Exchange's behalf pursuant to an RSA. *See* Securities Exchange Release No. 61419 (January 26, 2010), 75 FR 5157 (February 1, 2010) (SR–BATS–2009–031), note 93 and accompanying text.

[21] *See supra* note 4.

[22] 15 U.S.C. 78s(b)(2).

[23] 15 U.S.C. 78s(b)(2).

[24] 17 CFR 240.19d–1(c)(2).

[25] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

[Docket No: SSA–2020–0037]

Agency Information Collection Activities: Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes a revision of an OMB-approved information collection.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB)

Office of Management and Budget, *Attn:* Desk Officer for SSA, *Fax:* 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov*

(SSA)

Social Security Administration, OLCA, *Attn:* Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, *Fax:* 410–966–2830, *Email address: OR.Reports.Clearance@ssa.gov*

Or you may submit your comments online through *www.regulations.gov,* referencing Docket ID Number [SSA–2020–0037].

SSA submitted the information collection below to OMB for clearance. Your comments regarding this information collection would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than August 31, 2020. Individuals can obtain copies of the OMB clearance package by writing to *OR.Reports.Clearance@ssa.gov.*

Authorization for the Social Security Administration to Obtain Wage and Employment Information from Payroll Data Providers—0960–0807. Section 824 of the Bipartisan Budget Act (BBA) of 2015, Public Law 114–74, authorizes SSA to enter into information exchanges with payroll data providers for the purposes of improving program administration and preventing improper payments in the Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) programs. SSA uses Form SSA–8240, ''Authorization for the Social Security Administration to Obtain Wage and Employment Information from Payroll Data Providers,'' to secure the authorization needed from the relevant members of the public to obtain their wage and employment information from payroll data providers. Ultimately, SSA uses this wage and employment information to help determine program eligibility and payment amounts.

The public completes Form SSA–8240 using the following modalities: A paper form; the internet; or an in-office, or telephone interview, during which an SSA employee documents the wage and employment information authorization information on one of SSA's internal systems (the Modernized Claims System (MCS); the SSI Claims System; eWork; or iMain). The individual's authorization remains effective until one of the following four events occurs:

- SSA makes a final adverse decision on the application for benefits, and the applicant has filed no other claims or appeals under the Title for which SSA obtained the authorization;
- the individual's eligibility for payments ends, and the individual has not filed other claims or appeals under

the Title for which SSA obtained the authorization;

• the individual revokes the authorization verbally or in writing; or

• the deeming relationship ends (for SSI purposes only).

SSA requests authorization on an as-needed basis as part of the following processes: (a) SSDI and SSI initial claims; (b) SSI redeterminations; and (c) SSDI Work Continuing Disability Reviews. The respondents are individuals who file for, or are currently receiving, SSDI or SSI payments, and any person whose income and resources SSA counts when determining an individual's SSI eligibility or payment amount.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office (minutes) **	Total annual opportunity cost (dollars) ***
SSA–8240 (paper)	150,000	1	6	15,000	* $10.73	** 24	*** $804,750
Web Title II & Title XVI Electronic (MCS, MSSICS, and eWork)	3,492,903	1	2	116,430	* 10.73	0	*** 1,249,294
Internet	467,883	1	2	15,596	* 10.73	0	*** 167,345
Totals	4,110,786			147,026			*** 2,221,389

* We based this figure on average DI payments, as reported in SSA's disability insurance payment data (*https://www.ssa.gov/legislation/2020Fact%20Sheet.pdf*).
** We based this figure on the average FY 2020 wait times for field offices, based on SSA's current management information data.
*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

Dated: July 28, 2020.

Naomi Sipple,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 2020–16666 Filed 7–30–20; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 11167]

30-Day Notice of Proposed Information Collection: Repatriation/Emergency Medical and Dietary Assistance Loan Application

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995 we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: Submit comments up to August 31, 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 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Clifton Oliphant, Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS/MSU), U.S. Department of State, 2201 C. St. NW, Washington, DC 20522, who may be reached at *OlipantCE@state.gov* or by phone at 202–485–6020.

SUPPLEMENTARY INFORMATION:

• *Title of Information Collection:* Repatriation/Emergency Medical and Dietary Assistance Loan Application.

• *OMB Control Number:* 1405–0150.

• *Type of Request:* Revision of a currently approved collection.

• *Originating Office:* Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS).

• *Form Number:* DS–3072.

• *Respondents:* U.S. Citizens applying for emergency loan assistance.

• *Estimated Number of Respondents:* 1,459.

• *Estimated Number of Responses:* 1,459.

• *Average Time per Response:* 20 minutes.

• *Total Estimated Burden Time:* 486 hours.

• *Frequency:* On Occasion.

• *Obligation to Respond:* Required to Obtain a Benefit.

We are soliciting public comments to permit the Department to:

• Evaluate whether the proposed information collection is necessary for the proper functions of the Department.

• Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The DS–3072 is an application for an emergency loan for a destitute U.S. citizen and/or eligible family member to return to the United States or for a loan for a destitute U.S. citizen and/or eligible family member abroad to receive emergency medical and dietary assistance.

Methodology

The Bureau of Consular Affairs will post this form on Department of State websites to give respondents the opportunity to complete the form online, or print the form and fill it out manually and submit the form in person or by fax or mail.

Greg Gardner,

Managing Director, Acting.

[FR Doc. 2020–16594 Filed 7–30–20; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice 11161]

30-Day Notice of Proposed Information Collection: Evacuee Manifest and Promissory Note

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995 we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: Submit comments up to August 31, 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 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Clifton Oliphant, Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS/MSU), U.S. Department of State, 2201 C St. NW, Washington, DC 20522, who may be reached at *OliPhantCE@state.gov* or by phone at 202–485–6020.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Evacuee Manifest and Promissory Note.
- *OMB Control Number:* 1405–0211.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS).
- *Form Number:* DS–5528.
- *Respondents:* U.S. citizens, U.S. non-citizen nationals, lawful permanent residents, and third country nationals applying for emergency loan assistance during an evacuation.
- *Estimated Number of Respondents:* 525.
- *Estimated Number of Responses:* 525.
- *Average Time per Response:* 20 minutes.
- *Total Estimated Burden Time:* 175 hours.
- *Frequency:* On Occasion.
- *Obligation to Respond:* Required to Obtain Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The purpose of the DS–5528 is to document the evacuation of persons from abroad when their lives are endangered by war, civil unrest, or natural disaster; document issuance of a crisis evacuation loan; obtain a Privacy Act Waiver to share information about the welfare of a U.S. citizen or U.S. lawful permanent resident consistent with the Privacy Act of 1974; and, to facilitate debt collection.

Methodology

An electronic version of the Evacuee Manifest and Promissory Note was created by U.S. Department of State, allowing applicants to type their information into the form, print it, and present it to a consular officer at the evacuation point. The Department anticipates that continued software development will provide the capability to electronically submit signed loan applications for adjudication. Due to the potential for serious conditions during crisis events that often affect electronic and internet infrastructure systems, the electronic form will not replace the paper form. Rather, the paper form will still be maintained and used in the event that applicants are unable to submit forms electronically.

Zachary Parker,

Director.

[FR Doc. 2020–16600 Filed 7–30–20; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in California

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice of limitation on claims for judicial review of actions by the California Department of Transportation (Caltrans).

SUMMARY: The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans that are final. The actions relate to a proposed highway project, State Route (SR–) 91 Improvement Project between SR–57 and SR–55 from post mile (PM) 4.7 to PM R10.8 (from west of State College Boulevard to east of Lakeview Avenue), SR–57 from PM 15.5 to PM 16.2 (from just south of SR–91 to just north of SR–91), and SR–55 from PM 17.4 to PM R17.9 (from south of SR–91 to SR–91) in the cities of Anaheim, Fullerton, Orange, and Placentia, in the County of Orange, State of California. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA, on behalf of Caltrans, is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before December 28, 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 Caltrans: Smita Deshpande, Chief, Generalists' Branch, California Department of Transportation District 12, Division of Environmental Analysis, 1750 East 4th Street, Santa Ana, California 92705, weekdays from 8:00 a.m. to 5:00 p.m., Telephone number (657) 328–6151, email: *smita.deshpande@dot.ca.gov.* For FHWA, contact David Tedrick at (916) 498–5024 or email *david.tedrick@dot.gov.*

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, FHWA assigned, Caltrans assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that the Caltrans has taken final agency actions subject to 23 U.S.C. 139(l)(1) by issuing licenses, permits, and approvals for the following highway project in the State of California: The SR–91 Improvement Project between SR–57 and SR–55

(''project'') will improve traffic operations on SR–91 from Post Mile (PM) 4.7 to PM R10.8, SR–57 from PM 15.5 to PM 16.2, and on SR–55 from PM 17.4 to PM R17.9 in the cities of Anaheim, Fullerton, Orange, and Placentia in Orange County, California, a distance of approximately 6 miles. The proposed improvements would include the SR–91 freeway mainline widening, primarily in the eastbound direction, and modifications to various interchanges, connectors, ramps, and intersections. Construction of the proposed highway project is expected to begin in 2026 and is anticipated to be completed in 2030, a duration of approximately 3.5 years. The purpose of the proposed project within the corridor is to improve capacity and reduce congestion, as well as reduce weaving and merging between successive ramps at several interchanges. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Initial Study (IS)/Environmental Assessment (EA) for the project, approved on 6/22/2020, and in other documents in the FHWA project records. The Final Initial Study (IS) with Mitigated Negative Declaration/Environmental Assessment (EA) with Finding of No Significant Impact and other project records are available by contacting Caltrans at the addresses provided above. The Caltrans Final IS/EA can also be requested via email *D12_SR91_Project@dot.ca.gov,* or viewed at the address above.

This notice applies to all 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. National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128].

2. Clean Air Act [42 U.S.C. 7401–7671(q)].

3. Section 4(f) of the U.S. Department of Transportation Act of 1966 [49 U.S.C. 303].

4. Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [16 U.S.C. 469 469(c)]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. Clean Water Act 33 U.S.C. 1251–1387.

7. 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. 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.)

(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).

Rodney Whitfield,

Director, Financial Services, Federal Highway Administration, California Division.

[FR Doc. 2020–16561 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Verde Connect, Cornville Road to State Route 260 in Yavapai County, AZ

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice of limitation on claims for judicial review of actions by FHWA and other Federal agencies.

SUMMARY: This notice announces actions taken by FHWA and other Federal agencies that are final. The actions relate to the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for the Verde Connect, Cornville Road to State Route (SR) 260 project in Yavapai County, AZ. The actions grant licenses, permits, and approvals for the project.

DATES: By this notice, FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before December 28, 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: Mr. Alan Hansen, Team Leader Planning, Environment, Air Quality, Realty, and Civil Rights Team, Federal Highway Administration, 4000 N Central Avenue, Suite 1500, Phoenix, Arizona 85012–3500; telephone: (602) 379–3646, fax: (602) 382–8998, email: *Alan.Hansen@dot.gov.* The FHWA Arizona Division Office's normal business hours are 7:30 a.m. to 4 p.m. (Mountain Standard Time).

You may also contact: Ms. Rebecca Yedlin, Environmental Coordinator, Federal Highway Administration, 4000 N Central Ave., Suite 1500, Phoenix, Arizona 85012–3500; telephone: (602) 379–3646, fax: (602) 382–8998, email: *Rebecca.Yedlin@dot.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA and other Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the following project in the State of Arizona: Verde Connect, Cornville Rd. to SR 260. The actions by the Federal agencies and the laws under which such actions were taken, are described in the Draft EA approved on April 23, 2020, Final EA approved on July 20, 2020, in the FHWA Finding of No Significant Impact issued on July 21, 2020, and in other documents in the FHWA administrative record. Project decision documents are also available online at: *https://www.verdeconnect.com.* This notice applies to all 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 [23 U.S.C. 109].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the US Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536], 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 [16 U.S.C. 703–712].

5. Historic and Cultural Resources: Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–

2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. Wetlands and Water Resources: 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]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *Water:* Clean Water Act 33 U.S.C. 1251–1387.

9. *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. 13007 Indian Sacred Sites; 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.)

Authority: 23 U.S.C. 139(l)(1).

Issued on: July 23, 2020.

Karla S. Petty,

Arizona Division Administrator, Phoenix, Arizona.

[FR Doc. 2020–16333 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2019–0306]

Agency Information Collection Activities; Renewal of a Currently-Approved Information Collection Request: Annual Report of Class I and Class II Motor Carriers of Property

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval and invites public comment. FMCSA requests approval to renew the previously approved ICR titled, ''*Annual Report of Class I and Class II Motor Carriers of Property,*'' OMB Control No. 2126–0032. This ICR is necessary to ensure that motor carriers comply with FMCSA's financial and operating statistics requirements at chapter III of title 49 CFR part 369 titled, ''*Reports of Motor Carriers.*''

DATES: Please send your comments by August 31, 2020. OMB must receive your comments by this date in order to act quickly on the ICR.

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 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Secrist, Office of Registration and Safety Information, Department of Transportation, Federal Motor Carrier Safety Administration, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. Telephone: 202–385–2367; email *jeff.secrist@dot.gov*. Office hours are from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

SUPPLEMENTARY INFORMATION:

Title: Annual Report of Class I and Class II Motor Carriers of Property.

OMB Control Number: 2126–0032.

Type of Request: Renewal information collection.

Respondents: Class I and Class II For-Hire Motor Carriers of Property and Class I For-Hire Motor Carriers of Passengers.

Estimated Number of Respondents: 43 per year.

Estimated Time per Response: 9 hours for Form M and 0.3 hours for Form MP–1.

Expiration Date: September 30, 2020.

Frequency of Response: Annually.

Estimated Total Annual Burden: 387 hours [387 hours (Form M) + 0 hours (Form MP–1)].

Estimated annual respondents for Form M decreased from 96 in the previously approved ICR to 43 respondents in the proposed ICR. As a result, the estimated annual burden hours for Form M decreased by 477 hours [864 currently approved hours − 387 proposed hours = 477 hours]. For Form MP–1, respondents decreased from 2 in the previously approved ICR to 0 the proposed ICR. As a result, the estimated annual burden hours for Form MP–1 decreased by 1 hour [1 currently approved hour − 0 proposed hours = 1 hour] for Form MP–1. Burden costs to the industry regarding Form M decreased by $20,780 annually, [$38,811 in the currently approved burden cost − $18,031 in the proposed burden cost = $20,780]. Burden costs to the industry regarding form MP–1 have decreased by $59 annually [$59 in the currently approved burden cost − $0 in the proposed burden cost = $59]. For the Federal Government, regarding Form M, the federal burden costs have decreased by $91 annually [$165 in the currently approved federal burden cost − $74 in the proposed burden cost = $91]. Regarding Form MP–1, the federal burden costs have decreased by $2 annually [$2 in the currently approved federal burden cost − $0 in the proposed burden cost = $2].

These lower estimates of annual respondents, hours, respondent costs and federal costs is due to the decreased number of Form M and Form MP–1 submissions received by FMCSA between 2016 and 2018.

Background: Section 14123 of title 49 of the United States Code (U.S.C.) requires certain for-hire motor carriers of property, passengers, and household goods to file annual financial reports. The annual reporting program was implemented on December 24, 1938 (3 FR 3158), and it was subsequently transferred from the Interstate Commerce Commission (ICC) to the U.S. Department of Transportation's (DOT) Bureau of Transportation Statistics (BTS) on January 1, 1996. The Secretary of Transportation delegated to BTS the responsibility for the program on December 17, 1996 (61 FR 68162). Annual financial reports are filed on Form M (Class I and II for-hire property carriers, including household goods carriers) and Form MP–1 (Class I for-hire passenger carriers). Responsibility for collection of the reports was transferred from BTS to FMCSA on August 17, 2004 (69 FR 51009), and the regulations were redesignated as 49 CFR part 369 on August 10, 2006 (71 FR 45740). FMCSA has continued to collect carriers' annual reports and to furnish copies of the reports to the public when requested under the Freedom of Information Act (FOIA). For-hire motor carriers (including interstate and intrastate) subject to the Federal Motor Carrier Safety Regulations are classified on the basis of their gross carrier operating revenues.[1]

[1] For purposes of the Financial and Operating Statistics (F&OS) program, carriers are classified into the following three groups: (1) Class I carriers are those having annual carrier operating revenues (including interstate and intrastate) of $10 million or more after applying the revenue deflator formula

Under the Financial and Operating Statistics (F&OS) program, FMCSA collects from Class I and Class II for-hire motor carriers balance sheet and income statement data along with information on safety needs, tonnage, mileage, employees, transportation equipment, and other related data. FMCSA may also ask carriers to respond to surveys concerning their operations. The data and information collected is available to the public via FOIA requests, and may be used by FMCSA to determine a motor carrier's compliance with the F&OS program requirements prescribed at chapter III of title of 49 CFR part 369. FMCSA has created electronic forms that may be prepared, signed electronically, and submitted to FMCSA via *https://ask.fmcsa.dot.gov/app/ask/.*

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FMCSA to perform its functions; (2) the accuracy of the estimated burden; (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information.

Issued under the authority delegated in 49 CFR 1.87 on:

Kenneth Riddle,

Acting Associate Administrator, Office of Research and Registration.

[FR Doc. 2020–16597 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2020–0062]

Petition for Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on July 16, 2020, the Florida Department of Transportation, Central Florida Rail Corridor/SunRail (CFRC) petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 236. FRA assigned the petition Docket Number FRA–2020–0062.

Specifically, CFRC seeks relief from the requirements of 49 CFR 236.109, *Time releases, timing relays, and timing devices;* § 236.377, *Approach locking;* § 236.378, *Time locking;* § 236.379, *Route locking;* § 236.380, *Indication locking;* and § 236.381, *Traffic locking,* on vital microprocessor-based systems. Many of CFRC's interlockings, control points, and other locations are controlled by solid-state vital microprocessor-based systems. These systems utilize programmed logic equations in lieu of relays or other mechanical components for control of both vital and non-vital functions. The logic does not change once a microprocessor-based system has been tested and locking tests are documented on installation. CFRC proposes to verify and test signal locking systems and non-configurable timers controlled by microprocessor-based equipment by use of alternative procedures every 4 years after initial baseline testing or program change as follows:

- Verifying the cyclic redundancy check/check sum/universal control number of the existing location's specific application logic to the previously-tested version.
- Testing the appropriate interconnection to the associated signaling hardware equipment outside of the processor for switch indication, track indication, searchlight signal indication, approach locking (if external) to verify correct and intended inputs to and outputs from the processor are maintained.
- Analyze and compare the results of the 4-year alternative testing with the results of the baseline testing performed at the location and submit the results to FRA.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov.*

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website: http://www.regulations.gov* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by September 14, 2020 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.* See also *http://www.regulations.gov/#!privacyNotice* for the privacy notice of *regulations.gov.*

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2020–16682 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2010–0124]

Petition for Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on July 23, 2020, Railtown 1897 State Historic Park (Railtown) petitioned the Federal Railroad Administration (FRA) to extend its special approval and request a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 215, Railroad Freight Car Safety Standards. FRA assigned the petition Docket Number FRA–2010–0124.

Specifically, Railtown seeks to renew its special approval pursuant to 49 CFR 215.203, *Restricted cars,* to continue in service one cupola caboose originally shop built in 1923. Railtown also seeks

as set forth in Note A of 49 CFR 369.2; and (2) Class II carriers are those having annual carrier operating revenues (including interstate and intrastate) of at least $3 million, but less than $10 million after applying the revenue deflator formula as set forth in 49 CFR 369.2.

relief (not previously granted for this caboose) from § 215.303, *Stenciling of restricted cars,* due to the historic nature of the caboose.

Railtown states that this caboose has a maximum load of 30 passengers with a combined weight not to exceed 5,000 pounds. It will be used for excursion train service on 3 miles of privately owned track. Railtown is part of the California State Park System and is owned and operated by the State of California. Trained, paid and volunteer staff of the State of California operate and maintain the caboose. This caboose will not be interchanged with other railroads.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov.*

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by September 14, 2020 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable. Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of *regulations.gov.*

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety Chief Safety Officer.

[FR Doc. 2020–16684 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Transfer of Federally Assisted Facility

AGENCY: Federal Transit Administration (FTA), United States Department of Transportation (USDOT).

ACTION: Notice of Intent (NOI) to Transfer Federally-Assisted Land or facility.

SUMMARY: The Federal Transit Administration (FTA) is issuing this Notice to advise Federal agencies that the Central Puget Sound Regional Transit Authority (Sound Transit) intends to transfer the land portions of 20 parcels (Subject Properties) to the Seattle Office of Housing. Federal public transportation law delegated to the Federal Transit Administrator permits the Administrator of the Federal Transit Administration to authorize a recipient of FTA funds to transfer land or a facility to a public body for any public purpose with no further obligation to the Federal Government (the Government) if, among other things, no Federal agency is interested in acquiring the asset for Federal use.

DATES: Any Federal agency interested in acquiring the facility must notify the FTA Region X office of its interest no later than August 31, 2020.

ADDRESSES: Interested parties should notify the Regional Office by writing to Linda Gehrke, Regional Administrator, Federal Transit Administration, 915 Second Ave, Federal Building Suite 3142, Seattle, WA 98174–1002.

FOR FURTHER INFORMATION CONTACT: Mark Montgomery, Attorney-Advisor, (202) 366–1017.

SUPPLEMENTARY INFORMATION: Sound Transit used these locations as staging areas for light rail construction and to widen the street right-of-way. The parcels have been vacant for over ten years, and Sound Transit determined it no longer needs the land for public transportation purposes. The parcels are all located within Seattle Washington parcel locations are 4804 Martin Luther King (MLK) Jr Way S.; 4804 32nd Ave S; 4810 MLK Jr Way S.; 4851 MLK Jr Way S.; 4853 MLK Jr Way S.; 4859 MLK Jr Way S.; 4736 31st Ave S.; 4742 MLK Jr Way S.; 4733 MLK Jr Way S.; 4735 MLK Jr Way S.; 4741 MLK Jr Way S.; 4203 S. Kenyon St.; 7908 MLK Jr Way S.; 6740 MLK Jr Way S.; 3601 MLK Jr Way S.; 4865 MLK Jr Way S; 3112 S. Ferdinand St.; 3201 S. Ferdinand St.; 5042 MLK Jr Way S.; 6701 MLK Jr Way S.

Sound Transit requests FTA approval to transfer the Subject Properties to the City of Seattle's Office of Housing, if no Federal agency is interested in acquiring the asset for Federal use. The City of Seattle's Office of Housing has dedicated $11 million to work with affordable housing developers to convert the Subject Properties into approximately 200 permanently affordable housing units, as defined by Washington State's statute RCW 81.112.350. This transfer also would satisfy Sound Transit's statutory requirement to dispose or transfer surplus property to qualified entities to develop affordable housing.

Background

Federal public transportation law (49 U.S.C. 5334(h)) provides guidance on the transfer of capital assets. Specifically, if a recipient of FTA assistance decides an asset acquired with assistance under 49 U.S.C. Chapter 53 is no longer needed for the purpose for which it was acquired, the Secretary of Transportation may authorize the recipient to transfer the asset to a local governmental authority to be used for a public purpose with no further obligation to the Government. 49 U.S.C. 5334(h)(1).

Determinations

The FTA Administrator may authorize a transfer for a public purpose other than mass transportation only if the FTA Administrator decides:

(A) The asset will remain in public use for at least five (5) years after the date the asset is transferred;

(B) There is no purpose eligible for assistance under Chapter 53 of title 49, United States Code, for which the asset should be used;

(C) The overall benefit of allowing the transfer is greater than the interest of the Government in liquidation and return of the financial interest of the Government in the asset, after considering fair market value and other factors; and

(D) Through an appropriate screening or survey process, that there is no interest in acquiring the asset for

Government use if the asset is a facility or land.

The FTA Administrator has determined that the above requirements (A), (B), and (C) have been met; this Notice is issued pursuant to requirement (D).

Federal Interest in Acquiring Land or Facility

This Notice implements the requirements of 49 U.S.C. 5334(h)(1)(D). Accordingly, FTA hereby provides notice of the availability of the Subject Properties further described below. Any Federal agency interested in acquiring the Subject Properties should promptly notify the FTA. If no Federal agency is interested in acquiring the Subject Properties, FTA will transfer the properties.

Additional Description of Land or Facility

The Subject Properties are currently vacant land. The Subject Properties are between 1,400- 14,000 square feet, each as follows: 4804 MLK Jr Way S. 4,275 sq ft; 4804 32nd Ave S. 3,556 sq ft; 4810 MLK Jr Way S. 2,961 sq ft; 4851 MLK Jr Way S. 2,184 sq ft; 4853 MLK Jr Way S. 1,744 sq ft; 4859 MLK Jr Way S. 4,631 sq ft; 4736 31st Ave S. 4,655 sq ft; 4742 MLK Jr Way S. 2,036 sq ft; 4733 MLK Jr Way S. 1,815 sq ft; 4735 MLK Jr Way S. 1,428 sq ft; 4741 MLK Jr Way S. 4,522 sq ft; 4203 S. Kenyon St. 4,526 sq ft; 7908 MLK Jr Way S. 5,892 sq ft; 6740 MLK Jr Way S. 8,439 sq ft; 3601 MLK Jr Way S. 13,164 sq ft; 4865 MLK Jr Way S 3,292 sq ft; 3112 S. Ferdinand St. 1,845 sq ft; 3201 S. Ferdinand St. 3,776 sq ft; 5042 MLK Jr Way S. 2,387 sq ft; 6701 MLK Jr Way S. 8,341 sq ft.

Authority: 49 U.S.C. 5334(h).

K. Jane Williams,

Acting Administrator.

[FR Doc. 2020–16553 Filed 7–30–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0104]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel TEJAS (Sailing 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 August 31, 2020.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0104 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0104 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–2020–0104, 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 TEJAS is:

—*Intended Commercial Use of Vessel:* ''Day Charter and Overnight Charters.''

—*Geographic Region Including Base of Operations:* ''Florida, Texas, Georgia, North and South Carolina, Maine, Louisiana, Mississippi, and Alabama.'' (Base of Operations: Miami, FL)

—*Vessel Length and Type:* 40′ sailing catamaran

The complete application is available for review identified in the DOT docket as MARAD–2020–0104 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–2020–0104 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: July 28, 2020.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2020–16646 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0103]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel OUT OF BOUNDS (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 August 31, 2020.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0103 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0103 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–2020–0103, 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 OUT OF BOUNDS is:

—*Intended Commercial Use of Vessel:* ''Carrying passengers for hire. Small group luxury overnight guest charters, coastal and bay day tours.''

—*Geographic Region Including Base of Operations:* ''California'' (Base of Operations: Ballena Isle, CA)

—*Vessel Length and Type:* 54.5′motor vessel

The complete application is available for review identified in the DOT docket as MARAD–2020–0103 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–2020–0103 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: July 28, 2020.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2020–16643 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0101]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel HO'O'LEA (Sailing 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 August 31, 2020.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0101 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0101 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–2020–0101, 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 HO'O'LEA is:

—*Intended Commercial Use of Vessel:* ''Sailing charters for 6 or less people in the South Kohala Coast on the island of Hawai'i, USA.''

—*Geographic Region Including Base of Operations:* ''Hawai'i'' (Base of Operations: Kawaihae, HI).

—*Vessel Length and Type:* 20′ sailing catamaran.

The complete application is available for review identified in the DOT docket as MARAD–2020–0101 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–2020–0101 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: July 28, 2020.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2020–16636 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0102]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel ESCAPADE (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 August 31, 2020.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0102 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0102 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–2020–0102, 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 ESCAPADE is:

—*Intended Commercial Use of Vessel:* ''Small group tourist Charter, Sunset Sail, Private excursions to Dry Tortuga and other multi day destinations''

—*Geographic Region Including Base of Operations:* ''Florida, Puerto Rico'' (Base of Operations: Key West, FL)

—*Vessel Length and Type:* 45′ catamaran

The complete application is available for review identified in the DOT docket as MARAD–2020–0102 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–2020–0102 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: July 28, 2020.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2020–16645 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0099]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel BLUE HEAVEN (Power 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 August 31, 2020.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0099 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0099 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–2020–0099, 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 BLUE HEAVEN is:

—*Intended Commercial Use of Vessel:* ''This vessel will be used for chartering and limited trips to premier destinations such as Dry Tortuga's''

—*Geographic Region Including Base of Operations:* ''Florida'' (Base of Operations: Key West, FL)

—*Vessel Length and Type:* 45' power catamaran

The complete application is available for review identified in the DOT docket as MARAD–2020–0099 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–2020–0099 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: July 28, 2020.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2020–16642 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0100]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel BLUE MOON (Sailing 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 August 31, 2020.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0100 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0100 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–2020–0100, 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 BLUE MOON is:

—*Intended Commercial Use of Vessel:* ''In a charter operation''

—*Geographic Region Including Base of Operations:* ''Florida'' (Base of Operations: Key Largo, FL)

—*Vessel Length and Type:* 48.3′ sailing catamaran

The complete application is available for review identified in the DOT docket as MARAD–2020–0100 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–2020–0100 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: July 28, 2020.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2020–16644 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2020–0056]

Pipeline Safety: Gas and Liquid Advisory Committee Member Nominations

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice; request for nominations.

SUMMARY: PHMSA is requesting nominations for individuals to serve on the Gas Pipeline Advisory Committee (GPAC), also known as the Technical Pipeline Safety Standards Committee, and the Liquid Pipeline Advisory Committee (LPAC), also known as the Technical Hazardous Liquid Pipeline Safety Standards Committee. Each committee is composed of 15 members appointed by the Secretary of Transportation (the Secretary).

DATES: Nominations must be received by September 29, 2020. Nominations received after the above due date may be retained for evaluation for future vacancies after all other nominations received by the due date have been evaluated and considered.

ADDRESSES: Nominations should be sent to Tewabe Asebe by email at *tewabe.asebe@dot.gov* or by regular mail at the Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue SE, PHP–30: E24–456, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Tewabe Asebe by phone at 202–366–5523 or by email at *tewabe.asebe@dot.gov.* Interested parties can also access information about the GPAC and LPAC by visiting PHMSA's website at: *https://www.phmsa.dot.gov/standards-rulemaking/pipeline/pipeline-advisory-committees.*

SUPPLEMENTARY INFORMATION:

I. Advisory Committee Background and Duties

The GPAC and LPAC are statutorily mandated advisory committees that provide recommendations to PHMSA and the Secretary regarding proposed standards for gas and liquid pipelines and facilities. The committees were mandated by 49 United States Code (U.S.C.) § 60115 and established pursuant to the Federal Advisory Committee Act of 1972, as amended (5 U.S.C. App. 2), to review PHMSA's regulatory initiatives and determine their technical feasibility, reasonableness, cost-effectiveness, and practicability. These committees prepare and submit reports to the Secretary regarding the technical feasibility, reasonableness, cost-effectiveness, and practicability of a proposed standard no later than 90 days after receiving the standard and its supporting analyses. The Secretary must publish each report, including any recommended actions and minority views. The Secretary is not bound by a committee's conclusions; however, if the Secretary rejects the conclusions, the Secretary must publish the reasons for the rejection.

II. Membership

Pursuant to 49 U.S.C. 60115, the Secretary is authorized to appoint 15 members to both GPAC and LPAC committees that include (i) five members from departments, agencies, and instrumentalities of the Federal government and the States; (ii) five members from the natural gas or hazardous liquid industry, selected in consultation with industry representatives; and (iii) five members from the public to each committee. Two of the government members of each committee must be State officials. Additionally, each committee must have at least three industry members who currently participate in the active operation of natural gas or hazardous liquid pipelines or pipeline facilities, while at least one industry member must have a background, education, or experience in risk assessment and cost-benefit analysis. Each committee must have two public members who have a background, education, or experience in environmental protection or public safety, while at least one public member must have a background, education, or experience in risk assessment and cost-benefit analysis. At least one public member of each committee may not have any financial interest in the pipeline, petroleum, or natural gas industries. Finally, no public member of a committee may have a significant financial interest in the pipeline, petroleum, or gas industries.

III. Qualifications

Committee members must either have experience with the safety regulations that apply to the transportation of natural gas or hazardous liquids or the operation of a natural gas or hazardous liquid pipeline facility, or they must be technically qualified by training, experience, or knowledge in at least one field of engineering that is applicable to the transportation of gas or hazardous liquids or the operation of a gas or hazardous liquid pipeline facility. Members must also meet the criteria listed under section I of this notice.

Nominees should represent a broad spectrum of people for whom the candidate can advocate. In addition, the committees would benefit from members who have experience working in a consensus-building environment. PHMSA is particularly interested in members from organizations associated with fire safety, pipeline engineering, risk analysis, and emergency response, as well as those from other similar public safety or environmental protection groups. The Secretary will consult with the national organizations that represent State commissioners or utility regulators before selecting any State official. The Secretary will also consult with the national organizations that represent the owners and operators of pipeline facilities before selecting industry members. Nominations are open to all individuals without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, age, mental or physical disability, or marital status. Evaluations will be based on the materials submitted.

III. Terms of Service

- Each member serves for a 3-year term unless they resign, become unable to serve, cease to be qualified to serve, or are removed by the Secretary.
- Members may be reappointed to provide the continuity necessary for the review of technical proposals.
- All members serve at their own expense and receive no salary from the Federal government, although the government may provide travel reimbursement and per diem.
- GPAC and LPAC generally meet in person in Washington, DC, or the surrounding metropolitan area.
- PHMSA will ask potential public candidates to provide detailed information concerning their employment, financial holdings, and research grants and/or contracts so that PHMSA can evaluate any potential conflicts of interest.

IV. Nomination Procedures

- Any interested person may nominate one or more qualified individuals—including themselves—for advisory committee membership.
- Nominations must include a current and complete résumé that lists a business and/or home address, a telephone number, an email address, an education section, professional or business experience, a present occupation, and membership details for any other advisory committees (past or present) for each nominee.
- Each nominee must meet the training, education, or experience requirements listed under section II.
- Each nomination must include one of the following:
  - A short biography of the nominee, including professional and academic credentials for inclusion in membership package.
  - A one-page statement describing how the candidate will benefit the advisory committee, considering current membership and the candidate's unique perspective that will advance the conversation. This statement must also identify a primary and secondary interest to which the candidate's expertise best aligns. Finally, candidates should state their previous experience on Federal advisory committees and/or rulemaking committees (if any), their level of knowledge in their above stakeholder groups, and the size of their constituency they represent or are able to reach.
  - In lieu of a one-page statement, a professional organization's letter of recommendation.
- Nominations must also specify the advisory committee for which the nominee is recommended (GPAC or LPAC).
- Nominations must also acknowledge that the nominee is aware

of the nomination unless the individual is self-nominated.

Issued in Washington, DC, on July 27, 2020, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,

Associate Administrator for Pipeline Safety.

[FR Doc. 2020–16587 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2018–0025 (Notice No. 2020–05)]

Hazardous Materials: Information Collection Activities

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, PHMSA invites comments on an Office of Management and Budget (OMB) control number pertaining to hazardous materials transportation. This notice follows the publication of a PHMSA final rule titled ''Hazardous Materials: Liquefied Natural Gas by Rail'' [HM–264, 85 FR 44994] authorizing the transportation of liquefied natural gas by rail. PHMSA intends to request a renewal with change of currently approved OMB control number 2137–0612, ''Hazardous Materials Security Plans.''

DATES: Interested persons are invited to submit comments on or before September 29, 2020.

ADDRESSES: You may submit comments identified by the Docket Number PHMSA–2018–0025 (Notice No. 2020–05) by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System; U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* To the Docket Management System; Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and Docket Number (PHMSA–2018–0025) for this notice at the beginning of the comment. To avoid duplication, please use only one of these four methods. All comments received will be posted without change to the Federal Docket Management System (FDMS) and will include any personal information you provide.

Requests for a copy of an information collection should be directed to 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.

Docket: For access to the dockets to read background documents or comments received, go to *http://www.regulations.gov* or DOT's Docket Operations Office (see **ADDRESSES**).

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Confidential Business Info: 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 notice 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 notice, it is important that you clearly designate the submitted comments as ''CBI.'' Please mark each page of your submission containing CBI as ''PROPIN.'' PHMSA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this notice. Submissions containing CBI should be sent to Steven Andrews or Shelby Geller, Standards and Rulemaking Division and addressed to the Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. Any commentary that PHMSA receives which is not specifically designated as CBI will be placed in the public docket for this notice.

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: On July 24, 2020, PHMSA, in coordination with the Federal Railroad Administration (FRA), published a final rule [1] titled ''Hazardous Materials: Liquefied Natural Gas by Rail'' [HM–264, 85 FR 44994], to allow for the bulk transport of ''Methane, refrigerated liquid,'' commonly known as liquefied natural gas (LNG), in rail tank cars. In this final rule, PHMSA amended the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) to require any rail carrier transporting a tank car quantity of UN1972 (Methane, refrigerated liquid (cryogenic liquid) or Natural gas, refrigerated liquid (cryogenic liquid)) to comply with the additional safety and security planning requirements for transportation by rail. PHMSA currently accounts for the burden associated with safety and security planning requirements in Office of Management and Budget (OMB) Control Number 2137–0612, ''Hazardous Materials Security Plans.''

OMB regulations require PHMSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. 5 CFR 1320.8(d). Under the Paperwork Reduction Act of 1995 (Pub. L. 96–511), no person is required to respond to an information collection unless it has been approved by OMB and displays a valid OMB control number. As the HM–264 final rule contains revisions that were not proposed in the notice of proposed rulemaking (NPRM) [2] [October 24, 2019; 84 FR 56964], PHMSA is publishing this 60-day notice to provide an opportunity for public comment on the estimated increase in burden. The estimated increase in burden hours is reflected in ''Section VI.G. Paperwork Reduction Act,'' of the preamble to the final rule, with a minor adjustment due to a rounding error. PHMSA will subsequently publish a 30-day notice in response to any comments received to this notice, along with a submission to OMB reflecting this revised annual burden.

[1] See *https://www.govinfo.gov/content/pkg/FR-2020-07-24/pdf/2020-13604.pdf.*

[2] See *https://www.govinfo.gov/content/pkg/FR-2019-10-24/pdf/2019-22949.pdf.*

PHMSA requests comments on the following increase in OMB Control Number 2137–0612:

	Increase in total number of railroads	increase in total number of routes	Burden hours per route	Increase in total burden hours	Salary cost per hour	Increase in total salary cost
Class I Railroads	0	2	80	160	$60.83	$9,733
Class II Railroads	0	1	80	80	60.83	4,866
Class III Railroads	0	1	40	40	60.83	2,433
Total Increase in Primary Route Analysis		4		280		17,032

	Increase in total number of railroads	Increase in total number of routes	Burden hours per route	Increase in total burden hours	Salary cost per hour	Increase in total salary cost
Class I Railroads	0	2	120	240	$60.83	$14,599
Class II Railroads	0	1	120	120	60.83	7,300
Class III Railroads	0	1	40	40	60.83	2,433
Total Increase in Alternate Route Analysis		4		400		24,332

Annual Increase in Number of Respondents: 0.

Annual Increase in Number of Responses: 8.

Annual Increase in Burden Hours: 680.

Annual Increase in Salary Costs: $41,364.

Issued in Washington, DC on July 27, 2020, under authority delegated in 49 CFR 1.97.

William A. Quade,

Deputy Associate Administrator of Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2020–16556 Filed 7–30–20; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

[Docket No. TTB–2020–0001]

Proposed Information Collections; Comment Request (No. 79)

AGENCY: Alcohol and Tobacco Tax and Trade Bureau (TTB); Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of our continuing effort to reduce paperwork and respondent burden, and as required by the Paperwork Reduction Act of 1995, we invite comments on the proposed or continuing information collections listed below in this notice.

DATES: We must receive your written comments on or before September 29, 2020.

ADDRESSES: As described below, you may send comments on the information collections described in this document using the ''*Regulations.gov*'' online comment form for this document, or you may send written comments via U.S. mail or hand delivery. We no longer accept public comments via email or fax.

- *Internet:* To submit comments electronically, use the comment form for this document posted on the ''*Regulations.gov*'' e-rulemaking website at *https://www.regulations.gov* within Docket No. TTB–2019–0001.
- *U.S. Mail:* Send comments to the Paperwork Reduction Act Officer, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005.
- *Hand Delivery/Courier:* Delivery comments to the Paper Reduction Act Officer, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Suite 400, Washington, DC 20005.

Please submit separate comments for each specific information collection described in this document. You must reference the information collection's title, form or recordkeeping requirement number, and OMB control number (if any) in your comment.

You may view copies of this document, the information collections described in it and any associated instructions, and all comments received in response to this document at *https://www.regulations.gov* within Docket No. TTB–2019–0001. A link to that docket is posted on the TTB website at *https://www.ttb.gov/forms/comment-on-form.shtml.* You may also obtain paper copies of this document, the information collections described in it and any associated instructions, and any comments received in response to this document by contacting TTB's Paperwork Reduction Act Officer at the addresses or telephone number shown below.

FOR FURTHER INFORMATION CONTACT: Michael Hoover, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005; 202–453–1039, ext. 135; or *informationcollections@ttb.gov* (please do not submit comments to this email address).

SUPPLEMENTARY INFORMATION:

Request for Comments

The Department of the Treasury and its Alcohol and Tobacco Tax and Trade Bureau (TTB), as part of their continuing effort to reduce paperwork and respondent burden, invite the general public and other Federal agencies to comment on the proposed or continuing information collections described below in this notice, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Comments submitted in response to this notice will be included or summarized in our request for Office of Management and Budget (OMB) approval of the relevant information collection. All comments are part of the public record and subject to disclosure. Please do not include any confidential or inappropriate material in your comments.

We invite comments on: (a) Whether an information collection is necessary for the proper performance of the agency's functions, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the information collection's burden; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the information collection's burden on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide the requested information.

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 has a valid OMB control number.

Information Collections Open for Comment

Currently, we are seeking comments on the following forms, letterhead applications or notices, recordkeeping requirements, questionnaires, or surveys:

OMB Control No. 1513–0005

Title: Letterhead Applications and Notices Filed by Brewers, TTB REC 5130/2; and Brewer's Notice, TTB F 5130.10.

TTB Form Number: TTB F 5130.10.

TTB Recordkeeping Number: TTB REC 5130/2.

Abstract: The Internal Revenue Code (IRC) at 26 U.S.C. 5401 requires brewers to file a notice of intent to operate a brewery, containing such information as prescribed by regulation. Under this authority, TTB requires brewery applicants to submit TTB F 5130.10, Brewer's Notice, which collects information similar to that provided on a permit application. Under the TTB regulations, the brewer maintains the approved Brewer's Notice and all associated documents at the brewery premises available for inspection. Under the TTB regulations promulgated pursuant to the IRC, brewers submit letterhead applications or notices for authorization to conduct certain activities, such as to use a brewery for purposes other than those authorized (see 26 U.S.C. 5411) or to operate a pilot brewery (see 26 U.S.C. 5417). Letterhead applications and notices are necessary to identify brewery activities so that TTB may ensure that proposed operations will not jeopardize the revenue and will comply with the IRC and the TTB regulations.

Current Actions: While there are program and adjustments associated with this information collection, TTB is submitting it for extension purposes only. As for program changes, TTB no longer requires respondents to submit certain attachments to a Brewer's Notice, TTB F 5130.10 or its Permits Online (PONL) equivalent: Trade Name Registration, Certificate to Transact Business in a Foreign State, Environmental Information (TTB F 5000.29), and Supplemental Information on Water Quality Considerations (TTB F 5000.30). In addition, TTB has made other minor editorial changes to the Brewer's Notice form and its PONL equivalent. As for adjustments, due to changes in agency estimates resulting from continued growth in the number of breweries in the United States, TTB is increasing the total number of annual respondents, responses, and burden hours reported for this information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits.

Estimated Annual Burden

- *Number of Respondents:* 11,800.
- *Average Responses per Respondent:* 4.
- *Number of Responses:* 47,200.
- *Average per-response Burden:* 0.8 hours.
- *Total Burden:* 37,760 hours.

OMB Control No. 1513–0036

Title: Signing Authority for Corporate and LLC Officials.

TTB Form Number: TTB F 5100.1.

Abstract: Under the IRC at 26 U.S.C. 6061, any return, statement, or other document required to be made under the internal revenue laws or regulations ''shall be signed in accordance with forms or regulations'' prescribed by the Secretary of the Treasury. Corporations and limited liability companies (LLCs) use TTB F 5100.1 or its electronic equivalent to identify specific corporate or LLC officials or employees, by name or by position title, authorized by the entity's articles of incorporation, bylaws, or governing officials to act on behalf of, or sign documents for, the entity in TTB matters. This information collection is necessary to ensure that only duly authorized individuals sign documents submitted to TTB on behalf of corporations or LLCs.

Current Actions: There are no program changes or adjustments associated with this information collection, and TTB is submitting it for extension purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits.

Estimated Annual Burden

- *Number of Respondents:* 5,300.
- *Average Responses per Respondent:* 1 (one).
- *Number of Responses:* 5,300.
- *Average per-response Burden:* 0.2 hours.
- *Total Burden:* 1,060 hours.

OMB Control No. 1513–0051

Title: Application for an Alcohol Fuel Producer Permit Under 26 U.S.C. 5181.

TTB Form Number: TTB F 5110.74.

Abstract: Under the authority of the IRC at 26 U.S.C. 5181(a)(1), persons wishing to establish a distilled spirits plant for the sole purpose of producing and receiving distilled spirits for fuel use must provide an application and bond as the Secretary may prescribe by regulation. Under this authority, TTB has issued regulations concerning the establishment of such alcohol fuel plants (AFPs). These regulations require, among other things, that a person wishing to establish an AFP submit an application for an alcohol fuel producer permit using form TTB F 5110.74. This application form and its required supporting documents describe, among other things, the person(s) applying for the permit, the proposed AFP's location, its stills and the type(s) of materials to be distilled, the size category of the operation (small, medium, or large) based on the annual amount of alcohol fuel to be produced, and the security measures to be taken to protect the spirits from diversion and theft. The application also must include a diagram of the plant premises. In addition, existing alcohol fuel producer permit holders use TTB F 5110.74 to make certain amendments to their permit information. The information required on the alcohol fuel producer permit application is necessary to protect the revenue since, when first produced, distilled spirits made at AFPs are potable and are thus subject could to the Federal distilled spirits excise tax imposed by the IRC at 26 U.S.C. 5001. Only when denatured for fuel use as required by 26 U.S.C. 5181(e) may spirits be withdrawn from the AFP free of tax, as authorized by 26 U.S.C. 5214(a)(12).

Current Actions: There are no program changes or adjustments associated with this information collection, and TTB is submitting it for extension purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits, farms; Individuals or households.

Estimated Annual Burden

- *Number of Respondents:* 251.
- *Average Responses per Respondent:* 1 (one).
- *Number of Responses:* 251.
- *Average per-response Burden:* 1.5 hours.
- *Total Burden:* 377 hours.

Dated: July 28, 2020.

Amy R. Greenberg,

Director, Regulations and Rulings Division.

[FR Doc. 2020–16619 Filed 7–30–20; 8:45 am]

BILLING CODE 4810–31–P

FEDERAL REGISTER

Vol. 85 Friday,
No. 148 July 31, 2020

Part II

Department of Veterans Affairs

38 CFR Part 71
Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA MISSION Act of 2018; Final Rule

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 71

RIN 2900–AQ48

Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA MISSION Act of 2018

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) adopts as final, with changes, a proposed rule to revise its regulations that govern VA's Program of Comprehensive Assistance for Family Caregivers (PCAFC). This final rule makes improvements to PCAFC and updates the regulations to comply with the recent enactment of the VA MISSION Act of 2018, which made changes to the program's authorizing statute. This final rule allows PCAFC to better address the needs of veterans of all eras and standardize the program to focus on eligible veterans with moderate and severe needs.

DATES: The effective date is October 1, 2020.

FOR FURTHER INFORMATION CONTACT: Cari Malcolm, Management Analyst, Caregiver Support Program, Care Management and Social Work, 10P4C, Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Ave. NW, Washington, DC 20420, (202) 461–7337. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Title I of Public Law 111–163, Caregivers and Veterans Omnibus Health Services Act of 2010 (hereinafter referred to as ''the Caregivers Act''), established section 1720G(a) of title 38 of the United States Code (U.S.C.), which required VA to establish a program of comprehensive assistance for Family Caregivers of eligible veterans who have a serious injury incurred or aggravated in the line of duty on or after September 11, 2001. The Caregivers Act also required VA to establish a program of general caregiver support services, pursuant to 38 U.S.C. 1720G(b), which is available to caregivers of covered veterans of all eras of military service. VA implemented the program of comprehensive assistance for Family Caregivers (PCAFC) and the program of general caregiver support services (PGCSS) through its regulations in part 71 of title 38 of the Code of Federal Regulations (CFR). Through PCAFC, VA provides Family Caregivers of eligible veterans (as those terms are defined in 38 CFR 71.15) certain benefits, such as training, respite care, counseling, technical support, beneficiary travel (to attend required caregiver training and for an eligible veteran's medical appointments), a monthly stipend payment, and access to health care (if qualified) through the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA). 38 U.S.C. 1720G(a)(3), 38 CFR 71.40.

On June 6, 2018, the John S. McCain III, Daniel K. Akaka, and Samuel R. Johnson VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act of 2018 or the VA MISSION Act of 2018, Public Law 115–182, was signed into law. Section 161 of the VA MISSION Act of 2018 amended 38 U.S.C. 1720G by expanding eligibility for PCAFC to Family Caregivers of eligible veterans who incurred or aggravated a serious injury in the line of duty before September 11, 2001, establishing new benefits for designated Primary Family Caregivers of eligible veterans, and making other changes affecting program eligibility and VA's evaluation of PCAFC applications. The VA MISSION Act of 2018 established that expansion of PCAFC to Family Caregivers of eligible veterans who incurred or aggravated a serious injury in the line of duty before September 11, 2001, will occur in two phases. The first phase will begin when VA certifies to Congress that it has fully implemented a required information technology system (IT) that fully supports PCAFC and allows for data assessment and comprehensive monitoring of PCAFC. During the 2-year period beginning on the date of such certification to Congress, PCAFC will be expanded to include Family Caregivers of eligible veterans who have a serious injury (including traumatic brain injury, psychological trauma, or other mental disorder) incurred or aggravated in the line of duty in the active military, naval, or air service on or before May 7, 1975. Two years after the date of submission of the certification to Congress, PCAFC will be expanded to Family Caregivers of all eligible veterans who have a serious injury (including traumatic brain injury, psychological trauma, or other mental disorder) incurred or aggravated in the line of duty in the active military, naval, or air service, regardless of the period of service in which the serious injury was incurred or aggravated in the line of duty in the active military, naval, or air service. This final rule implements section 161 of the VA MISSION Act of 2018 as well as makes improvements to PCAFC to improve consistency and transparency in decision making.

On March 6, 2020, VA published a proposed rule to revise its regulations that govern PCAFC to make improvements to PCAFC and update the regulations to comply with section 161 of the VA MISSION Act of 2018. 85 FR 13356 (March 6, 2020). In response to this proposed rule, VA received 273 comments, of which one comment was withdrawn by the submitter and one comment was a duplicate submission, for a total of 271 unique comments. More than 37 comments expressed general support for the proposed rule, in whole or in part. We appreciate the support of such comments, and do not address them below. Other comments expressed support or disapproval, in whole or in part, with substantive provisions in the proposed rule, and we discuss those comments and applicable revisions from the proposed rule below. We note that the discussion below is organized by the sequential order of the provisions as presented in the proposed rule; however, we only address the provisions that received comments below. Additionally, we have included a section on miscellaneous comments received. We further note that numerous commenters raised individual matters (*e.g.,* struggles they may currently be having) which are informative to VA, and to the extent these individuals provided their personal information, we did attempt to reach out to them to address their individual matters outside of this rulemaking.

In the proposed rule and in this final rule, we provide various examples to illustrate how these regulations will be applied, but we emphasize here that clinical evaluation is complex and takes into account a holistic picture of the individual; therefore, we note that examples provided are for illustrative purposes only and should not be construed to indicate specific veterans and servicemembers and their caregivers will or will not meet certain regulatory criteria or requirements.

§ 71.10 Purpose and Scope

Several commenters raised concerns about restricting PCAFC to a ''State'' as that term is defined in 38 U.S.C. 101(20) because 38 U.S.C. 1720G does not place any geographic restrictions on PCAFC, and such restriction would be in the view of the commenters, arbitrary, unreasonable, and without sufficient justification, particularly as VA provides other benefits and services to veterans who reside outside of a State. One commenter shared that they lived in the United Kingdom (U.K.), but believed that they should be eligible for

PCAFC as many of the PCAFC processes and requirements can be completed in the U.K. despite being outside of a State (for example, the application can be submitted by mail or online; caregiver training is available online; assessments and monitoring can be done via telehealth, Foreign Medical Program (FMP), social media, or through the use of a contract with a home health agency); and benefits such as a stipend can be based on a U.K. locality rate. This same commenter recommended revising the language in this section to state that ''these benefits are provided to those individuals residing in a State as that term is defined in 38 U.S.C. 101(2). Individuals who reside outside a State will be considered for benefits on a case by case basis.'' While this commenter referenced section 101(2), we believe the commenter meant to reference section 101(20) as the definition of State, for purposes of title 38, is contained in section 101(20). Section 101(20) defines State, in pertinent part, to mean each of the several States, Territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico. In suggesting that the program could be administered through VA's FMP, we generally disagree. The legal authority for the FMP bars VA from furnishing ''hospital care'' and ''medical services'' outside of a State except in the case of the stated exceptions. 38 U.S.C. 1724. This authority, as implemented, generally covers only hospital care and medical services, as those terms are defined in 38 U.S.C. 1701 and 38 CFR 17.30, that are required to treat a service-connected disability or any disability held to be aggravating a service-connected condition. Because PCAFC involves benefits that do not constitute ''hospital care'' or ''medical services'' and accounts for the care needs of eligible veterans unrelated to their service-connected disability or disabilities, PCAFC could not be administered through FMP. Lastly, telehealth services are medical services and therefore not available outside a ''State,'' except as provided for under the FMP.

As stated in the proposed rule, it has been VA's practice since the launch of PCAFC and PGCSS in 2011 to only provide benefits to those individuals residing in a State; thus, the proposed changes merely codify an existing practice. In addition, it is currently not feasible for VA to provide benefits under part 71 outside of a State, specifically because ''requirements of this part include in-home visits such as an initial home-care assessment under current 38 CFR 71.25(e) and the provision of certain benefits that can be provided in-home such as respite care under current § 71.40(a)(4) and (c)(2), which would be difficult to conduct and provide in a consistent manner outside of a State.'' 85 FR 13358 (March 6, 2020). Also, as noted in the proposed rule, administrative limitations prevent us from providing certain benefits under this part even in remote areas within the scope of the term ''State.'' Additionally, ''ensuring oversight of PCAFC and PGCSS outside of a State would be resource-intensive and we do not believe there is sufficient demand to warrant the effort that would be required.'' Id. Furthermore, we do not believe the use of contracted services would provide standardized care for participants and would hinder our ability to provide appropriate oversight and monitoring. While we understand the commenters' concerns and appreciate the suggested changes, we are not making any changes based on this comment.

§ 71.15 Definitions

We received many comments that either suggested revisions to or clarification of some terms defined in the proposed rule. We address these comments below as they relate to the term in the order they were presented in § 71.15 as proposed.

Financial Planning Services

We received multiple comments about financial planning services. One commenter was pleased with VA's proposal to include financial planning services in the menu of Family Caregivers' supports and services under PCAFC and we thank the commenter for their feedback. One commenter questioned why this service is being provided, whether it is indicative of a deeper problem, and what precautions and safety nets will be in place to ensure veterans are not exploited or abused. Furthermore, one commenter asserted that regardless of what services are provided to help with budgeting, families will become accustomed to and spend according to the monthly stipend received each month.

As stated in the proposed rule, we are adding this term to address changes made to 38 U.S.C. 1720G by the VA MISSION Act of 2018. Specifically, the VA MISSION Act of 2018 added financial planning services relating to the needs of injured veterans and their caregivers as a benefit for Primary Family Caregivers. Accordingly, financial planning services will be added to the benefits available to Primary Family Caregivers under 38 CFR 71.40(c)(5). Legislative history reflects that the addition of financial planning services to PCAFC assistance was influenced by the 2014 RAND Corporation-published report, Hidden Heroes: America's Military Caregivers, which identified that few military caregiver-specific programs provided long-term planning assistance, including legal and financial planning, for military caregivers. S. Rep No. 115–212, at 58 (2018) (accompanying S.2193, which contained language nearly identical to that enacted in sections 161–163 of the VA MISSION Act of 2018). The purpose of this benefit is to increase the financial capability of Primary Family Caregivers to be able to manage their own personal finances and those of the eligible veteran, as applicable. Furthermore, we will include in any contracts requirements such as minimum degree attainment and national certifications for individuals providing financial planning services, as well as mechanisms that would prohibit exploitation or abuse of caregivers and veterans (*e.g.,* prohibit any form of compensation from the eligible veteran or Family Caregiver for the services provided) and that allow us to take any appropriate actions necessary to address related breaches of contract. We note that the contractor would be responsible for any liability arising from the financial planning services provided by it. Further, contractors are not VA employees and therefore not covered by the Federal Tort Claims Act.

We are not making any changes to the regulation based on these comments.

In Need of Personal Care Services

We proposed to define ''in need of personal care services'' to mean that the eligible veteran requires in-person personal care services from another person, and without such personal care services, alternative in-person caregiving arrangements (including respite care or assistance of an alternative caregiver) would be required to support the eligible veteran's safety. A few commenters supported this definition of in need of personal care services, and we appreciate their support. Others raised concerns with the definition, and we address those comments below.

One commenter found this definition too restrictive, and to be a major change to PCAFC that would result in exclusion of current participants from the program. Similarly, another commenter further explained that this definition may unfairly discriminate against veterans who served on or after September 11, 2001 (referred to herein

as post-9/11) who currently qualify for the program but may not yet need this required level of care, and also may result in younger veterans believing they are not ''disabled enough'' for PCAFC. The same commenter noted that this definition would exclude veterans who may need assistance with activities of daily living (ADL), but do not otherwise need a professional home health aide or nursing home care. While we appreciate the commenters' concerns, we believe these changes are supported by the statute and would help to reduce clinical subjectivity in PCAFC eligibility determinations. As provided in the proposed rule:

The statute makes clear the importance of regular support to an eligible veteran by allowing more than one Family Caregiver to be trained to provide personal care services. 38 U.S.C. 1720G(a)(5) and (6). Likewise, eligible veterans are provided protections under the statute in the absence of a Family Caregiver such as respite care during a family member's initial training if such training would interfere with the provision of personal care services for the eligible veteran. 38 U.S.C. 1720G(a)(6)(D). Thus, we believe ''in need of personal care services'' under section 1720G(a)(2)(C) means that without Family Caregiver support, VA would otherwise need to hire a professional home health aide or provide other support to the eligible veteran such as adult day health care, respite care, or facilitate a nursing home or other institutional care placement.85 FR 13359 (March 6, 2020).

Also, as previously stated we are standardizing PCAFC to focus on eligible veterans with moderate and severe needs, and we believe this definition supports this focus. Furthermore, ''alternative in-person caregiving arrangements'' are not limited to a professional home health aide, or nursing home care. There are many types of alternative caregiving arrangements that a veteran or servicemember may utilize or require in the absence of his or her Family Caregiver providing in-person personal care services. The personal care needs of eligible veterans participating in PCAFC vary and as such, so would the types of alternative caregiving arrangements they may require. Such arrangements may include adult day health care or other similar day treatment programs, assistance provided by a friend or family member informally or formally through a VA or community Veteran-Directed care program, or through volunteer organizations that train individuals to provide respite care. Thus, we believe this definition would not discriminate against post-9/11 veterans and servicemembers who may utilize other alternative in-person caregiving arrangements other than a professional home health aide or nursing home care in the absence of their Family Caregiver. We note that PCAFC has been and will remain available to post-9/11 eligible veterans, and that the changes we are making are intended to support veterans of all eras of service, consistent with expansion of the program under the VA MISSION Act of 2018. We further refer commenters to the discussion of § 71.20 addressing commenters' concerns that the proposed regulations would negatively impact post-9/11 veterans. Additionally, we recognize that there may be reluctance by some veterans, including post-9/11 veterans, to seek care and assistance because of perceived stigma or a belief that they are not ''disabled enough,'' and our goal is to reduce those concerns through outreach and education on all VA programs and services, to include PCAFC, that may help meet the needs of veterans and servicemembers and their caregivers. We are not making any changes based on these comments.

One commenter supported our definition of ''in need of personal care services'' because it clarified that such services are required in person. In contrast, another commenter disagreed with our assertion that the PCAFC was ''intended to provide assistance to Family Caregivers who are required to be physically present to support eligible veterans in their homes.'' 85 FR 13360 (March 6, 2020). They asserted that the statute is intended to enable a veteran to obtain care in his or her home regardless of where the caregiver is located, such that he or she could receive care remotely ''such as when the caregiver checks in to remind the veteran to take his or her medication, guide the veteran through a task that he or she can complete without physical assistance, or provide mental and emotional support should the need arise.'' VA's requirement that the eligible veteran requires ''in-person personal care services'' is supported by the statute, and we are not persuaded by the commenter's arguments to the contrary. Even putting aside the meaning of ''personal,'' with which the commenter takes issue, we believe the statute makes clear the importance of providing in-person personal care services by indicating that personal care services are provided in the eligible veteran's home (38 U.S.C. 1720G(a)(9)(C)(i)) and by establishing an expectation that Family Caregivers are providing services equivalent to that of a home health aide, which are generally furnished in-person and at home (38 U.S.C. 1720G(a)(3)(C)(ii), (iv)). See 85 FR 13360 (March 6, 2020). Also, rather than supporting the commenter's argument that VA's definition is unduly restrictive, we believe that 38 U.S.C. 1720G(d)(3)(B) also illustrates the importance of in-person personal care services by only authorizing a non-family member to be a Family Caregiver if the individual lives with the eligible veteran. We do not discount the importance of remote support that caregivers provide to veterans, such as medication reminders, remote guidance through a task via telephone, and mental and emotional support, but we do not believe that type of support alone rises to the level of support envisioned by the statute for eligible veterans who are in need of personal care services in PCAFC. This is particularly true as we standardize PCAFC to focus on eligible veterans with moderate and severe needs. 85 FR 13356 (March 6, 2020). VA's definition of ''in need of personal care services'' is a reasonable interpretation of the statute, and we are not making any changes based on this comment. We do, however, recognize the commenter's concern regarding consistency between PCAFC and PGCSS. As noted in VA's proposed rule, the definition of ''in need of personal care services'' will not apply to restrict eligibility under 38 U.S.C. 1720G(b), which governs PGCSS, or any other VA benefit authorities. VA will consider whether changes to the regulations governing PGCSS are appropriate in the future.

One commenter agreed with the definition to the extent that VA is not requiring the Family Caregiver to always be present. It is not our intent to require a Family Caregiver to be present at all times, rather this definition establishes that the eligible veteran requires in-person personal care services, and without such personal care services provided by the Family Caregiver, alternative in-person caregiver arrangements would be required to support the eligible veteran's safety. As stated by the commenter, this definition speaks to the type of personal care services needed by the eligible veteran, as the kind that must be delivered in person. We appreciate this comment and make no changes based upon it.

One commenter asked (1) whether a legacy participant determined to need in-person care services from another person, but who does not require assistance daily and each time an ADL is performed, would still be eligible to continue to participate in the PCAFC; and (2) whether a veteran who served

before September 11, 2001 (referred to herein as pre-9/11) who VA determines needs in-person care services from another person, but does not require assistance daily and each time, would be eligible for PCAFC. The commenter's questions and examples seem to merge and possibly confuse separate PCAFC eligibility requirements. To qualify for PCAFC under § 71.20(a)(3), a veteran or servicemember would need to be in need of personal care services (meaning the veteran or servicemember requires ''in-person personal care services from another person, and without such personal care services, alternative in-person caregiving arrangements . . . would be required to support the eligible veteran's safety'') based on either (1) an inability to perform an activity of living, or (2) a need for supervision, protection, or instruction, as such terms are defined in § 71.15 and discussed further below. The definition of ''inability to perform an activity of daily living'' refers to the veteran or servicemember requiring personal care services ''each time'' one or more ADLs is completed, and the definition of ''need for supervision, protection, or instruction'' refers to the individual's ability to maintain personal safety on a ''daily basis.'' The veteran or servicemember could qualify on both of these bases, but would be required to qualify based on only one of these bases. To the extent the commenter is concerned about these other definitions, we further address comments about those definitions separately in their respective sections below. We are not making any changes based on this comment.

Another commenter acknowledged an understanding of the ''in person'' requirement, but requested that we clearly state that the care does not need to be hands-on, physical care, and that assistance can be provided through supervision, protection, or instruction while the veteran completes an ADL. A veteran or servicemember that is eligible for PCAFC based on the definition of need for supervision, protection, or instruction would require in-person personal care services. However, that does not always mean hands-on care is provided or required. We note that if an eligible veteran is eligible for PCAFC because he or she meets the definition of inability to perform an ADL, the in-person personal care services required to perform an ADL would be hands-on care. We further refer that commenter to the discussion on the definition of inability to perform an ADL, where we address similar comments regarding veterans who may require supervision, protection, or instruction to complete ADLs. We make no changes based on this comment.

One commenter asked whether the use of community support professionals and resources (*e.g.,* art therapy services, life skills coaching) that provide active supervision to the eligible veteran while performing other activities when the designated Family Caregiver is not present would affect eligibility for PCAFC. It was recommended VA clarify the role that non-designated individuals or organizations such as those identified in the previous sentence may play in an eligible veteran's life, and the commenter advocated that use of such services should not disqualify a veteran from PCAFC. As previously explained, it is not our intent to require that a Family Caregiver be present at all times. We acknowledge that all caregivers need a break from caregiving. It is important to note that respite care is a benefit provided to assist Family Caregivers, and we encourage the use of respite care by Family Caregivers. The definition of ''in need of personal care services'' ensures that PCAFC is focused on veterans and servicemembers who require in-person personal care services, and that in the absence of such personal care services, such individuals would require alternative in-person caregiving arrangements. This definition as well as all other PCAFC eligibility criteria are not intended to discourage the utilization of community support resources or community-based organizations who may provide care or supervision to the eligible veteran while the Family Caregiver is not present. We note, however, it is our expectation that the Family Caregiver actually provide personal care services to the eligible veteran. The requirements in §§ 71.20(a)(5) and 71.25(f) make clear that personal care services must be provided by the Family Caregiver, and that personal care services will not be simultaneously and regularly provided by or through another individual or entity. We further refer the commenter to the discussion of § 71.25 below. We are not making any changes based on these comments.

One commenter asserted that VA's definition is further clarified by other regulatory requirements concerning neglect of eligible veterans, specifically § 71.25(b)(3) (''[t]here must be no determination by VA of . . . neglect of the eligible veteran by the [Family Caregiver] applicant'') and § 71.45(a)(1)(i)(B) (authorizing VA to revoke the designation of a Family Caregiver for cause when the Family Caregiver has neglected the eligible veteran). We used the ''in-person'' language to address the eligible veteran's level of need, which is distinct from §§ 71.20(a)(5) and 71.25(f), which establish the expectations of the Family Caregiver to provide personal care services, and §§ 71.25(b)(3) and 71.45(a)(1)(i)(B), which address neglect. If the veteran or servicemember does not require in-person personal care services, there may be other VA health care programs more suitable to meet his or her needs. If the Family Caregiver is not providing care, which pursuant to ''in need of personal care services'' will include in-person care, we could initiate revocation based on noncompliance under § 71.45(a)(1)(ii)(A), or for cause under § 71.45(a)(1)(i), depending on the circumstances. We note that these are distinct criteria and considerations. To the extent the commenter was remarking that the presence of requirements regarding neglect generally mean that the Family Caregiver is providing care in person rather than remotely, we agree. We make no changes based on this comment.

One commenter disagreed with the creation of the definition because of the existing statutory and regulatory definition of ''personal care services,'' and asserted that VA, by defining ''in need of personal care services,'' is restricting the bases upon which an eligible veteran can be deemed in need of personal care services in section 1720G(a)(2)(C). The commenter also asserted that VA has never created a definition for other programs and services in which similar language is used. We note that section 1720G(a)(2)(C) provides the bases upon which an individual may be deemed in need of personal care services; however, it does not define an objective standard for what it means to be in need of personal care services, and we found it necessary to define this term for purposes of PCAFC. We reiterate from the proposed rule that our interpretation of the term ''in need of personal care services'' for purposes of PCAFC would not apply to other sections in title 38, U.S.C., that use the phrase ''in need of'' in reference to other types of VA benefits that have separate eligibility criteria. We are not required to interpret ''in need of'' in the same manner in every instance the phase is used in title 38, U.S.C. See *Atlantic Cleaners & Dyers, Inc.* v. *United States,* 286 U.S. 427, 433 (1932) ([although] ''there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . the presumption is not rigid and readily yields whenever there

is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent''). We are not making any changes based on this comment.

One commenter that supported the definition suggested that eligibility assessment teams include an occupational therapist or have applicants evaluated by an occupational therapist to help ensure a more objective assessment. The commenter believes PCAFC disproportionately relies on self-reporting of functioning. We note that centralized eligibility and appeals team (CEAT) will determine eligibility, including whether the veteran is determined to be unable to self-sustain in the community, for purposes of PCAFC. These teams will be comprised of a standardized group of inter-professional, licensed practitioners with specific expertise and training in the eligibility requirements for PCAFC and the criteria for the higher-level stipend, and will include occupational therapists, as appropriate. We thank the commenter for their suggestion; however, as this specific commenter did not make any suggestions regarding the proposed rule itself, we are not making any changes based on this comment.

Two commenters restated our belief, as indicated in the proposed rule, that under 38 U.S.C. 1720G(a)(2)(C), ''in need of personal care services'' means that without Family Caregiver support, VA would otherwise need to hire a professional home health aide or provide other support to the eligible veteran, such as adult day health care, respite care, nursing home, or other institutional care. These two commenters further opined that this description does not include jail or prison. One of these commenters also referred to Veterans Health Administration (VHA) policy on Geriatric and Extended Care Services, eligibility for homemaker/home aide or related respite care services and home hospice services, and an Office of Inspector General (OIG) report related to caregivers being incarcerated or hospitalized. These commenters provide no further context as to their concerns related to the definition of ''in need of personal care services.'' To the extent that these comments concern incarcerated or hospitalized veterans and caregivers, we refer the commenter to the discussion on discharge and revocations under § 71.45 further below. It is unclear why these comments refer to other VA health care programs, but we note that PCAFC is one of many VHA programs available to meet the needs of eligible veterans. We make no changes based on these comments.

Another commenter noted that VA added a definition of ''in need of personal care services,'' but also referred to the definition for ''personal care services'' as it is currently defined in § 71.15, then stated the terminology ''is not specific and very narrow.'' The commenter asserted that it could therefore ''disqualify many veterans'' and ''allows one to think that family caregiver support is not allowed and only qualifies for a hired professional home health aide or provide other support to the eligible veteran such as adult day health care, respite care, or facilitate a nursing home or other institutional care placement.'' It is unclear if these comments were in reference to the proposed definition of ''in need of personal care services'' or to the current definition of ''personal care services.'' To the extent the commenter believes the definition for ''personal care services'' in current § 71.15 is too narrow, we did not propose to change that definition in this rulemaking and consider such comment outside the scope of this rulemaking. To the extent the commenter believes the definition for ''in need of personal care services'' is too narrow such that it would disqualify many veterans, lead one to believe that that Family Caregiver support is not allowed, and allow only a hired professional home health aide or other similar support, we disagree and we refer the commenter to the previous paragraphs in this section discussing this definition. We are not making any changes based on this comment.

One commenter also requested that VA clearly state in regulation that working is not an exclusion criterion for either the veteran or the Family Caregiver. This commenter stated that while VA has often publicly stated that working is not an exclusion criterion, they are aware of many situations when a Family Caregiver was discharged from PCAFC because either the veteran or Family Caregiver worked. We also received a similar comment in response to the definition of inability to perform an ADL, in which another commenter urged VA to include in the PCAFC regulations that employment does not exclude the veteran or the Family Caregiver from PCAFC, and noted they are aware of several instances where participants have been discharged from PCAFC because of employment. This commenter further stated that a veteran's ability to work does not mean that he or she does not need the same or higher level of assistance with ADLs as those catastrophically disabled veterans who are unable to work. Relatedly, some commenters opposed allowing veterans to be eligible for PCAFC if they work full time.

Employment is not an automatic disqualifier for PCAFC. However, we decline to include language in the regulation to explicitly state that, as doing so could suggest that employment is not considered by VA in determining eligibility for PCAFC, which is not the case. While maintaining employment would not automatically disqualify a veteran or servicemember for PCAFC, employment and other pursuits, such as volunteer services and recreational activities, can and do inform VA regarding an individual's functional ability and would be considered during the evaluation of the veteran or servicemember. For example, if a veteran or servicemember travels for work or leisure and can independently manage alone for weeks at a time without the presence of a caregiver, that would likely indicate that the individual does not require personal care services ''each time'' he or she completes one or more ADLs.

Creating any specific requirements regarding employment for eligible veterans or Family Caregivers would be difficult because of the unique needs of every individual and the vast employment options, both with and without accommodations. For example, an eligible veteran in need of personal care services due to an inability to perform multiple ADLs because of quadriplegia may be able to maintain any number of professional opportunities with proper accommodations, and still qualify for PCAFC. As the needs and condition for each veteran or servicemember and his or her caregiver are unique, we do not believe it is reasonable to place restrictions on a veteran's or servicemember's ability to work.

In regards to the Family Caregiver's employment, it is not our intent to prevent Family Caregivers from obtaining and maintaining gainful employment as we are cognizant that the monthly stipend is an acknowledgement of the sacrifices made by Family Caregivers, but may fall short of the income a Family Caregiver would otherwise earn if gainfully employed. The Family Caregiver may have the ability to provide the required personal care services to the eligible veteran while maintaining employment. We acknowledge that each Family Caregiver's situation is unique, such that he or she may be able to work from home, have a flexible work schedule, or have a standard workplace and schedule. We understand that Family Caregivers may not be present all of the

time to care for the eligible veteran, and we do not expect them to provide care 24/7. However, they would be required to be available to provide the required personal care services to the eligible veteran. Thus, we decline to include language to state that employment is not an exclusionary factor for eligibility under part 71, and make no changes based on these comments.

In the Best Interest

We proposed to revise the current definition of in the best interest to mean a clinical determination that participation in PCAFC is likely to be beneficial to the veteran or servicemember, and such determination will include consideration, by a clinician, of whether participation in the program significantly enhances the veteran's or servicemember's ability to live safely in a home setting, supports the veteran's or servicemember's potential progress in rehabilitation, if such potential exists, increases the veteran's or servicemember's potential independence, if such potential exists, and creates an environment that supports the health and well-being of the veteran or servicemember.

Multiple commenters stated that they believe the focus on the potential for independence in the proposed definition of ''in the best interest'' is contradictory to the proposed definition of ''serious injury,'' which would require a service-connected disability rating of 70 percent or more, and the requirement that the veteran or servicemember be in need of personal care services for a minimum of 6 months. One commenter further explained that contradiction, stating that not all serious injuries become less over time and therefore, independence should not be the highest achievable goal for PCAFC. The commenter stated that focusing on the veteran's ability for improvement does not fully acknowledge that a veteran's condition may never heal or get better over time. First, we note that while the comments appear to focus on serious injury, we are not requiring that the serious injury be connected to the eligible veteran's need for personal care services. Conditions other than the serious injury may be the reason the eligible veteran has a need for personal care services. We agree with the commenters that some eligible veterans may have serious injuries or other conditions, for which they are in need of personal care services, that may never improve over time, and PCAFC will continue to be available to such veterans and their caregivers if eligible. However, each individual is unique, and some eligible veterans may have serious injuries that improve over time, and we want to support such veterans if they are able to recover or improve over time. Furthermore, ''in some cases a clinician may determine that other care and maintenance options would be better to promote the [veteran's or servicemember's] functional capabilities and potential for independence.'' 76 FR 26149 (May 5, 2011). We also want to emphasize that the potential for independence is only one factor that will be considered by VA in determining whether the program is in the veteran's or servicemember's best interest. We are not making any changes based on these comments.

Several commenters raised concerns about the definition including potential for rehabilitation, in particular the ''if such potential exists'' language, as some veterans may have little or no potential for rehabilitation and should not be excluded from PCAFC. One commenter recommended that while the language ''if such potential exists'' provides some comfort, new language should be added to more explicitly state that veterans who fail to show improvement will not be excluded from the program. Another commenter noted that the phrase ''if such potential exists'' is confusing as to whether the program is intended to be permanent or rehabilitative; the commenter explained the language implies the program is permanent if the potential for independence does not exist. One commenter also raised concerns that this language can lead to VA removing veterans from PCAFC when they are benefitting from it due to having better access to an advocate for their medical care.

The current definition for in the best interest includes a consideration of whether participation in the program supports the veteran's or servicemember's potential for rehabilitation, if such potential exists, and we did not propose any changes to this part of the definition. Rather, we proposed to include an additional consideration of whether participation in the program increases the veteran's or servicemember's potential independence, if such potential exists. While we appreciate the commenters' concerns regarding the potential for rehabilitation, we believe these comments are beyond the scope of this rulemaking as we did not propose any changes to this part of the definition. However, we would like to clarify that the use of the phrase ''if such potential exists'' is intended to acknowledge that due to the conditions and impairments of some participants, a potential for rehabilitation or improved independence may not be reasonable, achievable, or expected. Many veterans participating in PCAFC will have injuries, conditions, or diseases that worsen over time that do not afford them the opportunity for rehabilitation or improved independence. Others, however, may indeed be able to achieve a level of increased functioning beyond their current abilities. We wish to make it clear that PCAFC is a clinical program, and the goal of clinical programs is to maximize health and well-being. If it is determined that participation in PCAFC is providing a disincentive for a veteran's well-being, PCAFC may be determined to not be in the individual's best interest. Similarly, we wish to make it clear that when such potential for improved functioning is not deemed reasonable, the lack of potential does not disqualify an individual from PCAFC. We make no changes based on these comments.

Several commenters expressed concern that eligibility determinations are based on a veteran's ability to recover. Commenters further asserted that it is unlawful for VA to deny or revoke eligibility based on a standard that focuses only on those who will recover or are likely to recover. While these commenters did not specifically provide these comments in the context of the definition for in the best interest, we believe these comments are best addressed in the discussion of this definition. We note that we are not basing eligibility decisions based on a veteran's ability to recover, and PCAFC eligibility is not dependent on a veteran's or servicemember's ability to recover. However, we do want to support an eligible veteran if they are able to recover, rehabilitate, or improve over time. There are many instances in which an eligible veteran has minimal ability to recover, rehabilitate or improve, and PCAFC will continue to be available to such veterans and their caregivers. We further note that as part of this rulemaking, we are extending eligibility to those with progressive illnesses (see definition of serious injury), from which an eligible veteran may never recover. We make no changes based on these comments.

One commenter explained that this definition perpetuates a paternalistic and condescending approach of how the Department should provide care to veterans, assuming a veteran is incapable of understanding what health care is and what is not in their best interest, and that the veteran is incapable of making their own health care decisions. Additionally, another commenter recommended that the definition focus on decision-making capacity and competence, and surrogate

decision making, consistent with VHA policy regarding informed consent for clinical treatments and procedures.

Under 38 U.S.C. 1720G(a)(1)(B), VA ''shall only provide support under [PCAFC] to a family caregiver of an eligible veteran if [VA] determines it is in the best interest of the eligible veteran to do so.'' As stated in VA's interim final rule establishing part 71, VA concludes that determinations of ''in the best interest'' must be clinical determinations, guided by VA health professionals' judgment on what care will best support the health and well-being of the veteran or servicemember. 76 FR 26149 (May 5, 2011). While we appreciate the commenters' concerns and suggestions, which seem to concern the overall purpose and scope of this definition, the commenters did not specifically address our proposed changes to this definition regarding the additional consideration of whether participation in the program increases the veteran's or servicemember's potential independence, if such potential exists. We make no changes based on these comments.

One commenter suggested that this definition not focus on the quality of the veteran and caregiver relationship, particularly as it is not appropriate or ethical to do so, except in circumstances that meet the definition of substantiated abuse or neglect consistent with applicable, related VHA policy on elder abuse and vulnerable adults. While we appreciate the commenter's concern, this definition is not focused on the relationship and quality of a veteran's or servicemember's relationship with their Family Caregiver; rather, it is focused on whether it is in the best interest of the eligible veteran to participate in PCAFC. The relationship of the veteran or servicemember and the Family Caregiver is considered, but is not a determining factor when deciding if participation in PCAFC is in the best interest of the veteran or servicemember. We make no changes based on this comment.

Another commenter recommended that the definition be revised to automatically presume a veteran's participation in PCAFC is in their best interest unless VA determines such participation is not in their best interest. As previously explained, we did not propose a new definition for ''in the best interest.'' Rather, we proposed to add an additional criterion to an already existing definition in § 71.15. Therefore, we believe this comment is beyond the scope of this rulemaking and we make no changes based on this comment.

Several commenters expressed concern about which clinician should be allowed to make the determination of whether PCAFC is in the best interest for a veteran or servicemember. Specifically, commenters were concerned that the clinician making the determination may not be the treating physician nor have any prior knowledge or experience with the veteran or servicemember. Additionally, one commenter suggested that the determination should be made with both the eligible veteran's primary care doctor and primary provider of care to ensure those who have knowledge of the veteran's needs are involved. As explained throughout this final rule, CEATs, composed of a standardized group of inter-professional, licensed practitioners, with specific expertise and training in the eligibility requirements for PCAFC, will make determinations of eligibility, including ''in the best interest,'' and whether the veteran is determined to be unable to self-sustain in the community. Clinical staff at local VA medical centers will conduct evaluations of PCAFC applicants with input provided by the primary care team to the maximum extent practicable. This information will be provided to the CEATs for use in making eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC. As explained in the discussion on primary care team, we are revising the definition of primary care team in this final rule to ensure that those medical professionals, including a VA primary care provider, who care for the veteran and have knowledge of the veteran's needs and treatments, are part of the primary care team. We further note that any documentation from a non-VA provider that the veteran or servicemember provides will be available to VA for purposes of PCAFC evaluation and eligibility determinations. We make no changes based on these comments.

A few commenters questioned why VA did not provide the proposed revised definition for in the best interest so that the public could review and comment. As indicated in the proposed rule, the current language in the definition would generally remain; however, we are replacing the phrase ''veteran or servicemember's'' with ''veteran's or servicemember's'' and adding that a clinician would also consider whether participation in PCFAC ''increases the veteran's or servicemember's potential independence, if such potential exists.'' 85 FR 13360 (March 6, 2020). Furthermore, the proposed rule provided the revised definition for the public to review and comment on:

> In the best interest means, for the purpose of determining whether it is in the best interest of the veteran or servicemember to participate in the Program of Comprehensive Assistance for Family Caregivers under 38 U.S.C. 1720G(a), a clinical determination that participation in such program is likely to be beneficial to the veteran or servicemember. Such determination will include consideration, by a clinician, of whether participation in the program significantly enhances the veteran*'s* or servicemember's ability to live safely in a home setting, supports the veteran*'s* or servicemember's potential progress in rehabilitation, if such potential exists, *increases the veteran's or servicemember's potential independence, if such potential exists,* and creates an environment that supports the health and well-being of the veteran or servicemember.

85 FR 13405 (March 6, 2020) (emphasis added). We are not making any changes based on these comments.

Inability To Perform an Activity of Daily Living (ADL)

VA proposed to modify its definition of inability to perform an activity of daily living (ADL) to mean that a veteran or servicemember requires personal care services each time he or she completes one or more of the specified ADLs, and would thereby exclude veterans and servicemembers who need help completing an ADL only some of the time the ADL is completed. VA received numerous comments about this proposed definition. Many commenters believe this definition to be too limiting and some suggested a less restrictive definition. Others requested clarification or suggested alternative approaches.

Several commenters raised concerns with the part of this definition that would require that a veteran or servicemember require personal care services ''each time'' he or she completes one or more ADL, and urged VA to not impose this requirement. Specifically, their concerns are that this definition is too limiting, is more restrictive than the current PCAFC, is too narrow to properly evaluate a veteran's disability and symptoms, and may result in veterans being ineligible for PCAFC when they may need more assistance than those who are determined eligible. Several commenters asserted that some veterans may not need assistance with one or more ADLs each time every day; they may only need assistance some or most of the time; and that the assistance needed can vary over time, may fluctuate (even throughout the day, based on medication or repeated motion, etc.), and can vary based on

circumstances (*e.g.,* weather, after surgery or physical therapy, seasonally). Numerous examples were provided by commenters of situations in which they assert a veteran may need caregiving on a regular basis (and potentially more so than others who would qualify under the definition) but would not meet the definition of inability to perform an ADL because they do not need assistance every time they perform an ADL. For example, one commenter indicated a veteran with severe traumatic brain injury (TBI) who has an inability to regulate mood, memory loss, or an inability to follow proper hygiene standards may not require assistance every day, but still requires caregiving on a regular basis. Another commenter asserted that the proposed criteria ''would discriminate against severely disabled veterans with musculoskeletal and/or neurological conditions that limit muscle endurance,'' that is, ''veterans with sufficient muscle force to complete one ADL instance without assistance but due to having to repeat the ADL throughout the course of the day would eventually require assistance would therefore not be eligible,'' and ''would also discriminate against other severe disabilities that relapses and remits, or that waxes and wanes, including mental health and cognitive impairments.'' One commenter asserted that this ''all or nothing'' approach is contrary to how health care and caregiving should be treated, resulting in harm to veterans. One commenter recommended the definition should use ''requires personal care services most of the time when attempting to complete one or more of the following . . .'' or similar language. Other commenters recommended clarifying that required assistance may vary over time or from one day to the next. Another commenter asserted that the requirement is not consistent with VA's ''long-established acknowledgement that an injury is not stable and changes,'' and specifically cited to VBA's Schedule for Rating for the musculoskeletal system at 38 CFR 4.40 and 4.45 in asserting that a veteran with functional loss of the musculoskeletal system may experience additional loss of function during repeated motions over time and flare-ups.

Other commenters requested clarification on how VA would consider ADLs that are not completed every day, including a commenter who recognized that that the frequency with which some ADLs are completed can vary based on the individual's clinical needs, such as bathing.

Some commenters asserted that the definition fails to support efforts by a catastrophically disabled veteran to exert even a small level of independence, when possible, and that because some veterans have spent years and decades striving for a degree of independence, an ability to infrequently perform ADLs should not disqualify a veteran from PCAFC.

While we appreciate the commenters' concerns, we make no changes based on these comments, and address them below.

First, we note that the definition of inability to perform an ADL is an objective standard used to evaluate eligibility for PCAFC. This determination is specific to PCAFC and does not indicate whether a veteran or servicemember is in need of, and eligible for, other health care benefits and services. If a veteran or servicemember does not meet this definition, they may not otherwise be eligible for PCAFC. However, it does not mean that he or she does not require, or is ineligible for, other VA benefits and services. For veterans and servicemembers who are not eligible for PCAFC, we will assist them, as appropriate, in considering what other health care programs may best meet their needs.

As explained in the proposed rule and reiterated here, this definition requires that a veteran or servicemember need personal care services each time he or she completes any of the ADLs listed in the definition. 85 FR 13360 (March 6, 2020). We would not require the veteran or servicemember qualifying for PCAFC based on an inability to perform an ADL need personal care services on a daily basis. As stated in the proposed rule:

Although the statute refers to an eligible veteran's inability to perform one or more activities of daily living as a basis upon which he or she can be deemed in need of personal care services (38 U.S.C. 1720G(a)(2)(C)(i)), we recognize that not all activities of daily living need to be performed every day. For example, bathing is included in the current § 71.15 definition of ''[i]nability to perform an activity of daily living,'' but bathing may not be required every day. A veteran may be able to maintain health and wellness by adhering to a less frequent bathing routine. Id. at 13361.

As we also explained in the proposed rule, this definition is not met if a veteran or servicemember needs help completing an ADL only some of the time that the ADL is completed. Id. We believe the proposed definition delineates an objective frequency requirement that will enable VA to operationalize and standardize PCAFC across the country and is consistent with our goal of focusing PCAFC on eligible veterans with moderate and severe needs. The definition sets forth a consistent, standardized, and clear requirement, by specifying that a veteran or servicemember requires personal care services each time the ADL is completed, regardless of which ADL it is. We believe that the requirement that assistance be needed each time the ADL is completed equates to a veteran or servicemember requiring a moderate amount of personal care services. Each ADL is treated the same irrespective of the specific tasks required to complete the ADL or frequency with which it is completed. Reliance on a Family Caregiver for any one of the seven ADLs results in a self-care deficit that affects the veteran's or servicemember's quality of life.

The definition of an inability to perform an ADL would only be met if a veteran or servicemember needs personal care services each time that he or she completes an ADL as indicated through a clinical evaluation of the veteran's functional abilities, with input by the veteran or servicemember and caregiver. We acknowledge the degree of assistance may vary; however, a degree of hands-on assistance will be required each time the ADL is performed. In some cases, the degree of assistance that a veteran or servicemember may need to complete the ADL may vary throughout the day. In some instances, the veteran or servicemember may only need minimal assistance completing the ADL, but in other instances throughout the day may require moderate assistance. For example, veterans and servicemembers who have muscle weakness, lack of dexterity, or fine motor skills, may only need assistance with removing clothing when toileting at the beginning of the day, but later in the day they may require assistance with removing clothing, performing appropriate hygiene and redressing when completing the task of toileting.

We considered whether we should require the definition of inability to perform an ADL include daily assistance with an ADL instead of assistance each time an ADL is completed, but we have determined that use of daily instead of each time would result in less consistency and clarity, as it would require us to include exceptions for certain ADLs, such as grooming and bathing, that may not be completed on a daily basis. These exceptions would create confusion in applying the definition and result in less consistency and standardization in the application of this definition.

Similarly, we did not define inability to perform an ADL to require assistance

with an ADL most or majority of the time because we believe such terms are too vague and subjective, leading to inconsistencies in interpretation and application. Using most or majority of the time instead of each time would be difficult to quantify, and would require us to establish an arbitrary threshold.

To the extent that a commenter was concerned that this definition would exclude veterans who may need more assistance than those who cannot independently accomplish one ADL, we respectfully disagree for the reasons described above. We believe that if a veteran or servicemember needs assistance with multiple ADLs, it is likely that at least one of those ADLs requires assistance each time the ADL is completed.

Furthermore, the monthly stipend provided to a Primary Family Caregiver under 38 U.S.C. 1720G is not disability compensation and it is not designed to supplement or replace the disability compensation received by the veteran. Therefore, we disagree with the assertion that this definition must maintain consistency with the rating schedule in 38 CFR part 4, subpart B.

Commenters raised concerns that catastrophically disabled veterans would not meet this definition. We assume these commenters are referring to the definition of catastrophically disabled veterans as used by VHA in 38 CFR 17.36(b). We disagree that catastrophically disabled veterans will inevitably be excluded based upon this definition. Veterans who are catastrophically disabled are those with a severely disabling injury, disorder, or disease that permanently compromises their ability to carry out activities of daily living. See 38 CFR 17.36(e). Some veterans with such a designation will be in need of personal care services based on an inability to perform an ADL (*i.e.,* requiring personal care services each time one or more ADLs is completed). However, through adaptive equipment, home modifications, or other resources, there may be veterans who do not require another individual to perform personal care services, or otherwise do not qualify for PCAFC. VA will evaluate each veteran and servicemember based on the eligibility criteria set forth in § 71.20.

We are not making any changes based on these comments.

One commenter provided data they collected from veterans concerning the performance of ADLs and noted that there were extremely few veterans who were completely dependent on caregivers to complete ADLs. Another commenter similarly asserted that even veterans with moderate and severe needs ''may not meet this high threshold, and the proposed revision may exclude vast numbers of veterans from the program,'' noting that ''even a veteran who needs assistance with an ADL nine times out of ten would nonetheless fail to meet the requirement.'' Additionally, one commenter believed the definition of inability to perform an ADL to suggest the program would be limited to veterans requiring 24/7 care, and that 95 percent of current PCAFC participants would fail to qualify based on the definition of inability to perform an ADL.

We appreciate the concerns raised by these commenters and the data provided by one of the commenters, as these are informative. However, we cannot verify that the data provided are accurate. We do not currently track and maintain data on how many current PCAFC participants qualify for PCAFC based on the current definition of inability to perform an ADL versus the current definition of need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury. While inability to perform an ADL is one way in which an individual can qualify for PCAFC, it is not the only way, as individuals may meet the definition of need for supervision, protection, or instruction (*i.e.,* an individual may have a functional impairment that directly impacts his or her ability to maintain personal safety on a daily basis). We do know that a majority of current PCAFC participants have a mental health diagnosis amongst their diagnoses, but we do not track if that mental health diagnosis is the reason they are eligible for PCAFC. We do not believe this definition of inability to perform an ADL will be as restrictive as the commenters assert, but we cannot verify if the data provided by the commenters is accurate. This does not change our decision to use the definition of inability to perform an ADL as we proposed and now make final, as we find the benefits (*e.g.,* clarity, objectivity, consistency) of using this definition outweigh any potential risks identified by the commenters. We will track and monitor PCAFC participants to determine the basis for their eligibility for PCAFC (*i.e.,* whether it is because he or she has an inability to perform an ADL or a need for supervision, protection, or instruction) moving forward. Additionally, VA will also track individuals who apply and are not eligible based on the definition of in need of personal care services. If over time we find that this definition is as restrictive as the commenters assert it will be, we will adjust and revise the definition accordingly in a future rulemaking.

Further, we do not believe that the definition of inability to perform an ADL will exclude vast numbers of veterans and servicemembers from PCAFC, as there will be veterans and servicemembers who meet this definition with regards to only one ADL. We believe requiring assistance with one ADL each time such ADL is performed encompasses a broad and inclusive range of injuries and illnesses which may cause an individual to require the care and assistance of another. For example, a veteran with Parkinson's disease who needs assistance with grooming each time, but does not need assistance with other ADLs, may meet this definition. A veteran who requires assistance donning prosthetic equipment, but once equipment is in place is otherwise independent, may also meet this definition. Similarly, a veteran with mobility impairment may meet this definition if he or she requires assistance with lower body dressing, but is otherwise independent. While some veterans may need assistance with more than one ADL, others will not but would still qualify so long as they need assistance with at least one ADL each time it is performed.

Contrary to the commenter's statement that PCAFC would be limited to veterans requiring 24/7 care, we note that it is not our intent that PCAFC be limited to only those veterans and servicemembers that require 24/7 care and we refer the commenter to the previously-cited examples above. We further note that we do not expect or require Family Caregivers to provide 24/7 care as part of PCAFC. This definition would not restrict PCAFC to only those requiring 24/7 care, as this definition requires that assistance be needed each time the ADL is completed, which we believe equates to a veteran or servicemember requiring a moderate amount of personal care services.

We make no changes based on these comments.

One commenter stated that they believe this definition of inability to perform an ADL is more aligned with the definition of ''incapability'' rather than ''inability'' because they interpret the definition of inability as contemplating degrees along a spectrum. This commenter further asserted that VA's definition of inability to perform an ADL does not align with Congressional intent for PCAFC. While we acknowledge that incapability and inability may have similar definitions,

we interpret and define inability to perform an ADL, as required by 38 U.S.C. 1720G, to mean that the veteran or servicemember needs personal care services each time an ADL is completed. We believe this interpretation is reasonable and rational, because it will provide objective criteria for evaluating this term and will ensure those with moderate and severe needs are eligible for PCAFC. It is also important to note that while ''ability'' can be considered along a spectrum, that does not mean that ''inability'' or ''lack'' of ability must similarly be considered along a spectrum. We make no changes based on this comment.

One commenter asserted that VA failed to state if the care provided must be hands-on, physical care to meet the definition of inability to perform an ADL and recommended VA state that assistance can also be in the form of supervision, protection, or instruction as the veteran completes each ADL. Relatedly, another commenter, in addressing the definition of ''need for supervision, protection, or instruction,'' suggested that VA had muddled the statutory language, which the commenter asserted ''neither limits the inability to perform one or more [ADLs] to physical impairments nor excludes physical impairments from causing the need for supervision or protection.'' Other commenters provided examples that seemed to confuse the definitions of ''inability to perform an activity of daily living'' and ''need for supervision, protection, or instruction,'' which are separate bases upon which an eligible veteran can be deemed in need of personal care services under § 71.20(a)(3). For example, one commenter referred to veterans who may not be able to remember to take medication, eat, or bathe unless directed to do so and supervised.

We reiterate from the proposed rule that VA considers inability to perform an ADL separate from a need for supervision, protection, or instruction, and that an inability to perform an ADL would involve physical impairment, while need for supervision, protection, or instruction would involve cognitive, neurological, or mental health impairment. See 85 FR 13363 (March 6, 2020). That does not mean, however, that veterans or servicemembers who require assistance with ADLs cannot qualify for PCAFC based on a need for supervision, protection, or instruction, as they may have a functional impairment that directly impacts their ability to maintain personal safety on a daily basis. It is important to note that when we evaluate veterans and servicemembers for PCAFC, we make a clinical determination that is comprehensive and holistic, and based on the whole picture of the individual.

We also note that the care required under the definition of inability to perform an ADL is hands-on, physical care. If that requirement of hands-on, physical care is not met, a veteran or servicemember may still qualify under the definition of need for supervision, protection, or instruction, as that definition does not require hands-on, physical care. To the extent that commenters suggested we include need for supervision, protection, or instruction as the level of assistance required for the definition of inability to perform an ADL, we decline to adopt that suggestion. The definition of need for supervision, protection, or instruction already includes a type of assistance, which we believe would accurately capture veterans with a functional impairment that impacts their ability to maintain their personal safety on a daily basis due to an inability to perform an ADL.

We are not making any changes based on these comments.

One commenter explained that posttraumatic stress disorder (PTSD) and TBI can lead to fluctuations in a veteran's level of functioning and requested VA clearly define what it means to require assistance with an ADL each time it is completed. The commenter also requested VA clarify how VA will consistently assess, across VA, a veteran's inability to perform an ADL. This will be a clinical determination based on a clinical assessment and evaluation of the veteran and include input from the Family Caregiver or Family Caregiver applicant. Additionally, we will provide ongoing education and training to field staff and CEATs. We anticipate fluctuations in functioning, especially with mental health conditions such as PTSD, but if such fluctuations mean that a veteran or servicemember does not require personal care services each time an ADL is completed, then the veteran or servicemember would not meet this definition. A veteran or servicemember could require only a minimal amount of assistance with an ADL on some occasions and a lot of assistance with an ADL on other occasions. However, they must require some amount of assistance with an ADL each time. Thus, if the veteran or servicemember can complete the ADL independently and without personal care services, even on remote occasions, the veteran or servicemember would not meet the requirement of this definition to require assistance ''each time'' with regards to an ADL. However, we note that if a veteran or servicemember does not meet the definition of inability to perform an ADL, they may be eligible under the definition of need for supervision, protection, or instruction. We are not making any changes based on this comment.

One commenter stated that this definition fails to consider the detrimental effect that delayed care would have on the veteran's or servicemember's health, and further raised concerns with the definition in suggesting that it conditions eligibility on deterioration of the veteran's or servicemember's health, which would be detrimental to the veteran or servicemember and create higher health care costs for the VA system. While we understand the commenter's concern, we believe that excluding veterans and servicemembers who need help completing an ADL only some of the time he or she completes any of the ADLs listed in the definition is consistent with our goal of focusing PCAFC on eligible veterans with moderate and severe needs. As stated in the proposed rule:

> This distinction is especially important for eligible veterans whose care needs may be more complex, particularly as personal care service needs related to a physical impairment can evolve over time. For example, infrequent assistance may be needed in the immediate time period following the onset of a disease (such that the individual needs help completing an ADL only some of the time it's completed), but over time and as the individual begins to age, the individual's care needs can progress. We would thus distinguish between veterans and servicemembers needing assistance with an ADL only some of the time from those who need assistance every time the ADL is completed, those who we believe have an ''inability'' to perform an ADL. 85 FR 13361 (March 6, 2020).

Furthermore, we note that PCAFC is just one of many VA programs available to support veterans and his or her caregiver, as VA offers a menu of supports and services that support caregivers caring for veterans such as homemaker and home health aides, home based primary care, Veteran-Directed care, and adult day care health care to name a few. In addition, VA offers supports and services provided directly to caregivers of eligible veterans through PGCSS including access to Caregiver Support Coordinators (CSCs) located at every VA medical center, a caregiver website, training and education offered on-line and in person on topics such as self-care, peer support, and telephone support by licensed social workers through VA's Caregiver Support Line. A determination that a veteran or servicemember is not eligible

for PCAFC would not exclude the veteran or servicemember and his or her caregiver from receiving VA support through alternative support and services as applicable. We are not making any changes based on this comment.

One commenter further noted that a veteran's use of an assistive device to perform an ADL should not be used against them. This same commenter also advocated that inability to perform an ADL should mean that the veteran or servicemember is unable to perform an ADL at any point of time, and suggested that this could be monitored in the wellness checks or annual assessment, and where assistance is required indefinitely, a permanent status could be noted in the record. First, use of an assistive device would not alone exclude a veteran or servicemember from PCAFC. However, we note that to qualify for PCAFC, the veteran or servicemember must be in need of personal care services, which means, in part, that the individual requires in-person care or assistance from another person. If the veteran's or servicemember's needs with respect to ADLs are met with an assistive device, the individual would not be in need of personal care services based on an inability to perform an ADL. Second, annual reassessments will include an assessment of whether an eligible veteran has an inability to perform an ADL, as appropriate, as the eligible veteran may have improved or worsened. While VA does not intend to assess PCAFC eligibility through wellness contacts, including whether an eligible veteran has an inability to perform an ADL, the need for a reassessment may be identified through a wellness contact. VHA is not imposing the ''each time'' requirement for purposes of oversight. We believe recurring reassessment and wellness checks are appropriate regardless of the frequency with which an eligible veteran is in need of personal care services. The ''each time'' requirement is solely for the purposes of determining whether a veteran or servicemember meets the definition of inability to perform an ADL. As discussed below with respect to other commenters who advocated for a permanent designation, we will not designate individuals as permanently eligible for PCAFC in their medical records, even for eligible veterans who are expected to need assistance indefinitely; however, there would be documentation of the eligible veteran's on-going needs in the medical record. Additionally, we note that the frequency of reassessments would be annually, unless there is a determination made and documented by VA to conduct reassessments on a more or less frequent basis. 85 FR 13379, 13408 (March 6, 2020). We make no changes based on these comments.

One commenter who objected to the definition of ''unable to self-sustain in the community'' (discussed further below) provided descriptions and examples of mobility or transferring, feeding or eating, toileting, and shower/bathing, to include descriptions of progressive stages of assistance. It is not clear what the commenter is recommending; however, we do not believe it is necessary for VA to further describe the ADLs listed in this definition as the individual needs for each veteran and servicemember are unique. It is important to note that the definition of inability to perform an ADL and the list of ADLs are based on widely-accepted and commonly understood definitions of ADL needs in the clinical context. Thus, we find it unnecessary to add any further descriptors, particularly as doing so could lead to confusion.

We are not making any changes based on this comment.

One commenter asked why certain instrumental activities of daily living (IADL) were not addressed in the PCAFC eligibility criteria. While we understand and recognize that many caregivers may assist with IADLs, we are required by the authorizing statute to consider ADLs specifically. As stated in the final rule implementing PCAFC and PGCSS, we believe that Congress specifically considered and rejected the use of the term ''instrumental activities of daily living'' in the Caregivers Act. See 80 FR 1357, at 1367 (January 9, 2015). Moreover, in section 162(b)(1) of the VA MISSION Act of 2018, Congress replaced the term ''independent activities of daily living'' with the term ''activities of daily living'' in the statutory definition of ''personal care services'' in 38 U.S.C. 1720G(d)(4) removing any doubt regarding the scope of the term ''activities of daily living.'' We are not making any changes based on this comment.

One commenter recommended VA use the guidance set forth in a procedural guide for the administration of the Servicemembers' Group Life Insurance Traumatic Injury Protection (TSGLI) program, which is authorized under 38 U.S.C. 1980A. Specifically, in the context of determining whether an individual has a loss of ADL, the TSGLI procedural guide states that the member must require assistance to perform at least two of the six ADLs. The TSGLI procedural guide defines ''requires assistance'' as: (1) Physical assistance: When a patient requires hands-on assistance from another person; (2) stand-by assistance: When a patient requires someone to be within arm's reach because the patient's ability fluctuates and physical or verbal assistance may be needed; and (3) verbal assistance: When a patient requires verbal instruction in order to complete the ADL due to cognitive impairment and without these verbal reminders, the patient would not remember to perform the ADL. See TSGLI Procedural Guide, Version 2.46 at 19–20 (June 12, 2019).

First, we note that TSGLI and PCAFC are two distinct programs with distinct purposes, as TSGLI provides ''monetary assistance to help the member and the member's family through an often long and arduous treatment and rehabilitation period.'' 70 FR 75940 (December 22, 2005). TSGLI is modeled after Accidental Death and Dismemberment (AD&D) insurance coverage. Id. These programs also have distinct eligibility criteria. For example, qualifying losses for TSGLI include, but are not limited to, total and permanent loss of sight; loss of a hand or foot by severance at or above the wrist or ankle; total and permanent loss of speech; total and permanent loss of hearing; loss of thumb and or other four fingers of the same hand by severance at or above the metacarpophalangeal joints; quadriplegia, paraplegia, hemiplegia, uniplegia; certain burns; coma or the inability to carry out the ADLs resulting from traumatic injury to the brain. 38 U.S.C. 1980A(b)(1); 38 CFR 9.20(f). While TSGLI does provide payments for an inability to carry out ADLs, those are limited to where that inability results from traumatic injury, including traumatic brain injury, and coma. See 38 U.S.C. 1980A; 38 CFR 9.20(f)(17) and (20). Additionally, inability to carry out ADLs is defined in section 1980A to mean the inability to independently perform two or more of the following six functions: Bathing, continence, dressing, eating, toileting, and transferring. 38 U.S.C. 1980A(b)(2)(D).

Under PCAFC, a veteran with TBI could be considered to be in need of personal care services; that is, because of either physical disabilities resulting in an inability to perform an ADL, or a cognitive, neurological, or mental health impairment resulting in a need for supervision, protection, or instruction. Stand-by and verbal assistance are covered under the need for supervision, protection, or instruction definition. Thus, we do not believe it is necessary to add these under the definition of inability to perform an ADL.

As we explained in the proposed rule, rather than quantifying losses, PCAFC is

designed to support the health and well-being of eligible veterans, enhance their ability to live safely in a home setting, and support their potential progress in rehabilitation, if such potential exists. Unlike TSGLI, which is limited to lump-sum monetary assistance, PCAFC provides eligible Family Caregivers with training and technical support to assist Family Caregivers in their role as a caregiver for an eligible veteran.

Additionally, we note that the monthly stipend provided to a Primary Family Caregiver under 38 U.S.C. 1720G is part of a clinical program rather than a rider to an insurance policy, thus we do not believe that this definition must maintain consistency with TSGLI. We are not making any changes based on this comment.

One commenter recommended that VA not evaluate inability to perform an ADL for those veterans receiving Special Monthly Compensation (SMC) for housebound status or aid and attendance, as they have already been certified by both medical providers and VBA to be in need of another person to perform an ADL, thereby suggesting that veterans in receipt of such benefits should be considered to meet the ''inability to perform an activity of daily living'' definition for purposes of PCAFC eligibility. SMC for aid and attendance is payable when a veteran, due to mental or physical disability, requires the regular aid and attendance of another person. 38 U.S.C. 1114(l), (r); 38 CFR 3.350(b), (h). SMC for housebound status is payable when a veteran, due to mental or physical disability, has a service-connected disability rated as total and (1) has additional service-connected disability or disabilities independently ratable at 60 percent or more, or (2) by reason of service-connected disability or disabilities, is permanently housebound. 38 U.S.C. 1114(s); 38 CFR 3.350(i). Section 3.352 of title 38, CFR, provides criteria for determining the need for regular aid and attendance, which include inability to perform ADLs such as dressing, eating, and continence, or requiring supervision or protection on a regular basis, for purposes of determining eligibility for SMC and special monthly pension.

While the eligibility requirements for SMC referenced by the commenter may seem similar, they are not synonymous with VA's definition of ''inability to perform an ADL.'' The regulatory criteria for aid and attendance under 38 CFR 3.352(a) provide that inability to perform certain specified ADLs ''will be accorded consideration in determining the need for regular aid and attendance.'' Further, whether an individual is ''substantially confined as a direct result of service-connected disabilities to his or her dwelling and the immediate premises'' for purposes of housebound status, see 38 CFR 3.350(i)(2), does not correlate directly with the more objective ADL criteria we proposed for PCAFC eligibility. Consequently, the part 3 criteria fail to provide the level of objectivity VA seeks in order to ensure that its caregiver program is administered in a fair and consistent manner for all participants, and we do not believe criteria for those benefits should be a substitute for a clinical evaluation of whether a veteran or servicemember is eligible for PCAFC due to an inability to perform an ADL as set forth in § 71.15. We believe that in order to ensure that PCAFC is implemented in a standardized and uniform manner across VHA, each veteran or servicemember must be evaluated based on the eligibility criteria in § 71.20. To that end, VA will utilize standardized assessments to evaluate both the veteran or servicemember and his or her identified caregiver when determining eligibility for PCAFC. It is our goal to provide a program that has clear and transparent eligibility criteria that is applied to each and every applicant. Additionally, we do not believe it would be appropriate to consider certain disability ratings as a substitute for a clinical evaluation of whether a veteran or servicemember has an inability to perform an ADL, as not all veterans and servicemembers applying for or participating in PCAFC will have been evaluated by VA for such ratings, and because VA has not considered whether additional VA disability ratings or other benefits determinations other than those recommended by the commenters may be appropriate for establishing that a veteran or servicemember has an inability to perform an ADL for purposes of PCAFC. We are not making any changes based on this comment.

Institutionalization

Several commenters opposed the inclusion of jail or prison in the proposed definition of institutionalization. Specifically, commenters stated this definition conflicts with the common use of the term by health care providers and other VHA and federal programs. Furthermore, commenters raised concerns about the application of this definition in 38 CFR 71.45(b)(1) and (2) (related to discharge of the Family Caregiver due to the eligible veteran or Family Caregiver, respectively). We note that this definition will only be used in the context of § 71.45, Revocation and Discharge of Family Caregivers, and refer the commenters to the discussion below regarding discharge due to incarceration under section § 71.45.

Joint Application

One commenter raised concerns about the definition of joint application, in particular that an application is considered incomplete when all mandatory sections are not completed, since many veterans may not be able to easily access information due to the passage of time or may have health issues that make it difficult or impossible to complete the application without assistance. This commenter also opined that delays will still result as VA will need to inform applicants that their applications are incomplete. While this commenter noted that, pursuant to 38 CFR 21.1032, VA has a duty to assist veterans in obtaining evidence in claims for other VA benefits, they suggested VA adopt a less punitive approach by instituting a process that includes notifying the applicant as promptly as possible that their application is incomplete. By defining the joint application to mean an application that has all fields within the application completed, including signature and date by all applicants, and providing for certain exceptions within the definition, it was not VA's intent to create a burden on veterans and caregivers; rather we are establishing the date on which VA can begin evaluating the applicants' eligibility for PCAFC. As stated in the proposed rule, the required fields are necessary for VA to begin evaluating the eligibility of veterans and servicemembers and their family members for PCAFC. The date the joint application received by VA is also the date on which certain PCAFC benefits are effective (unless another date applies under § 71.40(d)). It would not be reasonable to provide PCAFC benefits back to the date an incomplete application is received by VA; we need a complete application. This is a common requirement for the administration of benefits and services. We further note that the information required within the application (*i.e.,* names, address of veteran's or servicemember's residence, dates of birth, certifications, and signatures) is specific to the veteran and caregiver and is information they would have readily available. They are not required to further submit other supporting documentation that they may not have readily available, such as a DD–214 or medical records, as part of the application. As mentioned, the mandatory information should be readily available to them and the

application should be relatively easy to complete. However, if assistance with the application is needed, caregivers and veterans can ask VA staff for help, guidance, and support, and we will assist applicants as needed. In the application, we will include instructions that will provide information on requesting assistance with filling out the form, and various VA touchpoints including the National Caregiver Support line, VA's website, and a link to VA's Caregiver Support Coordinator (CSC) locator. We also note that it has been our practice to contact the caregiver and veteran when applications are incomplete, and we will continue to do so. Additionally, we will consider inclusion in policy of requirements for prompt notification in instances of incomplete applications. While we understand the commenter's concerns and appreciate the suggested changes, we make no changes to the regulations based on this comment.

Legal Services

One commenter asserted that VA's proposed definition of legal services is inconsistent with 38 U.S.C. 1720G and the VA MISSION Act of 2018. This commenter specifically stated that ''instead of creating a program which would provide free, broadly accessible legal services to PCAFC veterans and their caregivers that covers a broad range of civil legal issues, including full representation matters where warranted, the proposed regulations impose a set of arbitrary limits on the types of matters to be covered.'' While this commenter acknowledged that there are existing programs that provide legal services to veterans, servicemembers, and their families, the commenter asserted that such programs are insufficient; and inclusion of legal services in the VA MISSION Act of 2018 recognized the need for legal services by PCAFC veterans and their caregivers. This commenter praised VA for including preparation and execution of wills and other advance directives, but recommended VA expand the definition to include free legal services, and full representation as warranted, in areas of law where veterans and caregivers commonly face issues, including affordable housing, eviction and foreclosure, consumer debt, access to and maintaining local and federal government benefits, and family law.

We do not agree that the definition of legal services is inconsistent with our statutory authority, as 38 U.S.C. 1720G, as amended by the VA MISSION Act of 2018, did not define this term further than to state that legal services included legal advice and consultation, relating to the needs of injured veterans and their caregivers. We have the authority to further define this term, and did so in the proposed rule. Through a **Federal Register** Notice published on November 27, 2018, we solicited feedback from the public in order to develop this definition, and we also held meetings and listening sessions to obtain input from stakeholders. The responses received were varied, as we explained in the proposed rule. See 85 FR 13362 (March 6, 2020). For example, some feedback acknowledged the potential for conflicts of interest between the eligible veteran and Family Caregiver regarding certain legal issues, including divorce or child custody, while other feedback specified that legal services should include advanced directives, power of attorney, wills, and guardianship. Id. We considered the feedback received and, consistent with that feedback, we defined legal services to include assistance with advanced directives, power of attorney, simple wills, and guardianship; education on legal topics relevant to caregiving; and a referral service for other legal services. Id. We determined this would be the most appropriate way to define legal services, as this would allow us to provide assistance with the most common matters that Family Caregivers face in providing personal care services to eligible veterans (*i.e.,* advanced directives, power of attorney, simple wills, and guardianship), providing education on legal topics relevant to caregiving, and a referral service for other legal services. As explained in the proposed rule, this definition would address these important needs, while also being mindful of VA resources. Id. Paying for legal services for matters other than those described in the definition would be cost prohibitive and may limit our ability to provide the same level of services to as many Family Caregivers as possible, and would not be focused on those matters that Family Caregivers most commonly face in providing personal care services to eligible veterans. Providing limited legal assistance, education, and referrals would ensure we consistently provide an equitable level of legal services to all Primary Family Caregivers. As we explained in the proposed rule and reiterate here, we will provide as legal services assistance with advanced directives, power of attorney, simple wills, and guardianship; education on legal topics relevant to caregiving; and a referral service for other legal services. These services would be provided only in relation to the personal legal needs of the eligible veteran and the Primary Family Caregiver. This definition of legal services excludes assistance with matters in which the eligible veteran or Primary Family Caregiver is taking or has taken any adversarial legal action against the United States government, and disputes between the eligible veteran and Primary Family Caregiver.

We make no changes to the definition based on this comment, but will continue to assess the need for legal services by Family Caregivers to determine if VA should propose changes to the definition in the future.

Another commenter similarly praised VA for the inclusion of assistance with advanced directives, power of attorney, simple wills, and guardianship; educational opportunities on legal topics relevant to caregiving; and referrals to community resources and attorneys for legal assistance or representation in other legal matters. We appreciate the comment and are not making any changes based on this comment.

One commenter asked for clarification on whether legal services would be available regarding family members of the Family Caregiver and eligible veteran, such as children. While the benefit is for the Primary Family Caregiver, a family member of the Primary Family Caregiver and the eligible veteran may indirectly benefit from the legal services. However, they are not directly eligible for the benefit if they are not approved and designated as the Primary Family Caregiver. We make no changes based on this comment.

Another commenter questioned why legal services will be available to caregivers, whether it is indicative of a deeper problem, and asked what precautions and safety nets will be put in place to ensure veterans are not exploited or abused. As stated in the proposed rule, we are adding this term to address changes made to 38 U.S.C. 1720G by the VA MISSION Act of 2018. Specifically, the VA MISSION Act of 2018 added legal services as a benefit for Primary Family Caregivers. Accordingly, legal services will be added to the benefits available to Primary Family Caregivers under § 71.40(c)(6). Similar to financial planning services, we will include in any contracts requirements such as minimum degree attainment and certifications for individuals providing legal services, as well as mechanisms that would prohibit exploitation or abuse of caregivers and veterans (*e.g.,* prohibit any form of compensation from the eligible veteran or Family Caregiver for the services provided) and that allow us to take any appropriate actions

necessary to address related breach of contracts. We note that the contractors would be responsible for any liability arising from legal services provided. Further, contractors are not VA employees and therefore not covered by the Federal Tort Claims Act. We also plan to provide resources to the Family Caregiver to report any concerns of abuse or exploitation that may arise in the course of receiving the legal services, such as links to State and local bar discipline reporting sites, as appropriate. We make no changes based on this comment.

Monthly Stipend Rate

Several commenters expressed concern about VA's definition of monthly stipend rate. Specifically, some commenters believe it is too high, some believe it is too low, and others disagree with using the Office of Personnel Management's (OPM) General Schedule (GS) scale. We note that this definition will only be applied in the context of 38 CFR 71.40(c), Primary Family Caregiver benefits. Therefore, we address the comments in the section below regarding § 71.40.

Need for Supervision, Protection, or Instruction

VA's proposed rule added ''need for supervision, protection, or instruction'' as a new term and basis upon which a veteran or servicemember can be deemed in need of personal care services under § 71.20(a)(3). This term and its definition serve to implement the statutory phrases ''a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury'' and ''a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired'' in clauses (ii) and (iii) of section 1720G(a)(2)(C) of title 38, U.S.C. VA received numerous comments about this proposed definition. Some commenters supported the definition, while others believed it is too restrictive or disagreed with VA's interpretation of the statutory requirements, and others requested VA provide clarification.

Commenters stated that quantifying the amount of time for supervision needed under this definition is difficult, and that some veterans may need constant supervision because of their health conditions. Commenters also requested VA clarify the frequency with which a veteran would need supervision, protection, or instruction for purposes of PCAFC eligibility. One commenter opined that the definition is extremely narrow in scope. Another commenter stated that the ''daily basis'' requirement will place an undue hurdle on veterans otherwise eligible for PCAFC. Another commenter opined that the definition is too restrictive, particularly as a veteran with ''severe TBI may have symptoms that affect their function in a major way, but does not require assistance with functioning every day,'' which does not diminish their need for caregiving on a regular basis. Additionally, commenters questioned how we would operationalize this definition, as individuals may have daily a potential need for supervision, protection, or instruction but intervention may only be required a few times a week.

As indicated in the proposed rule, we would define need for supervision, protection, or instruction to mean an individual has a functional impairment that directly impacts the individual's ability to maintain his or her personal safety on a daily basis. 85 FR 13363 (March 6, 2020). We revised the definition because we found the term ''need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury'' and its definition unduly restricted our ability to consider all functional impairments that may impact a veteran's or servicemember's ability to maintain his or her personal safety on a daily basis. Id. Contrary to some of the comments, it was not our intent to narrow and restrict eligibility with this change, and we believe that these revisions will broaden the current criteria since it will no longer be limited to a predetermined list of impairments. Additionally, the revised definition will be consistent with our goal of focusing PCAFC on eligible veterans with moderate and severe needs. Id. at 13364.

As we indicated in the proposed rule, ''[w]hether a veteran or servicemember would qualify for PCAFC on this basis would depend on whether his or her functional impairment directly impacts the individual's ability to maintain his or her personal safety on a daily basis.'' Id.

Some commenters raised concerns about the reference to ''daily'' in this definition, and we agree that additional clarification is needed. While ''daily basis'' in the definition refers to the individual's ability to maintain personal safety, most individuals determined to qualify on this basis will also require personal care services from a caregiver on a daily basis. The proposed rule was not clear in this regard, but it did allude to such individuals requiring personal care services on a daily basis. For example, we explained that a veteran or servicemember meeting this definition may not need supervision, protection, or instruction continuously during the day, but would need such personal care services on a daily basis, even if just intermittently each day. See 85 FR 13364 (March 6, 2020). This requirement for daily personal care services under the definition of ''need for supervision, protection, or instruction'' was also referenced in the context of explaining the definition of inability to perform an ADL, which does not require the veteran or servicemember need daily personal care services. See id. at 13361.

By focusing the definition of need for supervision, protection, or instruction on individuals who require personal care services on a daily basis, we will help ensure that PCAFC targets eligible veterans with moderate and severe needs. While we acknowledge that veterans with needs at a lower level may also benefit from the assistance of another individual, we believe PCAFC was intended to support those with moderate and severe needs. For applicants that apply to PCAFC and do not qualify, VA will assist the applicant in identifying and making referrals to other available resources that may meet their needs. Thus, we do not believe that the ''daily basis'' requirement in the definition creates an ''undue hurdle''. Also, as we explained above, we are broadening the definition beyond a predetermined list of impairments, which will remove an existing barrier for many veterans and servicemembers who would meet the definition of need for supervision, protection, or instruction but do not have one of the listed impairments in the current regulation.

As part of this discussion, we would like to further correct and clarify the meanings of daily and continuous for purposes of the terms need for supervision, protection, or instruction, and unable to self-sustain in the community, respectively. We note that those who have a need for supervision, protection, or instruction on a continuous basis would meet the definition of unable to self-sustain in the community for purposes of the monthly stipend payment.

The terms daily and continuous relate to the frequency with which intervention is required in order to maintain an individual's personal safety that is directly impacted by his or her functional impairment. PCAFC is a clinical program and as such the determination of whether the frequency of intervention is daily or continuous is a clinical decision. Clinical decision making is highly individualized based on the specific needs of the individual

veteran or servicemember. As previously stated, it is important to note that when we evaluate veterans and servicemembers for PCAFC, we make a clinical determination that is comprehensive and holistic, and based on the whole picture of the individual. Factors VA will consider when evaluating the frequency of intervention required, specifically daily or continuous, include the factors set forth in 38 U.S.C. 1720G(a)(3)(C)(iii)(II) and (III), that is, the ''extent to which the veteran [or servicemember] can function safely and independently in the absence of such supervision, protection, or instruction,'' and the ''amount of time required for the family caregiver to provide such supervision, protection, or instruction to the veteran [or servicemember].''

In addition to frequency, VA determinations of whether a veteran or servicemember is in need of supervision, protection, or instruction, and whether such need is on a continuous basis for purposes of the higher-level stipend, which are clinical determinations, also account for the degree of intervention required to support the safety of the veteran or servicemember. Individuals whose functional impairment directly impacts their personal safety on a daily basis generally require at least one active intervention each day. In contrast to passive interventions that may include the mere proximity of a caregiver, active intervention requires the caregiver to be actively involved and engaged in providing supervision, protection, or instruction. Whether the need is daily or continuous will also depend on the individual's demonstrated pattern of need.

For example, an eligible veteran with moderate cognitive impairment may need a Family Caregiver to provide step-by-step instruction when dressing in the morning and in the evening. Such active intervention is required on a daily basis, takes a finite amount of time, and the veteran can maintain their personal safety without additional active interventions from a caregiver for the remainder of the day. This veteran may be found to meet the definition of ''need for supervision, protection, or instruction.'' In contrast, an eligible veteran with advanced cognitive impairment may require supervision, protection, or instruction on a daily basis due to the need for step-by-step instruction in dressing each morning and because of a demonstrated pattern of wandering outside the home at various times throughout the day. In this example, the Family Caregiver would provide step-by-step instruction for dressing each morning, which is a planned intervention. In addition, because of the demonstrated pattern of wandering outside the home at various and unpredictable times, the veteran cannot function safely and independently in the absence of a caregiver. The Family Caregiver actively intervenes through verbal and physical redirection multiple times during the day. This veteran would have a continuous need for an active intervention to ensure his or her daily safety is maintained. Such veteran may meet the definition of unable to self-sustain in the community because of a need for supervision, protection, or instruction on a continuous basis.

We make no changes based on these comments.

One commenter expressed concern that the proposed definition would exclude from PCAFC veterans who require minimal assistance with supervision and provided an example of a veteran who can be alone, but would need to call his or her caregiver to be talked down when they begin to spiral or have an episode. As previously explained, we are standardizing PCAFC to focus on eligible veterans with moderate and severe needs. If a veteran or servicemember does not have a functional impairment that directly impacts the individual's ability to maintain his or her personal safety on a daily basis (or have an inability to perform an ADL), they would not qualify for PCAFC. In addition, the definition of in need of personal care services specifies that the eligible veteran requires in-person personal care services, among other requirements. We note that PCAFC is intended to focus on veterans with moderate and severe needs who need the assistance of a Family Caregiver, and is not intended to be a program for individuals who may only need a minimal amount of assistance. Further, this definition is not intended to cover the potentiality that someone may have a need for supervision, protection, or instruction at some point in the future, but rather instead is meant to cover those servicemembers and veterans who have a demonstrated pattern of having a need for supervision, protection, or instruction.

For individuals who do not meet these requirements, including an individual who does not require in-person personal care services but instead requires only minimal assistance through an occasional or even daily phone call, there may be other VA health care programs and services that would help meet their needs and those of their caregivers. VA offers a menu of supports and services that supports caregivers caring for veterans such as homemaker and home health aides, home based primary care, Veteran-Directed care, and adult day care health care to name a few. In addition, VA offers supports and services provided directly to caregivers of eligible veterans through PGCSS including access to CSCs located at every VA medical center, a caregiver website, training and education offered online and in person on topics such as self-care, peer support, and telephone support by licensed social workers through VA's Caregiver Support Line.

We are not making any changes based on this comment.

Several commenters raised concerns about how this definition incorporates mental health conditions, cognitive impairments, and ''invisible injuries'' (*e.g.,* TBI, PTSD, mental illness), particularly related to veterans with conditions that may not meet the definition of inability to perform an ADL. As we stated in the proposed rule, determining eligibility on the basis of this definition would not focus on the individual's specific diagnosis or conditions, but rather whether the veteran or servicemember has impairment in functioning that directly impacts the individual's ability to maintain his or her personal safety on a daily basis and thus requires supervision, protection, or instruction from another individual. 85 FR 13364 (March 6, 2020). We further provided examples to include an individual with schizophrenia who has active delusional thoughts that lead to unsafe behavior, and an individual with dementia who may be unable to use the appropriate water temperature when taking a bath and may thus require step-by-step instruction or sequencing to maintain his or her personal safety on a daily basis. Individuals with TBI or mental health conditions may also qualify for PCAFC on this basis. For example, a veteran or servicemember with TBI who has cognitive impairment resulting in difficulty initiating and completing complex tasks, such as a grooming routine, may require step-by-step instruction in order to maintain his or her personal safety on a daily basis. Additionally, eligibility on the basis of this definition may result from multiple conditions or diagnoses. Therefore, we believe this definition incorporates mental health conditions, cognitive impairments, and ''invisible injuries'' (*e.g.,* TBI, PTSD, mental illness). We are not making any changes based on these comments.

One commenter was specifically concerned that an individual with

dementia who is forgetful or misplaces items but can adapt and manage successfully without compromising his or her personal safety on a daily basis may not qualify for PCAFC under this definition. Another commenter inquired into whether an individual who is 100 percent service-connected disabled due to PTSD will qualify under this definition if the individual does not meet the inability to perform an ADL definition. Relatedly, this commenter stated that this definition needs to be better defined for mental health conditions or cognitive impairments when that person does not have a specific ADL deficit. As explained above, eligibility on this basis is focused on whether the veteran or servicemember has an impairment in functioning that directly impacts the individual's ability to maintain his or her personal safety on a daily basis and thus requires supervision, protection, or instruction from another individual, rather than a specific diagnosis or condition. The definition of ''need for supervision, protection, or instruction'' is consistent with our goal of focusing PCAFC on eligible veterans with moderate and severe needs. Thus, for an individual who is forgetful or misplaces items but does not have a functional impairment that directly impacts his or her ability to maintain personal safety on a daily basis (and who is not determined to be in need of personal care services based on an inability to perform an ADL), there may be other VA programs and resources available to meet the individual's needs. An individual with 100 percent service-connected disability due to PTSD may be eligible under this definition if the individual has a functional impairment that directly impacts his or her ability to maintain his or her personal safety on a daily basis. We are not making any changes based on these comments.

Several commenters requested VA provide clarification about this definition, including a commenter who noted that this definition is vague. One commenter suggested that VA define the terms ''on a daily basis, even if just intermittently each day'' and ''ability to maintain his or her personal safety'' to ensure consistent implementation. One commenter asserted that VA proposed no objective criteria for supervision, protection, or instruction, and another commenter suggested that VA failed to provide an objective operational definition of need for supervision, protection, or instruction. One commenter indicated that while the supervision, protection, and instruction standards need to be more inclusive, they set up a point of confusion in what elements are to be considered and not considered. This commenter further asserted that any assessment tool used to determine PCAFC eligibility would have to define the elements considered for supervision, protection, and instruction, and asked why VA did not define those elements in the regulation. Another commenter asserted that although the characterization of being unable to self-sustain in the community is relatively clear, it appears likely that eligibility for the lower tier stipend will be contentious for both VA and veterans' families, and the definition of need for supervision, protection, or instruction should be clarified further if the program is to serve its targeted population. Furthermore, the commenter asserted that VA's explanation that a veteran or servicemember meeting this criterion may only need such personal care services intermittently each day opens the door to a variety of interpretations and increases the potential for complex and time-consuming eligibility decisions. The commenter also questioned if a caregiver reminding one's spouse that he or she has an upcoming appointment constitutes instruction and if it should be considered indicative of a severe impairment in functioning, in the absence of any objective cognitive deficits.

First, we disagree with the commenters who believe that this definition is vague. While we broadened this definition to remove the predetermined list of functional impairments associated with ''need for supervision or protection based on symptoms or residuals of neurological or other impairment of injury,'' so that ''need for supervision, protection, or instruction'' can cover more diagnoses and conditions, we believe the revised definition is specific enough to allow us to make objective determinations about whether a veteran or servicemember has a need for supervision, protection, or instruction, consistent with the authorizing statute and intent of PCAFC. When assessing personal care needs, VA will assess and document the support the veteran or servicemember needs to maintain personal safety, if such needs exist, and the frequency with which he or she requires interventions by the caregiver. This will include consideration of, among other factors, the veteran's or servicemember's functional ability as it relates to such things as: Medication management, self-preservation, safety, and self-direction. We recognize this is not a comprehensive list of functions in which a veteran or servicemember may experience impairment. We also note that the reasons a functional impairment will directly impact an individual's ability to maintain his or her personal safety on a daily basis will vary (*e.g.,* due to memory loss, delusion, uncontrolled seizure disorder). How an individual's ability to maintain his or her personal safety is impacted by his or her functional impairments will vary based on those impairments and diagnoses. In the regulation, we would not list the elements to be considered as doing so could potentially be more restrictive than intended. These are clinical decisions that are dependent on each individual's unique situation and it would be impractical for the regulation to list and account for every functional impairment that may directly impact an individual's ability to maintain his or her personal safety on a daily basis. As explained above, we would require that a veteran or servicemember have a functional impairment that directly impacts his or her ability to maintain personal safety on a daily basis, but the type, degree, and frequency of intervention may vary.

We would not define the terms ''on a daily basis, even if just intermittently each day'' and ''ability to maintain his or her personal safety'' because this a clinical program, and how these criteria are met will vary based on each veteran's or servicemember's unique situation. The phrase ''on a daily basis, even if intermittently each day'' in the proposed rule was used to clarify that a veteran or servicemember may require supervision, protection, or instruction when completing certain tasks but may not require a caregiver to be present the remainder of the day. We further refer the commenters to the earlier discussion in this section regarding VA's clinical assessment of whether a veteran or servicemember has a need for supervision, protection, or instruction, and whether such need is continuous for purposes of the definition of ''unable to self-sustain in the community.''

We provided many examples in the proposed rule to explain the phrase ''ability to maintain his or her personal safety,'' and added a further example above regarding an individual with TBI. These examples were provided to illustrate situations in which a veteran or servicemember may require another individual to provide supervision, protection, or instruction to ensure the veteran or servicemember is able to maintain his or her personal safety on a daily basis.

Furthermore, we provided examples of when an individual may not be in

need of supervision, protection, or instruction, to include ''an individual with dementia who is forgetful or misplaces items but can adapt and manage successfully without compromising his or her personal safety on a daily basis (*e.g.,* by relying on lists or visual cues for prompting).'' 85 FR 13364 (March 6, 2020). We also note that a veteran whose only need from a caregiver is to be reminded of appointments or to take medications, would likely not be determined to be in need of personal care services based on a need for supervision, protection, or instruction, as that alone would not demonstrate that the veteran or servicemember requires in-person personal care services from another person, and without such personal care services, alternative in-person caregiving arrangements would be required, based on a functional impairment that directly impacts the individual's ability to maintain his or her personal safety on a daily basis.

We make no changes based on these comments.

One commenter took issue with VA combining 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) under one term and asserted that retaining the previous basis of ''need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury'' and its associated definition and adding a new definition for ''need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired'' would better align with Congressional intent. Relatedly, one commenter stated that VA did not provide data, or sufficient information and analysis to justify combining clauses (ii) and (iii) of 38 U.S.C. 1720G(a)(2)(C). This commenter asserted that this definition is incongruent with the plain reading of the law and Congressional intent, which the commenter stated requires VA utilize at least three separate eligibility criteria to serve as the bases upon which a veteran or servicemember can be deemed in need of personal care services.

As indicated in the proposed rule, we believe that the current definition for ''need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury'' unduly restricts VA's ability to consider all functional impairments that may impact a veteran's or servicemember's ability to maintain his or her personal safety on a daily basis. Additionally, it is VA's intent to broaden the current criteria by removing the predetermined list of impairments, such that veterans and servicemembers with impairments not listed in the current definition who may otherwise meet the definition of need for supervision, protection, or instruction may be eligible for PCAFC. This change will allow us to consider additional impairments that are not listed in the current definition. Additionally, as we explained in the discussion on the definition of inability to perform an ADL, it may be the assistance needed for an ADL that results in a need for supervision, protection, or instruction.

We disagree with the commenters that combining clauses (ii) and (iii) of 38 U.S.C. 1720G(a)(2)(C) is not consistent with the statute and Congressional intent. As we explained in the proposed rule, we combined these two bases for PCAFC eligibility because we believe these two bases capture the personal care service needs of veterans and servicemembers with a significant cognitive, neurological, or mental health impairment, as opposed to an inability to perform an ADL, which covers physical impairments. 85 FR 13363 (March 6, 2020). We sought input from the public on how to differentiate and define these two bases in a **Federal Register** Notice that was published on November 27, 2018. See 83 FR 60966 (November 27, 2018). We also held meetings with various stakeholders from February through May of 2019. We appreciate the feedback we received from these efforts. However, we did not receive any meaningful recommendations in addition to what we had identified and considered internally for defining these bases. We were unable to distinguish them in a meaningful way and determined that the most logical approach was to broaden the current definition of ''need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury'' under a new term that would also capture veterans and servicemembers who have ''a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired.'' We further note that in response to this proposed rule, while some commenters objected to combining these two bases, no specific recommendations or suggestions on how to define and distinguish these two bases were submitted. We make no changes based on these comments.

Primary Care Team

In the proposed rule, we proposed to revise the definition of ''primary care team'' to mean one or more VA medical professionals who care for a patient based on the clinical needs of the patient. We also proposed to remove the reference to the primary care team in various sections, including current §§ 71.20(c) and (d), 71.20(g), 71.25(c)(1)–(2), 71.25(f), and 71.40(b)(2). Instead, we would reference primary care team in one section, § 71.25(a)(2)(i), to state that PCAFC eligibility evaluations being performed in collaboration with the primary care team to the maximum extent practicable.

We received comments on the definition of primary care team, the role of the primary care team in PCAFC processes, and the centralized eligibility and appeals teams, which are addressed below.

Primary Care Team Definition

We received multiple comments stating that the proposed definition of ''primary care team'' is too broad and requested that the definition remain the same or be more specific with regard to which type of VA medical professional would serve on the primary care team for a veteran or servicemember. Specifically, the commenters raised concerns that the proposed definition would not require the primary care team to include a physician, nurse practitioner, or physician assistant to oversee the care of the veteran or servicemember but rather would allow any medical professional who is licensed or certified to provide health care services such as nurses, hospice workers, emergency medical technicians, optometrists, social workers, clinical dietitians, occupational or physical therapists, and other trained caregivers. Commenters asserted that the lack of specificity would result in no requirement for any type of medical evaluation encounter to determine if personal care services are medically necessary during the evaluation of the joint application, and referred to evaluation and management guidelines that require services to be rendered by a physician or other qualified health care professional who may report evaluation and management services. We address these comments below.

We appreciate the comments and agree that the proposed definition was not specific enough. As indicated in the proposed rule, our intent was to expand the definition to account for veterans and servicemembers who ''receive their primary care in the community and may only utilize VA for a portion of their care, such as mental health or specialty services.'' 85 FR 13365 (March 6, 2020). However, it was not our intent to imply that the primary care team may be

comprised of any medical professional (*e.g.,* nurses, hospice workers, emergency medical technicians) in the absence of a physician, advanced practice nurse, or a physician assistant. Additionally, after reviewing the comments, we agree with their concerns that we should maintain the reference to a primary care provider. Therefore, we are revising the definition of primary care team to mean ''one or more medical professionals who care for a patient based on the clinical needs of the patient. Primary care teams must include a VA primary care provider who is a physician, advanced practice nurse, or a physician assistant.'' We make no further changes based on these comments.

Multiple commenters asserted that the removal of the phrase ''provider who coordinates the care'' is contradictory and is not aligned with existing VA national policy. One commenter asserted that ''responsibility for coordination of care must reside with a primary care provider or team of providers,'' and suggested that one mechanism to facilitate this coordination is through the establishment of an information system that can be accessed by providers in the same or different locations that provides a record on each enrollee to include his or her socio-demographic characteristics, a minimum data set on all clinical encounters and an identifier that permits linkage of the individual's encounter data over time. Commenters further expounded that primary care is the day-to-day health care given by a health care provider and that the provider typically acts as the first contact and principal point of continuing care for patients within a health care system and coordinates other specialty care.

As we explained in the proposed rule, we would remove this phrase, ''provider who coordinates the care,'' because it can lead to misinterpretation, and it does not specify whether the care coordinated is specific care to PCAFC or all of the eligible veteran's care coordination needs. 85 FR 13365 (March 6, 2020). Additionally, because of the role that the primary care team plays in coordinating an eligible veteran's care, we believe continuing to include this language would be unnecessary and redundant. Additionally, as explained above, we are revising the definition to include a requirement that a VA primary care provider who is a physician, advanced practice nurse or physician assistant must be on the team; thus the commenters' concerns regarding the removal of the phrase ''provider who coordinates the care'' because a primary care provider is responsible for care coordination is moot. Furthermore, VA has an electronic medical record system that allows VA providers from multiple locations to access a patient's medical record. To the extent the commenter is suggesting we build a medical record system specific for PCAFC, we believe this is beyond the scope of this rulemaking. We are not making any changes based on these comments.

Multiple commenters asserted that the proposed definition does not align with industry standards such as the American Medical Associations (AMA) Code of Medical Ethics and the American Academy of Family Physicians, particularly as it does not clearly define the prescribing authority for a VA medical professional. We appreciate the commenters concerns; however, the definition of primary care team is only used for purposes of part 71, and not for the general provision of health care at VA. Additionally, there are multiple definitions for primary care teams in health care. Therefore, we do not believe VA has a requirement to align the definition of primary care team with industry or other federal or non-federal programs. We make no changes based on these comments.

Several commenters expressed concern that the proposed definition is inconsistent with VA's provision of care in the community. One commenter asserted that the definition does not align with VA's statutory requirements to accommodate veterans and servicemembers who may receive care in the community. One commenter asserted that VA has not consulted with non-VA treating physicians when making eligibility determinations and that given pending legislation that is likely to expand fee-for-service programs and third-party providers, it is imperative that VA primary care teams consult these doctors and utilize their assessments. The same commenter noted that they do not believe non-VA providers should determine eligibility; but rather PCAFC must consult with clinicians who are actually treating the veteran or servicemember.

First, we note that, as explained above, we are revising the definition to require that a VA primary care provider must be on the team; however, we removed ''VA'' from the phrase ''one or more medical professionals'' which we believe allows other medical professionals (including non-VA medical professionals) who care for the patient based on the clinical needs of the patient, to be part of the team. We believe this definition is inclusive of veterans or servicemembers who receive care in the community, and thus is consistent with our statutory authority.

We further note that neither the veteran's VA primary care provider nor his or her non-VA provider would determine PCAFC eligibility; CEATs will determine eligibility for PCAFC, including whether the veteran is determined to be unable to self-sustain in the community. Clinical staff at local VA medical centers will conduct evaluations of PCAFC applicants with input provided by the primary care team to the maximum extent practicable. This information will be provided to the CEATs for use in making eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community for purposes of PCAFC. The CEAT will be composed of a standardized group of inter-professional, licensed practitioners, with specific expertise and training in the determinations of eligibility and the criteria for the higher-level stipend. We believe the use of CEATs will improve standardization in eligibility determinations across VA. While primary care teams will not collaborate directly with the CEAT on determining eligibility, documentation of their input in the local staff evaluation of PCAFC applicants will be available in the medical record for review. This documentation will be used by the CEAT to help inform eligibility determinations for PCAFC, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC. Any documentation from a non-VA provider that the veteran or servicemember provides will be available to VA for purposes of PCAFC evaluation and eligibility determinations. We are not making any changes based on these comments.

Role of Primary Care Team in PCAFC Processes

Many commenters raised concerns that these changes relating to the primary care team will reduce or eliminate the important role of a veteran's team of medical professionals in PCAFC processes, and instead rely on a single medical provider who may not have full knowledge of a veteran's medical needs, medical history, or involvement in a veteran's treatment, especially as this can lead to inconsistencies in PCAFC determinations. Some commenters allege this would be inconsistent with and exceed VA's authority under 38 U.S.C. 1720G. Commenters were also concerned that a veteran's medical evaluation will be performed by a professional who is ill-equipped to

correctly assess the veteran, especially when determining when a veteran has an inability to perform ADLs.

Some commenters raised concerns about the removal of primary care team specifically from various paragraphs in §§ 71.20 and 71.25. These concerns included a fear that it will give VA too much flexibility in determining who will conduct eligibility assessments, it will provide too much deference to non-medical personnel who do not have the qualifications of the medical practitioners on the primary care team, will result in medical professionals making eligibility determinations outside the scope of their practice, will provide the CSCs and uninvolved parties who do not treat the veteran or servicemember with too much discretion, and will create inconsistencies. Additionally, one commenter asserted that VA did not provide justification for why it would be more appropriate to remove the primary care team from the eligibility assessment process. Relatedly, several commenters disagreed with VA's claim that current references to the primary care team are unclear. However, one of those commenters agreed that authorizations by the primary care team have not been applied consistently between facilities.

We address these comments below.

As we explained directly above and based on the comments received, we are revising the primary care team definition to mean ''one or more medical professionals who care for a patient based on the clinical needs of the patient. Primary care teams must include a VA primary care provider who is a physician, advanced practice nurse, or a physician assistant.'' As Congress did not provide a definition for primary care team in 38 U.S.C. 1720G, we define the term as previously described, which we believe is rational and reasonable for purposes of PCAFC. This definition, as revised in this final rule, will ensure that those medical professionals, including a VA primary care provider, who care for the veteran and have knowledge of the veteran's needs and treatments, are part of the primary care team and have the opportunity to provide input into determinations of whether the veteran or servicemember is eligible for PCAFC.

As explained previously in this section, clinical staff at local VA medical centers will conduct evaluations of PCAFC applicants with input provided by the primary care team to the maximum extent practicable. The CEAT, composed of a standardized group of inter-professional, licensed practitioners, with specific expertise and training in the eligibility requirements for PCAFC and the criteria for the higher-level stipend, will use those evaluations to inform PCAFC eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community. While primary care teams will not collaborate directly with the CEAT on determining eligibility, including whether the veteran is determined to be unable to self-sustain in the community, documentation of their input with the local staff evaluation of PCAFC applicants will be available in the medical record for review. This documentation will be used by the CEAT to help inform eligibility determinations for PCAFC, including whether the veteran is determined to be unable to self-sustain in the community. We believe the use of CEATs will improve standardization in eligibility determinations across VA. These teams will have access to the documentation of the evaluations conducted in order to inform eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC. We also note that we will provide robust training and education to those staff conducting evaluations, and CEAT members who are determining eligibility. We further refer the commenters to our discussion on ''Staff training on eligibility determinations'' in the miscellaneous comments section of this rule.

We disagree with the commenters' assertion that we are eliminating the primary care team from PCAFC processes, which some allege is inconsistent with and exceeds our authority under 38 U.S.C. 1720G. The primary care team has not been entirely removed from eligibility determinations; rather as indicated in the proposed rule, instead of referencing the primary care team in various paragraphs of §§ 71.20 and 71.25, we will reference the primary care team in § 71.25(a)(2)(i) to indicate that PCAFC eligibility evaluations will be performed in collaboration with the primary care team to the maximum extent practicable. 85 FR 13364 (March 6, 2020).

We proposed to reference primary care team in § 71.25(a)(2)(i), to be consistent with 38 U.S.C. 1720G(a)(5), which requires that PCAFC applications be evaluated by VA in collaboration with the primary care team for the eligible veteran to the maximum extent practicable. As we explained in the proposed rule, this would ensure collaboration with the VA medical professionals involved in the patient's care during VA's evaluation of the joint application. Id. However, it may be appropriate to consider care requirements prescribed by providers other than the veteran's or servicemember's primary care team, such as a non-VA provider, or other appropriate individual or individuals in VA. We reiterate here that these changes would give us more flexibility in how we evaluate PCAFC eligibility and approve and designate Family Caregivers while also ensuring that joint applications are evaluated in collaboration with the primary care team of the veteran or servicemember to the maximum extent practicable, consistent with the authorizing statute. We make no changes based on these comments.

Several commenters also expressed general disagreement with the removal of primary care team from § 71.40(b)(2). Specifically, one commenter asserted PCAFC is proposing to fundamentally alter accepted medical standards for provision of primary care services, clinical staff conducting home visits have an ethical and legal responsibility to communicate directly the functional status and well-being of the eligible veteran directly to the eligible veteran's primary care team, and that such staff do not have the same qualifications as medical professionals in order to make medical determinations about the eligible veteran. The same commenter opined that VA must recognize that collaboration among providers which includes clinical staff conducting home visits is a desirable characteristic of primary care.

We disagree with the assertion that the removal of primary care team from § 71.40(b)(2) conflicts with accepted medical standards. As indicated in the proposed rule, it may not always be appropriate for the clinical staff conducting home visits to collaborate directly with the primary care team; however, collaboration will still occur with the primary care team either directly with the provider conducting wellness contacts or through intermediaries such as the CSC. We make no changes based on these comments.

Several commenters were critical of our implied belief that primary care teams are ''too close'' to veterans and their caregivers to provide unbiased eligibility determinations, while several commenters agreed with the removal of the primary care team from eligibility determinations because the primary care team may not oversee the eligible veteran's care and may not have a relationship with the eligible veteran. One commenter specifically opined that there is a conflict and danger of involving the primary care team in a

decision that has a financial consequence. The same commenter asserted that VA has historically separated VHA from VBA to ensure health care and benefits are not enmeshed with a provider's ability to provide quality care. We agree that requiring a primary care provider to make eligibility determinations that have a financial impact on a veteran or servicemember and his or her Family Caregiver, places them in an undesirable situation, and may have a negative impact on the provider-patient relationship. Thus, we believe that the use of CEATs to make eligibility determinations, as described above, will help preserve the veteran-provider relationship. We make no changes based on this comment.

One commenter generally disagreed with removing the reference to the primary care team maintaining the eligible veteran's treatment plan and opined that it does not align with the American Medical Association Code of Medical Ethics. We note that CSP does not have responsibility for the totality of the veteran's medical treatment plan, as that would still be maintained by the primary care team consistent with what we stated in the proposed rule. See 85 FR 13365 (March 6, 2020). We make no changes based on this comment.

Centralized Eligibility and Appeals Team (CEAT)

Several commenters opposed the use of CEATs and expressed concerns that it will be composed of individuals who are not medically qualified or providers not familiar with the veteran's history. Two commenters asserted that the use of CEATs is similar to a disability benefits review board. One commenter asserted that use of CEATs is contrary to health care standards for delivering medical care and standards for authorizing and certifying that personal care services are medically necessary. This same commenter referenced the requirements for an independent medical examination (IME) and explained that the goal of an IME may be to poke holes in a patient's story for purposes of evaluating a workers' compensation claim or disability benefits.

As previously discussed, the CEATs will be composed of a standardized group of inter-professional, licensed practitioners with specific expertise and training in the eligibility requirements for PCAFC and the criteria for the higher-level stipend. We note that the CEATs will receive training to conduct eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC; and we further refer the commenters to our discussion on staff training on eligibility determinations within the miscellaneous comments section of this rule. We believe the use of CEATs to determine eligibility for PCAFC will improve standardization in these determinations across VA. We make no changes based on these comments.

Serious Injury

VA received many comments on its proposed definition of serious injury, including VA's inclusion of any service-connected disability, regardless of whether it resulted from an injury, illness, or disease, and removal of the requirement that the serious injury renders the eligible veteran in need of personal care services. Most comments on VA's proposed definition, however, concerned VA's proposed requirement that the eligible veteran have a singular or combined service-connected disability rating of 70 percent or more, and suggested other potential measures for establishing a serious injury. These comments have been grouped accordingly and addressed in turn.

Many commenters supported VA's expansion of the term ''serious injury'' to include any service-connected disabilities, including illnesses and diseases, and we thank them for their comments. One commenter raised concerns that the definition does not address illnesses (*e.g.,* cancers, hypertension, hypothyroidism, parkinsonism, multiple sclerosis, amyotrophic lateral sclerosis (ALS)) that may prevent a veteran from carrying out ADLs or impede on their safety and welfare. This commenter urged VA to revise the definition to include such illnesses. Another commenter requested VA include service-connected diseases. We believe these commenters misunderstood VA's proposed definition, and we are not making any changes based on these comments. As indicated in the proposed rule, this definition will now include any service-connected disability regardless of whether it resulted from an injury or disease. Therefore, a veteran or servicemember with illnesses incurred or aggravated in the line of duty (*e.g.,* cancers, hypertension, hypothyroidism, parkinsonism, multiple sclerosis, ALS) may be eligible for PCAFC if he or she has a single or combined service-connected rating of 70 percent or more and meets the other applicable PCAFC eligibility criteria, including being in need of personal care services for a minimum of six continuous months based on an inability to perform an activity of daily living, or a need for supervision, protection, or instruction.

Several commenters opposed the change to the definition to include illnesses and diseases and asserted that doing so is improper and unfair. Commenters noted that many of these conditions will not be from injuries and may have occurred before service, were not in the line of duty, or may have been due to the veteran's own fault or misconduct. One commenter stated that only those who suffer true injuries should be eligible and that those should only be those injuries that were incurred in the line of duty. VA's proposed rule sets forth VA's rationale for deviating from the plain meaning of ''injury'' to include illnesses and diseases. Among other reasons set forth in the proposed rule, VA explained that this change is necessary to reduce subjective clinical judgement and improve consistency in PCAFC eligibility determinations and ensure that eligible veterans who served both before and after September 11, 2001 have equitable access to PCAFC. While Congress may have originally intended to focus PCAFC on the signature disabilities of veterans and servicemembers who served after September 11, 2001, the VA MISSION Act of 2018 expanded this program to veterans and servicemembers of earlier eras, and the signature disabilities of earlier conflicts include illnesses and diseases such as diseases presumed to be the result of herbicide exposure in Vietnam and other places, and chronic multi-symptom illness experienced by Persian Gulf veterans. VA believes caregivers of veterans and servicemembers with illnesses and diseases incurred or aggravated in the line of duty should benefit from PCAFC in the same manner as caregivers of veterans with injuries such as TBI or spinal cord injury. Thus, we believe the definition of serious injury for purposes of PCAFC should be as inclusive as possible by recognizing any service-connected disability. Additionally, this change will help to reduce inequities between veterans and servicemembers from different eras. To the extent commenters are concerned that a veteran could meet the serious injury requirement based on a disability not incurred or aggravated in line of duty or that resulted from the veteran's willful misconduct, we note that VA's definition of serious injury requires the veteran have a service-connected disability rated by VA. See 38 CFR 3.1(k) (defining ''[s]ervice-connected'') and 3.301 (addressing line of duty and misconduct). To the extent commenters opposed including service-connected

disabilities in the serious injury definition, we note that having an injury or disease incurred or aggravated in the line of duty in the active military, naval, or air service means the injury or disease is service-connected. See 38 U.S.C. 101(16) and 38 CFR 3.2(k). For purposes of PCAFC, service-connected disability ratings are the primary method we use to determine whether an injury was incurred or aggravated in the line of duty. We are not making any changes based on these comments.

Several commenters supported the removal of the language that required a connection between the need for personal care services and the serious injury and we thank them for their comments. One commenter disagreed with removing the language that ''couples'' the serious injury with the need for personal care services, as the ''particular injury should be the exact reason the [v]eteran requires a caregiver.'' This commenter expressed concern that this change will result in overburdening the program with false or undeserving cases and would be contrary to Congressional intent. Similarly, another commenter expressed concern that decoupling would greatly increase the number of veterans that will be eligible for this program.

As indicated in the proposed rule, many veterans have complex needs as a result of multiple medical conditions, and we find this even more true among older veterans. The complexity of assessing each specific medical condition and whether it renders the veteran or servicemember in need of personal care services has resulted in inconsistency in how ''serious injury'' is interpreted. We believe this inconsistency would be exacerbated as PCAFC expands to the pre-9/11 population. For example:

[A]n individual may have leg pain due to a service-connected spinal cord injury but be able to manage his or her symptoms. After a number of years, the individual is diagnosed with diabetes unrelated to his or her military service. Over time, the individual develops neuropathy in his or her lower extremities, which results in the individual being unable to complete his or her ADLs independently. The onset of neuropathy could be related to either the spinal cord injury or diabetes. This example illustrates the difficulty of these clinical decisions because the determination of whether the onset of neuropathy is related to the qualifying serious injury or the illness unrelated to military service would be a subjective clinical determination. 85 FR 13369 (March 6, 2020). Therefore, we believe it is necessary to decouple serious injury from the need for personal care services. We also recognize that this ''decoupling'' will expand PCAFC eligibility, thus increasing participation in PCAFC.

Furthermore, we disagree with the commenter's assertion that this decoupling would be contrary to Congressional intent as the ''serious injury'' criterion and ''need for personal care services'' requirement are separate under 38 U.S.C. 1720G(a)(2)(B) and (C), as VA articulated in its 2011 Interim Final Rule. 76 FR 26150 (May 5, 2011) (''the statute does not clearly state that the need for personal care services must relate to the 'serious injury' required under section 1720G(a)(2)(B)''). Rather serious injury was coupled with the need for personal services through VA's regulations based on VA's interpretation of the overall purpose and language of the statute as it was originally enacted. Id. However, as explained above, we no longer believe the coupling of serious injury and the need for personal care services is reasonable. This is especially true as we expand to older veterans from earlier service eras whose clinical needs are even more complex. Moreover, expanding this definition will not exclude veterans and servicemembers whose needs for personal care services stem from an injury incurred or aggravated in the line of duty in the active military, naval, or air service. We are not making any changes based on these comments.

VA received numerous comments about its proposed reliance on a single or combined service-connected disability rating of 70 percent or more in establishing whether an eligible veteran has a serious injury. In the discussion that follows, we have grouped comments that opposed VA's use of a service-connection rating in general or expressed concern about the different purposes of PCAFC and VA disability compensation, and those that opposed the use of the 70 percent threshold specifically or suggested other alternatives.

Several commenters opposed use of a service-connected rating to determine PCAFC eligibility by asserting that doing so is contrary to Congressional intent, particularly as the statutory authority does not require a minimum rating, or contending that a service-connected rating is not an appropriate consideration for determining whether a veteran or servicemember requires personal care services from a Family Caregiver. One commenter requested VA eliminate this requirement because the statute does not provide VA with authority to curtail specified eligibility. Two commenters asserted that eligibility was intended to be based on a clinical determination of a veteran's need, which is not a rating decision adjudicated by a non-health care professional at the Veterans Benefits Administration, and this should not be left to an administrative process entirely separate from VHA. Relatedly, another commenter stated that VA should not suggest to the public that the 70 percent rating is an objective ''clinical standard'' associated with an applicant's potential need for personal care services. Another commenter was similarly concerned about use of a disability rating since disability compensation is intended to compensate for loss of ability of veteran to earn income by working which is different than the intent of PCAFC. Relatedly one commenter noted that service connection and injury are two separate things and urged VA to keep the definition as it currently is. Another commenter noted that the veteran should be looked at ''on the whole'' by a clinician.

VA acknowledges that 38 U.S.C. 1720G does not set forth a specific service-connected disability rating as a minimum requirement to establish PCAFC eligibility, and that imposing one through this rulemaking is a departure from the position taken by VA in its January 9, 2015 Final Rule. However, VA's proposed definition is a reasonable interpretation of the statutory requirement that an eligible veteran has an injury that is serious, particularly in the context of other changes VA is making to the definition of serious injury.

Heretofore, the only meaning applied to establish whether an injury was serious was that the injury render the eligible veteran in need of personal care services. VA's proposed rule explained why it is necessary to ''decouple'' these requirements as PCAFC expands to veterans of earlier eras (as discussed above), but doing so removed the only guidance informing the meaning of whether the eligible veteran's injury was serious. Therefore, VA must replace the definition with some standard that distinguishes a ''serious injury'' from an ''injury'' to give effect to the statutory requirement. *Williams* v. *Taylor,* 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

In considering how to define ''serious injury'' for purposes of PCAFC, VA sought to impose a definition that would be easily understood by veterans and caregivers and consistently applied by VA. A specific service-connected disability rating threshold serves those purposes. As noted by one commenter in support of VA's proposed definition, ''disability ratings are a more common

standard used for eligibility across other VA programs.'' Establishing an objective baseline for PCAFC eligibility will increase transparency and assist the program in adjudicating applications efficiently.

VA agrees that the purpose of disability compensation is quite different than the purpose of providing benefits to Family Caregivers under PCAFC, and it was not VA's intent to suggest that a single or combined 70 percent service-connected disability rating establishes or suggests a need for personal care services from a Family Caregiver. On the contrary, many veterans with disability ratings of 70 percent or higher are fully independent and able to function in the absence of support from a caregiver. Instead, a single or combined service-connected disability rating of 70 percent or more serves as an objective standard to determine whether an eligible veteran has a ''serious injury . . . incurred or aggravated in the line of duty in the active, military, naval, or air service'' and thereby demonstrates that a veteran's or servicemember's disability or disabilities rise to the level of serious. Other criteria in part 71 will establish a veteran's or servicemember's need for personal care services (*i.e.,* whether the veteran or servicemember is ''in need of personal care services . . . based on [a]n inability to perform an activity of daily living; or . . . [a] need for supervision, protection, or instruction''). We note that approximately 98 percent of the current PCAFC population across all three tiers have a 70 percent or higher service-connected disability rating, and would meet this definition of serious injury. VA agrees that applicants should be looked at holistically by clinicians considering PCAFC eligibility, and will work to ensure that practitioners determining PCAFC eligibility are trained to understand that ''serious injury'' is only one component of the PCAFC eligibility criteria. We are not making any changes based on these comments.

Several commenters expressed concerns about the ability of veterans and servicemembers without VA disability ratings or with VA disability ratings less than 70 percent to obtain an expedited review of their claims and appeals in order to qualify for PCAFC. Several commenters were particularly concerned about how delays in processing claims and appeals will impact veterans applying for PCAFC, and how this rating requirement will impact the processing of claims and appeals, particularly in light of backlogs and delays in processing such claims and appeals. One such commenter suggested that without a plan to expedite claims for individuals applying to PCAFC, VA would be imposing a roadblock to timely admission into PCAFC, and that bureaucracy and red tape should never be a barrier to a veteran's ability to receive needed in-home care. One commenter expressed concern that the proposed rule did not provide any data or analysis about how the claims and appeals process will impact the administration of this requirement, and urged VA to establish an expedited VBA claims and appeals process for veterans submitting a joint application for PCAFC.

VA agrees with the commenters and acknowledges that this requirement may result in some delays in adjudicating PCAFC eligibility; however, we do not believe these concerns outweigh the advantages of this approach that are outlined above and in VA's proposed rule. Furthermore, compensation claims processing time has continued to decrease over the years. Specifically, the average number of days to process a claim, as of March 2, 2020, was 78.5 days, compared to 91.8 days on October 1, 2018. We acknowledge that, as of July 4, 2020, the average number of days to process a claim has increased to 114.4 days. This increase was due to the COVID–19 national emergency and the inability to conduct in-person medical exams. However, we note that in-person medical exams have begun again. In addition, VA currently prioritizes certain compensation claims from any claimant who is: Experiencing extreme financial hardship; homeless; terminally ill; a former prisoner of war; more than 85 years old; became very seriously ill or injured/seriously ill or injured during service as determined by the Department of Defense; diagnosed with ALS or Lou Gehrig's Disease; or in receipt of a Purple Heart or Medal of Honor. In addition, VA has modernized its appeals process since February 19, 2019 to create different claims lanes (higher level reviews, supplemental claims, and appeals to the Board of Veterans' Appeals) that help ensure that claimants receive a timely decision on review when they disagree with a VA claims adjudication. We note that VA currently does not provide priority processing of disability compensation benefits for aid and attendance and other ancillary benefits such as a housebound benefit. As to whether claims can be expedited for PCAFC program applicants, VA does not have an already available method for collecting data on veterans to know whether or not they are also applying for PCAFC. Therefore, VA cannot currently prioritize disability compensation claims for PCAFC claimants, as doing so would be administratively challenging.

We also note that VA offers a menu of supports and services that supports veterans and their caregivers that may be available PCAFC applicants who are awaiting a VA disability rating decision. Such services include PGCSS, homemaker and home health aides, home based primary care, veteran directed care, and adult day care health care to name a few. We appreciate the commenters' concerns; however, we are not making any changes based on these comments.

One commenter expressed concern that many veterans from earlier eras of military service were not treated right by this country and the government, so they have not had interactions with VA and do not have a VA disability rating. We agree that veterans from earlier eras of military service have encountered challenging experiences with our government and VA. We believe expansion of PCAFC to eligible veterans who served before September 11, 2001 is one step to help remedy the challenges veterans from those eras have faced. Other changes to the definition of serious injury were designed to ensure PCAFC is inclusive of veterans from all eras by including all service-connected disabilities, regardless of whether they resulted from an injury, illness or disease, and removing the link between the serious injury and the individual's need for personal care services. We encourage veterans who do not yet have an existing relationship with VA to contact VA, through *www.va.gov,* your local VA location using the Find a VA Location on *www.va.gov,* or 844–698–2311, to find out about the services and benefits that may be available to them, including VA disability compensation, pension, and health care benefits. This is especially important for veterans and servicemembers seeking to qualify for PCAFC because in addition to requiring that an eligible veteran have a single or combined service-connected disability rating of 70 percent or more, the PCAFC eligibility criteria under § 71.20 also require the eligible veteran to receive ongoing care from a primary care team, which includes a VA primary care provider, or to do so if VA approves and designates a Family Caregiver. Thus, veterans and servicemembers would need to establish a relationship with VA (by obtaining a service-connected disability rating and receiving ongoing care from a primary care team) to qualify for PCAFC. We appreciate the commenter's concern; however, we are

not making any changes based on this comment.

Other commenters raised concerns about use of the 70 percent service-connected disability threshold specifically, as being either too high or too low, or suggested alternative bases for establishing whether an eligible veteran has a serious injury.

Numerous commenters were concerned that using a singular or combined service-connected disability rating of 70 percent was too high and arbitrary, and those with lower ratings may need assistance. Several commenters suggested VA lower the minimum rating requirement to 50 percent for consistency with the requirements for priority group one eligibility for purposes of enrollment in VA health care. One commenter asserted that Congress believed these veterans were of highest concern by assigning them to priority group one, and utilizing a threshold of 50 percent or more would allow more veterans with sustained serious service-connected disabilities to have access to PCAFC. A few commenters suggested revising the criterion to include any disabled veteran with a 50 percent or more service-connected disability rating that served prior to 1975. Relatedly, one commenter suggested using a rating of 60 percent based on the commenter's belief that this is the threshold for qualifying for no cost VA medical care and VA disability pension.

Other commenters asserted that using a 70 percent rating would expand the program beyond what Congress intended. Likewise, another commenter noted that a 70 percent rating is not difficult to achieve, and the need for a caregiver is not hard to prove, as these are normally granted because they are subjective.

In determining how to revise the definition of serious injury, VA considered other service-connected disability rating levels to establish whether an eligible veteran has a serious injury, but found a single or combined rating of 70 percent or more to be the best approach, as approximately 98 percent of current participants meet this requirement. Similarly, we note that one commenter that represents a veterans service organization conducted a survey of their ''warriors'' (*i.e.,* veteran members) and concluded that ''over 96 percent—2,333 out of 2,410 applicable warriors—of survey respondents enrolled in the PCAFC reported a service-connected disability rating of 70 percent or higher.''

We believe that a single or combined rating of 70 percent or more would demonstrate that a veteran's or servicemember's injuries rise to the level of serious, at least for purposes of establishing eligibility for PCAFC. While we understand that lower ratings are used to determine eligibility for various other VA services (*i.e.,* Priority Group 1 eligibility for VA health care), we reiterate that PCAFC is one of many services offered to veterans and servicemembers, as applicable, that are complementary but are not required to be identical in terms of eligibility requirements. VA considered applying a minimum service-connection rating lower than 70 percent, such as 50 percent or 60 percent, but determined, based on reviewing the rating criteria in 38 CFR part 4, that not every 50 or 60 percent rating may be indicative of a serious injury. Additionally, for the reasons set forth in the proposed rule and this final rule, we believe the threshold of 70 percent is a reasonable and appropriate interpretation of the ''serious injury'' requirement in 38 U.S.C. 1720G(a)(2)(B). Moreover,

> [a]s the Supreme Court has noted, ''[t]he 'task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line.''' *United States R.R. Retirement Bd.* v. *Fritz,* 449 U.S. 166, 179 (1980) (quoting *Mathews* v. *Diaz,* 426 U.S. 67, 83–84 (1976)). Provided there is a legitimate basis for the general classification established by Congress or the agency, it is not arbitrary or capricious simply because it may be overinclusive or underinclusive on some applications. *See Weinberger* v. *Salfi,* 422 U.S. 749, 776 (1975) (''[g]eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases'').
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> Brief for Respondent-Appellant at 15–16, *Haas* v. *Peake*, 525 F.3d 1168 (2008) (No. 2007–7037), 2007 U.S. Fed. Cir. Briefs LEXIS 1048, at 21–22.

VA also considered applying a minimum service-connected rating higher than 70 percent, such as 100 percent, but determined that would be too narrow and restrictive. For instance, a 70 percent rating for PTSD would require: Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: Suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships. 38 CFR 4.130 DC 9411. We believe that veterans who have symptomology that manifest to that level should not be denied admittance to the program on the basis that their injury or disease would not be considered ''serious,'' which would result if we used a service-connected disability rating higher than 70 percent. Furthermore, applying a 100 percent rating would result in approximately 40 percent of the current participants no longer being eligible because they would not meet that higher threshold.

VA elected not to apply different criteria to veterans and servicemembers depending on the date their serious injury was incurred or aggravated in the line of duty because this would be inequitable and would lead to treating eligible veterans differently based on their era of service. We are not making any changes based on these comments.

Another commenter noted that 70 percent is the rating required for nursing home care, but asserted that Congress considered and rejected limiting PCAFC to only those who would otherwise require nursing home care. We would like to clarify that although having a single or combined service-connection rating of 70 percent or more is one basis upon which eligibility can be established for VA nursing home care under 38 U.S.C. 1710A, we are not suggesting that the eligibility criteria for PCAFC and nursing home care are identical. As we noted in the proposed rule, there may be instances when nursing home care would be more appropriate for a veteran or servicemember than PCAFC. 85 FR 13369 (March 6, 2020). We are requiring a 70 percent or more service-connected disability rating because of the reasons stated in the proposed rule and additionally outlined above and note that it is the minimum threshold that must be met for PCAFC eligibility. As explained in the proposed rule and reiterated in this final rule, additional criteria must also be met before an individual is determined to be eligible for PCAFC. We are not making any changes based on this comment.

Several commenters raised concerns about potential abuse of the program by individuals who may not really need it but qualify, nonetheless. Similarly, one commenter asserted that the amount of service connection should not be considered because there are veterans with 100 percent service-connection ratings but do not need a caregiver. A

separate commenter who asserted that a 70 percent rating is not difficult to achieve, also indicated that the need for a caregiver is not hard to prove, and because eligibility determinations are subjective, benefits are normally granted. However, this commenter also raised concerns about how staff may review these determinations later and decide to remove participants from PCAFC.

First, we note that many of the changes we are making in this final rule are aimed at improving standardization and reducing subjectivity in PCAFC eligibility determinations. We agree that an eligible veteran's service-connection rating does not establish a need for personal care services from a Family Caregiver, and it was not VA's intent to suggest that it does. As indicated above, a single or combined 70 percent or more service-connected rating is just one component of the PCAFC eligibility determination. Separate eligibility criteria in § 71.20 would establish whether a veteran or servicemember is in need of personal care services (based on an inability to perform an activity of daily living or a need for supervision, protection, or instruction) and whether participation in PCAFC is in the veteran's or servicemember's best interest, among other criteria. Therefore, a veteran or servicemember would not be eligible for PCAFC solely for having a service-connected disability rating. Instead, the definition of serious injury will provide a transparent and objective standard for determining whether a veteran's or servicemember's injury is serious. Also, as indicated in the proposed rule, any changes to a veteran's or servicemember's service-connected rating that results in a rating less than 70 percent for a single or combined service-connected disability will result in the veteran or servicemember no longer being eligible for PCAFC. In such instance, the veteran or servicemember would be discharged in accordance with § 71.45(b)(1)(i)(A) for no longer meeting the requirements of § 71.20 because of improvement in the eligible veteran's condition or otherwise (*e.g.,* no longer meeting the definition of serious injury). To the extent that commenters raised concerns about how staff may review these determinations later and decide to remove participants from PCAFC, we note that we will provide training to VA staff who are making eligibility determinations to ensure that the same criteria that are used to determine eligibility at the time of application are the same as those used during reassessments. We are not making any changes based on these comments.

One commenter was concerned about how VA would fund this program as a result of using this criterion, suggesting there must be millions of veterans with a 70 percent service-connected rating, and believed this funding could be better spent elsewhere (*e.g.,* on aging families affected by the COVID–19 national emergency). This same commenter was concerned that this criterion is excessive and would create dependency on VA. Thus, this commenter suggested limiting this program to 12 months per one's lifetime or conditioning PCAFC participation on the veteran subsequently participating in one of the other VA in-home care programs.

We thank the commenter for their concerns and refer them to the regulatory impact analysis accompanying this rulemaking for a detailed analysis of the estimated costs for this program. As noted previously, the serious injury requirement is only one criterion that must be met under § 71.20 for a veteran or servicemember to qualify for PCAFC. To the extent that this commenter is concerned that the criteria set forth in § 71.20 are too broad, we disagree. VA has tailored the eligibility criteria to target veterans and servicemembers with moderate and severe needs through new definitions for the terms ''in need of personal care services,'' ''inability to perform an activity of daily living,'' and ''need for supervision, protection, or instruction,'' in particular. PCAFC is a clinical program that addresses the unique needs of each eligible veteran and his or her caregiver which may change over time. Also, the potential for rehabilitation or independence among PCAFC eligible veterans will likely decrease as the program expands to veterans and servicemembers from earlier eras of military service who have more progressive illness and injuries, such as dementia or Parkinson's disease. Therefore, we do not believe limiting this program to a specific time period or mandating the use of other VA in-home care programs is appropriate. Furthermore, PCAFC is one of many in-home services that are complementary but not necessarily exclusive to one another. As a result, an eligible veteran and his or her caregiver may also participate in other home-based VA programs, such as home based primary care, respite care, and adult day health care, as applicable.

To the extent that this commenter is concerned that the criteria will create dependency, we note that we proposed, and make final, § 71.30 which establishes the requirement for reassessments of eligible veterans and Family Caregivers to determine their continued eligibility for participation in PCAFC under part 71. The reassessment includes consideration of the PCAFC eligibility criteria, including whether PCAFC participation is in the best interest of the veteran or servicemember. As proposed and explained previously in this rulemaking, ''in the best interest'' is a clinical determination that includes consideration of whether PCAFC participation supports the veteran's or servicemember's potential progress in rehabilitation, if such potential exists, and increases the veteran's or servicemember's potential independence, if such potential exists, among other factors. We believe that this reassessment process, which will occur annually (unless a determination is made and documented by VA that more of less frequent reassessment is appropriate), will reduce the risk of dependency in instances where the eligible veteran may have the potential for improvement. We are not making any changes based on this comment.

One commenter was supportive of including consideration of any service-connected disability and VA no longer requiring a connection between the need for personal care services and the qualifying serious injury, but recommended VA consider including in the definition of serious injury service-connected veterans in receipt of individual unemployability (IU), which the commenter described as a benefit reserved for veterans whose service-connected condition(s) is so severe as to render them unable to obtain and maintain ''substantially gainful'' employment. Section 4.16(a) of 38 CFR, establishes the requirements for IU (referred therein as schedular IU), which includes that the veteran have at least one service-connected disability rated at least 60 percent disabling, or have two or more service-connected disabilities, with at least one rated at least 40 percent disabling and a combined rating of at least 70 percent. According to the commenter, ''[t]here are numerous disabilities warranting IU that would require a [F]amily [C]aregiver to provide personal services to maintain the veteran's independence in his or her community.'' IU allows VA to pay certain veterans compensation at the 100 percent rate, even though VA has not rated his or her service-connected disabilities at that level. To qualify, a veteran must, in addition to meeting the service-connection rating requirements identified by the commenter, be unable

to secure or follow a substantially gainful occupation as a result of service-connected disabilities. We note that veterans who are unemployable by reason of service-connected disabilities but who fail to meet the requirements of § 4.16(a), may still qualify for IU based on additional consideration under § 4.16(b). Simply put, a veteran can be in receipt of an IU rating irrespective of a specific service-connected rating.

We do not find it appropriate to use IU as a substitute for the single or combined 70 percent rating as not all veterans and servicemembers applying for or participating in PCAFC will have been evaluated by VA for such ratings, and if VA were to create an exception to the ''serious injury'' requirement for individuals with an IU rating, VA would also need to consider whether other exceptions (based on disability rating criteria or otherwise) should also satisfy the ''serious injury'' requirement. In addition, IU has proven to be a very difficult concept to apply consistently in the context of disability compensation and has been the source of considerable dissatisfaction with VA adjudications and of litigation. Consequently, we choose not to import this rather subjective standard and its potential for inconsistency into the PCAFC program. As stated above, we believe the requirement that a veteran or servicemember have a single or combined service-connected disability rating of 70 percent or more is a reasonable and appropriate interpretation of the ''serious injury'' requirement in 38 U.S.C. 1720G(a)(2)(B). See Brief for Respondent-Appellant at 15–16, Haas, 525 F.3d 1168 (2008) (No. 2007–7037) (citing *Fritz,* 449 U.S. at 179 (concerning regulatory line drawing); *Weinberger,* 422 U.S. at 776).

One commenter recommended that VA add specific injuries and disabilities to the list of requirements for PCAFC which is similarly done for Special Home Adaptation (SHA) or Specially Adapted Housing (SAH) grants (*e.g.,* loss or loss of use of more than one limb, blindness, severe burns, loss or loss of use of certain extremities). The commenter further opined that a clear requirement could be that a veteran have a Purple Heart, an award of combat related special compensation, concurrent retirement and disability pay, a medical retirement/discharge, be a TSGLI recipient, or have a line of duty investigation for the injury. Relatedly, one commenter requested VA tie eligibility to award of the Purple Heart, as there are other programs available to veterans. As previously explained, having a serious injury is only one component of the PCAFC eligibility criteria, and the serious injury will no longer be tied to the veteran's or servicemember's need for personal care services. Therefore, we respectfully decline to include a specific list of injuries, disabilities, awards, or compensations that may suggest a need of personal care services. Moreover, because VA is expanding the definition of serious injury to include any singular or combined service-connected disability rated 70 percent or higher, regardless of whether it resulted from an injury, illness, or disease, it is not necessary to provide examples of potentially qualifying conditions. Doing so could cause unnecessary confusion by suggesting that listed conditions are somehow more applicable. Additionally, we believe limiting PCAFC eligibility to recipients of the Military Order of the Purple Heart would be too restrictive as it is associated only with combat injuries, such awards have historically discriminated against minorities and women, and recordkeeping on these awards has been inconsistent. Further, as indicated in the proposed rule, we considered the TSGLI definition of ''traumatic injury'' in defining serious injury; however, we determined it would be too restrictive and result in additional inequities, and noted the inherit differences between the two programs—TSGLI is modeled after Accidental Death and Dismemberment insurance coverage, whereas PCAFC is a clinical benefit program designed to provide assistance to Family Caregivers that provide personal care services to eligible veterans. We are not making any changes based on these comments.

One commenter recommended VA consider defining serious injury consistent with the definition of serious injury or illness contained in 29 CFR 825.127(c). We note this commenter is referring to the Department of Labor's (DOL) regulations for the Family and Medical Leave Act (FMLA). This definition is defined, in part, to mean: a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in PCAFC.

FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. The section and definition referenced by this commenter relate specifically to when a military caregiver may use FMLA leave to care for a covered servicemember with a serious injury or illness. We note that FMLA is entirely different from PCAFC as FMLA protects workers when they need to take leave to care for certain family and medical reasons, while PCAFC is a clinical program that provides benefits to Family Caregivers. While DOL's definition of serious injury or illness includes veterans participating in PCAFC, we do not believe that requires us to adopt DOL's definition for purposes of defining serious injury in PCAFC. We note that the authorizing statutes (*i.e.,* 38 U.S.C. 1720G and 29 U.S.C. 2611) vary in how they define serious injury and serious injury or illness, respectively. We make no changes based on this comment.

One commenter recommended that in order to remain consistent with the definition of serious injury, VA must improve its education and communication about two of the most common conditions affecting veterans, specifically mild traumatic brain injury (mTBI or concussion) and PTSD. This commenter noted that a service-connected rating for a mTBI will not automatically confer a need for supervision, and that PTSD symptoms can be managed and even resolved completely; and explained that family care is a complement to, not a substitute for professional treatment and expertise. The commenter asserted that while a spouse can help a veteran work toward his or her mental health goals, and may be involved in treatment planning, relying on a spouse to manage a veteran's mental health symptoms is clinically inappropriate and cannot be the basis for acceptance into PCAFC.

First, we would like to clarify that participation in PCAFC is not meant to replace medical or mental health treatment and agree with the commenter that a Family Caregiver is not expected to provide such treatment, but rather required personal care services, for mTBI or PTSD. Further, part of the eligibility criteria for the program require the eligible veteran to receive ongoing care from a primary care team, which will help ensure the eligible veteran is engaged in appropriate care based on his or her clinical needs.

Second, as discussed above, the veteran's or servicemember's serious injury does not need to be related to his or her need of personal care services, which is separately considered (*i.e.,* whether the veteran or servicemember is ''in need of personal care services for a minimum of six continuous months based on . . . [a]n inability to perform an activity of daily living; or . . . [a] need for supervision, protection, or instruction''). Finally, we agree with the commenter that education and training is important for staff, eligible veterans and their Family Caregivers, and we note that we currently provide such training on many conditions, such as TBI, PTSD, and dementia. We will continue to provide a robust training plan for staff and PCAFC participants. Specifically, we will ensure that training on conditions, such as TBI, PTSD, and dementia will continue to be provided. We make no changes based on this comment.

Unable To Self-Sustain in the Community

Several commenters expressed confusion and concern about this definition and how it will be used to determine whether a Primary Family Caregiver will receive the lower- or higher-level stipend. We note that this definition will only be used in the context of § 71.40(c), Primary Family Caregiver benefits, and refer to the discussion of that section below regarding unable to self-sustain in the community.

§ 71.20 Eligible veterans and servicemembers

Two-Phase Eligibility Expansion

Multiple commenters disagreed with the phased eligibility expansion. They also opined that this phased eligibility expansion discriminated against pre-9/11 veterans, that pre-9/11 veterans should not be treated differently than post-9/11 veterans, that veterans from all eras require assistance from caregivers, and that PCAFC expansion for all pre-9/11 veterans should not be delayed and should be immediate to veterans from all eras. Many commenters expressed that they felt that veterans who served between May 8, 1975 and September 10, 2001 should not have to wait another two years to be part of the PCAFC expansion. One commenter asked if there was any way the two-year time frame for this group of veterans could be changed to a year or less. Also, commenters expressed that they would like to see veterans with a terminal illness or 100 percent disability rating be eligible for PCAFC immediately, irrespective of their service date, while another commenter suggested that immediate eligibility for PCAFC should be viewed on a case-by-case basis instead of service dates.

In response to the above comments, the initial eligibility distinction between pre- and post-9/11 veterans and servicemembers in the current program was mandated by Congress by the Caregivers Act, as established by 38 U.S.C. 1720G. Furthermore, as previously stated, the VA MISSION Act of 2018 further modified section 1720G by expanding eligibility for PCAFC to Family Caregivers of eligible veterans who incurred or aggravated a serious injury in the line of duty before September 11, 2001. However, Congress mandated that this expansion occur in two phases. The first phase of expansion will include eligible veterans who have a serious injury (including traumatic brain injury, psychological trauma, or other mental disorder) incurred or aggravated in the line of duty in the active military, naval, or air service on or before May 7, 1975, and will begin on the date the Secretary submits a certification to Congress that VA has fully implemented a required IT system that fully supports PCAFC and allows for data assessment and comprehensive monitoring of PCAFC. The second phase will occur two years after the date the Secretary submits certification to Congress that VA has fully implemented the required IT system, and will expand PCAFC to all eligible veterans who have a serious injury (including traumatic brain injury, psychological trauma, or other mental disorder) incurred or aggravated in the line of duty in the active military, naval, or air service, regardless of the period of service in which the serious injury was incurred or aggravated in the line of duty in the active military, naval, or air service. Therefore, we lack authority to eliminate the two-phase eligibility expansion and make the changes suggested by these comments. See 38 U.S.C 1720G(a)(2)(B).

Multiple commenters also expressed confusion as to when Vietnam veterans would be eligible for PCAFC and asked for clarification. Other commenters expressed confusion about when other pre-9/11 era veterans would be eligible for PCAFC and asked for clarification. One commenter asked if VA will use ''the same standard as the [Veterans Benefits Administration (VBA)] of having to serve at least one day during the time period.'' While the commenter did not provide any further detail as to this standard, we note that in the VBA context, similar language is found in various parts of VA's Adjudication Procedures Manual, M21–1, to include parts regarding eligibility determinations for pension, consideration of presumptive service-connection based on active duty for training and inactive duty for training, and jurisdiction of Camp Lejeune claims.

As previously explained, the authorizing statute, 38 U.S.C. 1720G, as amended by section 161 of the VA MISSION Act of 2018, bases eligibility for PCAFC, in part, on the date the serious injury was incurred or aggravated in the line of duty in the active military, naval, or air service. 38 U.S.C. 1720G(a)(2)(B). In this regard, eligibility is not based only on the dates of active military, naval, or air service. Instead, it is focused on when the veteran or servicemember incurred or aggravated a serious injury in the line of duty while in the active military, naval, or air service. Currently, only those whose serious injury was incurred or aggravated in the line of duty in the active military, naval or air service on or after September 11, 2001, are eligible for PCAFC. 38 U.S.C. 1720G(a)(2)(B)(i). In the first phase of expansion (that will begin on the date the Secretary submits to Congress certification that VA has fully implemented the required IT system), those veterans and servicemembers will continue to be eligible for PCAFC, and additionally, those veterans and servicemembers who incurred or aggravated a serious injury in the line of duty in the active military, naval or air service on or before May 7, 1975 will also become eligible (subject to the other applicable eligibility criteria). 38 U.S.C. 1720G(a)(2)(B)(ii). Two years after the date the Secretary submits to Congress certification that VA has fully implemented the required IT system, all veterans and servicemembers, that otherwise meet eligibility criteria, including those who have a serious injury incurred or aggravated in the line of duty in the active military, naval, or air service after May 7, 1975 but before September 11, 2001, will be eligible for PCAFC (*i.e.,* May 8, 1975 to September 10, 2001). See 38 U.S.C. 1720G(a)(2)(B)(iii). We also note that because eligibility under 38 U.S.C. 1720G(a)(2)(B) is based on the date the serious injury was incurred or aggravated, and not merely on the dates of a veteran's or servicemember's service, we would not, nor would there be a need, to apply language that the veteran or servicemember serve ''at least one day'' during the time periods outlined above for eligibility for the first phase of the PCAFC expansion. We

make no changes based on these comments.

Multiple commenters asked how VA will determine eligibility for veterans with service dates that overlap the time periods set forth in 38 U.S.C. 1720G(a)(2)(B)(i)–(iii), and specifically, those who served both before and after May 7, 1975; and commenters asked how VA will determine eligibility for veterans who have presumptions of service-connection for conditions that are not diagnosed until years after their service. Commenters provided specific scenarios and asked under which phase of expansion veterans would qualify for PCAFC. One commenter asked if a veteran with a 100 percent service rating who served from 1974 to 1994 could be eligible for PCAFC in the first phase of expansion or in the second phase of expansion. Another commenter asked which phase of expansion would apply for a veteran with active military service from 1972 to 1992, who has a combined rating from several service-connected disabilities of 70 percent or greater with one disability at 30 percent due to service in Vietnam and the other disabilities incurred in active service during the Lebanon conflict and the Persian Gulf War. Another commenter asked which phase of expansion would apply for a veteran who served from prior to May 7, 1975, until April 30, 1980, developed ALS and was awarded presumptive service connection for ALS last year. A different commenter asked whether a veteran would be included under phase one of expansion if the veteran served in Vietnam prior to May 7, 1975, was exposed to Agent Orange, left the military in August 1975, was diagnosed with ALS several years later, is service-connected at 100 percent, and meets all additional eligibility criteria.

As previously explained in this section, the authorizing statute, 38 U.S.C. 1720G, as amended by section 161 of the VA MISSION Act of 2018, bases eligibility for PCAFC, in part, on the date the serious injury was incurred or aggravated in the line of duty in the active military, naval, or air service. Thus, while there may be veterans and servicemembers who have service dates that cover more than one of the time periods set forth in 38 U.S.C. 1720G(a)(2)(B)(i)–(iii), their eligibility under section 1720G(a)(2)(B) is dependent on the date the serious injury was incurred or aggravated. In this rulemaking, the term ''serious injury'' means ''any service-connected disability that: (1) Is rated at 70 percent or more by VA; or (2) Is combined with any other service-connected disability or disabilities, and a combined rating of 70 percent or more is assigned by VA.'' This means a veteran with a service-connected disability incurred or aggravated in the line of duty before May 7, 1975, would qualify for the first phase of expansion so long as the veteran's service-connected disability is rated at 70 percent or more by VA or is combined with any other service-connected disability or disabilities, and a combined rating of 70 percent or more is assigned by VA, and the veteran meets all the other PCAFC eligibility criteria. If a veteran has a serious injury, as defined in this rulemaking, that was incurred or aggravated after May 7, 1975, but before September 11, 2001, and meets all other eligibility criteria for PCAFC, then he or she would be eligible for PCAFC in the second phase of expansion.

Additionally, there may be instances in which a veteran's or servicemember's condition is not diagnosed until years after they served and years after the condition was actually incurred or aggravated, such that it may be difficult to identify when the serious injury was incurred or aggravated. We note that there may be a lack of documentation identifying the date on which an applicant's serious injury was incurred or aggravated. For example, a veteran may have served before and after May 7, 1975, and been diagnosed with ALS several years after the veteran was discharged from active military, naval, or air service. If that veteran has received a presumption of service-connection for ALS, but the rating decision does not specify the dates of service to which the ALS is attributable, VA would determine on a case-by-case basis whether the veteran could qualify for PCAFC under the first or second phase of expansion. The dates of service, along with other documentation such as rating decisions, service treatment records, VBA claims files, and review of medical records will help inform VA of when the serious injury was incurred or aggravated. It is important to note that such issues regarding the date the serious injury was incurred or aggravated will arise only during the first phase of expansion, only when the veteran has dates of service before and after May 7, 1975, and only in instances in which the date of the serious injury is not documented. We make no changes based on these comments.

Implementation Delay

Commenters asked why it is taking so long to get the eligibility expansion started, to include implementation of an IT system, and expressed dissatisfaction that the expansion was not being implemented now or in a more timely manner. Commenters urged that the expansion be sped up, especially before most pre-9/11 veterans pass away. Multiple commenters asserted that VA has missed its statutory deadline to expand. In this regard, commenters explained that the VA MISSION Act of 2018 required VA to certify implementation of the required IT system no later than October 1, 2019, and as such, VA was required to implement phase one by October 1, 2019 and phase two by October 1, 2021. Accordingly, one commenter requested VA implement phase one no later than September 2020. Another commenter asked VA to clarify why an additional two years is needed for evaluating phase two applicants and recommended that VA commit to a shorter timeline for phase two expansion. Other commenters asserted that VA must implement phase two by October 1, 2021, to be consistent with Congressional intent. Furthermore, one commenter specifically asked, given the delays to the IT system, that VA publish monthly updates on the progress towards implementation of the required IT system and on the progress towards publishing a final rule.

We acknowledge that the full implementation of the new IT system has been delayed. This is due to VA's pivot from developing a home grown IT system to configuration of a commercial platform (Salesforce) which, among other things, has required migration of data from the legacy web-based application to the new Salesforce platform, development of new functionality to automate monthly stipend calculations, as well as integration with other VA systems. However, as required by law, the phases of expansion are explicitly tied to the date VA submits to Congress a certification that the Department has fully implemented the required IT system, and VA has not yet submitted to Congress that certification. The phases of expansion are not tied to the October 1, 2019 due date for such certification in section 162(d)(3)(A) of the VA MISSION Act of 2018. See 38 U.S.C. 1720G(a)(2)(B). Accordingly, the first phase of expansion will begin when VA submits to Congress certification that it has fully implemented the required IT system, and the second phase will begin two years after the date VA submits that certification to Congress. Therefore, we are unable to expand immediately or expedite the second phase of expansion once VA submits its certification to Congress.

Further, we will not provide the requested monthly updates on the progress towards implementation of the

required IT system and on the progress of the final rule, as these are actions we typically do not take, and it would divert our energy and resources in making progress towards fully implementing the required IT system and the final rule. We note that we will provide the public with notification upon certification of the required IT system and the publication of the final rule. We make no changes based on these comments.

Legacy Participants

VA received multiple comments concerning eligibility for legacy participants, as that term will be defined in § 71.15. We will address the comments below.

One commenter inquired into the reasons VA was providing a transition period for legacy participants who the commenter believes will not be reassessed for a year and will receive an additional five months to transition out of PCAFC even though they may no longer be eligible for PCAFC. The commenter suggested this is a misuse of taxpayer dollars and recommended current PCAFC participants be reassessed immediately to determine their continued eligibility, and if found ineligible, only be allowed two to three months to transition out of PCAFC.

We believe the transition period set forth in the proposed rule for legacy participants and legacy applicants who do not meet the requirements of § 71.20(a), and their Family Caregivers is a fair and reasonable amount of time. To clarify, VA will not wait one year after the effective date of the rule to evaluate the eligibility of legacy participants and legacy applicants. VA will begin the reassessments of such individuals when this final rule becomes effective, but VA estimates that it will need a full year to ensure all such reassessments are completed. The one-year period beginning on the effective date of the rule (set forth in § 71.20(b) and (c)) will allow VA to conduct reassessments of legacy participants and legacy applicants, while also adjudicating an influx of applications as a result of the first phase of expansion. VA would allow legacy participants and legacy applicants to remain in the program for a full year after the effective date of the final rule so that they all have the same transition period, regardless of when during the one-year transition period the reassessment is completed. As VA cannot assess all legacy participants at the same time, this ensures equitable treatment for everyone.

As to the commenter's suggestion that there only be a two- or three-month transition compared to the five-month transition, we believe that the transition period proposed by VA is appropriate and not a misuse of taxpayer dollars. The five-month period referenced by the commenter consists of a 60-day advanced notice followed by a 90-day extension of benefits for discharge based on the legacy participant or legacy applicant no longer qualifying for PCAFC as set forth in § 71.45(b)(1). The 60-day advanced notice requirement provides an opportunity for PCAFC participants to contest VA's findings before a stipend decrease takes effect, and in certain instances of revocation or discharge which we believe would benefit both VA and eligible veterans and Family Caregivers. 85 FR 13394 (March 6, 2020). The 90-day extension of benefits pursuant to § 71.45(b)(1)(iii) would permit the eligible veteran and his or her Family Caregiver a reasonable adjustment time to adapt and plan for discharge from PCAFC. Further, while continuing benefits for 90 days after discharge is not contemplated under the authorizing statute, we believe it is an appropriate and compassionate way to interpret and enforce our authorizing statute. See 85 FR 13399 (March 6, 2020).

VA believes that the transition period is both fair and reasonable and also an appropriate use of taxpayer dollars. As indicated in the proposed rule, the Primary Family Caregivers of legacy participants, in particular, may have come to rely on the benefits of PCAFC, to include the monthly stipend payments based on the combined rate authorized under current § 71.40(c)(4). Our proposed transition period would allow time for VA to communicate potential changes to affected individuals and assist them in preparing for any potential discharge from PCAFC or reduction in their stipend payment before such changes take effect. We are not making any changes based on this comment.

Several commenters suggested VA ''grandfather'' in current PCAFC participants, such that they not be subject to the new requirements in § 71.20(a). Two commenters suggested that the new criteria in § 71.20(a) should only apply to new applicants and VA establish a separate program for these individuals. Relatedly, one commenter suggested that if current participants are only subjected to existing criteria, the proposed sections on legacy participants will not be needed. Another commenter stated that VA should retain the current standard for legacy participants and use the new standard for new applicants. This commenter noted that this would be permissible under law and would protect the interest of severely disabled veterans and their Family Caregivers that are current PCAFC participants. Similarly, many commenters expressed concern about the negative impact of losing the PCAFC benefits that they have come to rely on. Additionally, other commenters suggested that legacy participants should not be reassessed. In particular, two commenters referred to the often-long-term nature of veterans' disabilities, including veterans whose clinical conditions are not expected to improve over time. Another commenter suggested that instead of reassessments, VA should review the initial application of current PCAFC participants to determine if the participants meet the new criteria, especially given the challenges of seeking medical care during the COVID–19 national emergency.

As indicated in the proposed rule, we are shifting the focus of PCAFC to eligible veterans with moderate and severe needs and making other changes that will allow PCAFC to better address the needs of veterans of all eras and improve and standardize the program. However, we are mindful of the potential impact these changes may have on legacy participants and legacy applicants, as those terms are defined in § 71.15, and appreciate the commenters recommendations. Specifically, we considered whether VA could continue applying the current criteria to legacy participants and legacy applicants, and apply the new criteria in § 71.20(a) only to new applicants, but decided against it. Doing so would require VA to run two separate PCAFC programs, which would be administratively prohibitive; would lead to confusion among veterans, caregivers, and staff; and would result in inequities between similarly situated veterans and caregivers. Instead, VA proposes to reassess legacy participants and legacy applicants under the new eligibility criteria in § 71.20(a) within the one-year period following the effective date of this final rule. As explained above, VA is providing a transition period that consists of one year for VA to complete reassessments, followed by a period of 60-day advanced notice, and 90-day extension of benefits. The purpose of this transition period is to reduce any negative impact these changes may have on current PCAFC participants. To the extent the commenters believe PCAFC should be a permanent program, we discuss similar comments further below.

As to the specific concerns about reassessments, consistent with other changes VA is making to improve PCAFC discussed above, we believe it is reasonable to reassess legacy

participants and legacy applicants to determine their continued eligibility under § 71.20(a). We understand that reassessments may cause anxiety for some individuals, but we are adding reassessment requirements to improve consistency and transparency in the program. We note that reassessments are not just for current participants but will be an ongoing part of PCAFC under § 71.30. Moreover, as the personal care needs for current participants and their Family Caregiver(s) continue to evolve, we believe it is prudent to reassess legacy participants and legacy applicants, as opposed to only reviewing the initial application for PCAFC, for continued eligibility as well as to identify changes in their condition that may impact the monthly stipend payment amount. We note that the initial application includes basic information, primarily demographic in nature and does not capture clinical information related to the needs of the veteran or servicemember. Additionally, eligibility determinations are complex, and we are establishing consistent processes and practices which include the CEATs to review evaluations conducted at the local medical centers and make eligibility determinations under § 71.20(a). For the foregoing reasons, we believe it is necessary for legacy participants and legacy applicants to participate in reassessments to determine their continued eligibility under § 71.20(a). We are not making any changes based on these comments.

One commenter opposed requiring legacy participants to reapply for PCAFC based on the assertion that recipients of VA disability compensation and social security benefits do not have to reapply for those programs after they have been approved. As indicated in the proposed rule and reiterated above, VA will not require legacy participants or legacy applicants to reapply to PCAFC, rather they will be reassessed within the one-year transition period beginning on the effective date of the final rule to determine continued eligibility under the new eligibility criteria in § 71.20(a). We are not making any changes based on this comment.

Several commenters raised concerns that a number of current PCAFC participants would not meet the definition of serious injury specifically and would be deemed ineligible for the program. VA assessed the service-connected disability rating of eligible veterans currently participating in PCAFC and found that approximately 98 percent have a single or combined service-connected disability rating of 70 percent or more and would therefore meet the definition of ''serious injury.'' As explained above, VA will provide a transition period for those who would not qualify under the new PCAFC eligibility criteria, including those who do not have a single or combined service-connected disability rating of 70 percent or more. Furthermore, PCAFC is just one of many services offered to veterans and servicemembers, as VA offers a menu of supports and services that supports caregivers caring for veterans such as PGCSS, homemaker and home health aides, home based primary care, Veteran-Directed care, and adult day care health care to name a few. We will assist legacy participants and legacy applicants who are transitioning out of PCAFC by identifying and making referrals to additional supports and services, as applicable. We are not making any changes based on these comments.

One commenter asked why the proposed rule did not provide equitable relief to current participants who will be adversely affected by the changes to eligibility. Similarly, another commenter recommended VA provide equitable relief for current PCAFC participants whose eligibility would be adversely affected by the new definition of serious injury. The Secretary of Veterans Affairs is authorized to grant equitable relief when the Secretary determines that: (a) Benefits administered by VA have not been provided by reason of administrative error; or (b) a person has suffered loss as a consequence of reliance upon a determination by VA of eligibility or entitlements to benefits, without knowledge that it was erroneously made. See 38 U.S.C. 503. It is unlikely the Secretary would consider VA's lawful implementation of new regulatory requirements in 38 CFR part 71 to constitute an administrative error on the part of VA or application of new regulatory criteria to constitute erroneous eligibility determinations. Therefore, equitable relief would likely not be appropriate as recommended by the commenters because the changes to PCAFC eligibility would not be the result of an error but rather a deliberate decision to change the eligibility requirements for this program. Furthermore, we note that the regulations provide a period of transition for legacy participants and legacy applicants, as those terms are defined in § 71.15, who may no longer be eligible or whose Primary Family Caregivers will have their monthly stipends decreased as a result of changes to PCAFC in this rulemaking, as discussed further above. We are not making any changes based on these comments.

Unclear Eligibility Requirements

Several commenters suggested VA better clarify eligibility by having clear and defined standards, and by providing examples of qualifying conditions, such as spinal cord injury and paralysis. Commenters stated the eligibility requirements were confusing, vague, and contained discrepancies. Commenters also stated that there is too much subjectivity and inconsistency across VA and asserted that who does the eligibility determination varies, as does what they consider. One commenter raised concerns that the proposed eligibility criteria was more general than the current criteria which would turn PCAFC into a ''free for all.'' Similarly, another commenter indicated fraud is prevalent in the program and recommended VA ensure the requirements are clear. VA recognizes that improvements to PCAFC are required and this recognition was the catalyst for the changes in the proposed rule to improve consistency and transparency in how the program is administered. As indicated in the proposed rule, we are standardizing PCAFC to focus on veterans and servicemembers with moderate and severe needs while at the same time revising the eligibility criteria to encompass the care needs for veterans and servicemembers of all eras rather than only post-9/11 veterans and servicemembers. Also, it is VA's intent to broaden the current criteria so as not to limit eligibility to a predetermined list of injuries or impairments. Thus, changes to the eligibility criteria include revising definitions such as serious injury, in the best interest, and inability to complete an ADL; creating a new definition for in need of personal care services and need for supervision, protection, or instruction; and establishing a transition period for legacy participants and legacy applicants who no longer qualify or whose stipends would be reduced by these regulatory changes. VA will further address subjectivity and inconsistency across VA by creating a centralized infrastructure for eligibility determinations, standardizing eligibility determinations and appeals processes, and implementing uniform and national outcome-based measures to identify successes, best practices, and opportunities for improvement. Furthermore, in addition to standardizing the eligibility determination process, VA is revising the criteria for revocation to hold an

eligible veteran and his or her Family Caregiver(s) accountable for instances of fraud or abuse under §§ 71.45(a) and 71.47, as applicable. We thank these commenters for their input; however, we are not making any changes based on these comments.

One commenter described PCAFC as an alternative to the Homemaker and Home Health Aide (H/HHA) program, H/HHA as an alternative to nursing home care, and PCAFC as VHA's version of two Center for Medicare and Medicaid (CMS) programs: Home and Community-Based Services (HCBS) and Self-Directed Personal Assistance Services. To the extent that this commenter believes that PCAFC should operate similar to VA's H/HHA program, and CMS's Home and Community-Based Services and Self-Directed Personal Assistance Services, we note that these are programs distinct from PCAFC, as explained directly below.

VA's H/HHA program provides community-based services through public and private agencies under a system of case management by VA staff. H/HHA services enable frail or functionally impaired persons to remain in the home. An H/HHA is a trained person who can come to a veteran's home and help the veteran take care of themselves and their daily activities. The H/HHA program is for veterans who need assistance with activities of daily living, and who meet other criteria such as those who live alone.

The Veteran-Directed Home and Community Based Services (VD–HCBS) is a type of H/HHA that provides veterans of all ages the opportunity to receive home and community-based services in lieu of nursing home care and continue to live in their homes and communities. In VD–HCBS, the veteran and veteran's caregiver will: Manage a flexible budget; decide for themselves what mix of services will best meet their personal care needs; hire their own personal care aides, including family or neighbors; and purchase items or services to live independently in the community. VD–HCBS is offered as a special component to the Administration for Community Living's (ACL) Community Living Program (CLP). The ACL–VA joint partnership combines the expertise of ACL's national network of aging and disability service providers with the resources of VA to provide veterans and their caregivers with more access, choices and control over their long-term services and supports.

While there may be some veterans that are eligible for PCAFC as well as H/HHA and/or VD–HCBS, these programs are distinct as they are intended to provide different services to different groups. For example, PCAFC provides benefits directly to Family Caregivers whereas H/HHA and VD–HCBS provide services directly to veterans. Additionally, as described above, these benefits and services differ, as PCAFC provides such benefits as a monthly stipend to Primary Family Caregivers and access to healthcare benefits through the CHAMPVA for those who otherwise are eligible.

As further described below, H/HHA and VD–HCBS are more aligned with CMS's HCBS and Self-Directed Personal Assistance Services programs, and vice versa, than with PCAFC.

CMS' HCBS programs provide opportunities for Medicaid beneficiaries to receive services in their own home or community rather than institutions or other isolated settings. These programs serve a variety of targeted populations, such as people with intellectual or developmental disabilities, physical disabilities, and/or mental illnesses. While HCBS programs can address the needs of individuals who need assistance with ADLs (similar to certain eligible veterans in PCAFC), HCBS programs are intended to cover a broader population as they serve Medicaid beneficiaries and target a variety of populations groups, such as people with intellectual or developmental disabilities, physical disabilities, and/or mental illnesses. We note that HCBS eligibility varies by state, as these programs are part of a state's Medicaid program. Additionally, the health care and human services that may be provided to beneficiaries can vary based on each state, and may include such services as skilled nursing care; occupational, speech, and physical therapies; dietary management; caregiver and client training; pharmacy; durable medical equipment; case management; hospice care; adult day care; home-delivered meals; personal care; information and referral services; financial services; and legal services. The services are provided by lead agencies and other service providers and are much broader than those that we are authorized to provide pursuant to 38 U.S.C. 1720G for purposes of PCAFC. Whereas PCAFC provides benefits to the Family Caregiver of the eligible veteran (in support of the wellbeing of the eligible veteran), HCBS provides health care and human services directly to the Medicaid beneficiary (who is more similar to the eligible veteran than the Family Caregiver in terms of their needs). As explained previously, we consider HCBS to be more like other programs we offer such as H/HHA and VD–HCBS than with PCAFC. Thus, because PCAFC and HCBS are distinct programs with different requirements and services, we make no changes based on this comment.

This commenter also referenced CMS's Self-Directed Personal Assistance Services program, which falls under the larger umbrella of CMS's HCBS program. We note that this is a self-directed Medicaid services program that permits participants, or their representatives if applicable, to have decision-making authority over certain services and take direct responsibility to manage their services with the assistance of a system of available supports, instead of relying on state agencies to provide these services. Services covered include those personal care and related services provided under the state's Medicaid plan and/or related waivers a state already has in place, and participants are afforded the decision-making authority to recruit, hire, train and supervise the individuals who furnish their services. As is the case with the overall HCBS program, eligibility and the services covered under the Self-Directed Personal Assistance Services program vary by state. We note that the Self-Directed Personal Assistance Services program operates similarly to VD–HCBS, in providing individuals with more autonomy over community-based services they receive. Because PCAFC and Self-Directed Personal Assistance Services are distinct programs with different requirements and services, we make no changes based on this comment.

Because this commenter provided no additional context or arguments related to this specific comment, which is otherwise unclear, we are unable to further respond. We are not making any changes based on this comment.

Negative Impact on Post-9/11 Veterans

Many commenters supported expansion of PCAFC to include veterans of all eras of military service, and ensuring that those with the greatest need are eligible for PCAFC, regardless of era served. We thank them for their comments. On the other hand, several commenters opposed the proposed eligibility criteria because they believe it focuses on pre-9/11 and geriatric veterans at the expense of post-9/11 and younger veterans. Commenters stated that this is unfair, punitive, and inconsistent with Congressional intent, and would result in current participants being ineligible for PCAFC. Some commenters specifically asserted that the VA MISSION Act of 2018 only

expanded PCAFC eligibility, and that making changes that restrict eligibility are not in line with Congress's intent in enacting the VA MISSION Act of 2018. One of the commenters also noted that the proposed changes to the regulations have affected their own health. One commenter opposed the new criteria and asserted that it would result in current participants who receive stipends at tier one no longer being eligible for PCAFC, which they allege was VA's intention. This commenter asserts that because Congress did not provide the necessary funds for expansion, VA found it necessary to revise the eligibility criteria, and this commenter requests VA be transparent about that rationale. Relatedly, one commenter requested additional funding be provided to support expansion of the program.

We acknowledge the commenters' concerns and thank veterans and caregivers for sharing their personal stories and experiences with PCAFC. We also note that commenters raised concerns about their mental health. We encourage such veterans and caregivers to seek assistance through their health care provider. If you are a veteran in crisis or you are concerned about one, free and confidential support is available 24/7 by calling the Veterans Crisis Line at 1–800–273–8255 and Press 1 or by sending a text message to 838255.

As indicated in the proposed rule, VA recognizes that improvements to PCAFC are needed to improve consistency and transparency in decision making. We note that many of the changes we proposed were made in response to complaints that VA has received about the administration of the program and these changes are designed to ensure improvement in the program for all eligible veterans—to include current and future participants, from all eras of service. Further, we are standardizing PCAFC to focus on veterans and servicemembers with moderate and severe needs while at the same time revising the eligibility criteria to encompass the care needs for veterans and servicemembers of all eras rather than only post-9/11 veterans and servicemembers.

We note that we are not expanding PCAFC to pre-9/11 veterans at the expense of post-9/11 veterans and servicemembers; rather, the changes to PCAFC's eligibility criteria are intended to ensure that PCAFC is inclusive of veterans and servicemembers of all eras, consistent with the VA MISSION Act of 2018.

Additionally, we disagree with the assertion that Congress did not provide the necessary funds for expansion. The 2020 President's Budget included estimated funding to meet the caregiver population expansion from the MISSION Act. The Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94) included sufficient funding to meet the Caregiver Program cost estimates. The 2021 President's Budget included a funding request for the Caregiver Program based on the same updated projection model as used to formulate the regulatory impact analysis budget impact for this rulemaking. Future President's Budget requests will incorporate new data and updated cost projections as they become available. For a detailed analysis of the costs of this program, please refer to the regulatory impact analysis accompanying this rulemaking.

We are not making any changes based on these comments.

One commenter suggested that if budgetary concerns are the basis for the changes in eligibility requirements, then VA should start by excluding those veterans who can work and still get VA benefits, salary, and caregiver benefits. As stated above, budgetary concerns did not form the basis for changing the eligibility criteria; rather, VA's proposed changes recognized and addressed opportunities for improvement and the need to make PCAFC more inclusive to veterans and servicemembers of all eras. Further, we note that the authorizing statute does not condition eligibility for PCAFC on whether a veteran or servicemember cannot work or is not in receipt of other VA benefits; instead, it is based on specific criteria such as whether the veteran or servicemember has a serious injury and is in need of personal care services. Thus, we do not believe that it is reasonable to regulate PCAFC eligibility based on employment status, individual financial situations, or eligibility for other programs; but rather PCAFC eligibility focuses on the need for personal care services, among other factors, consistent with 38 U.S.C. 1720G.

To the extent this commenter believes that veterans who can work should not be eligible for PCAFC, we refer the commenter to the section on the definition of ''in need of personal care services'' in which we discuss employment of eligibility veterans and Family Caregivers.

We also do not believe PCAFC eligibility should be conditioned on whether a veteran or servicemember is not in receipt of other VA benefits as eligibility for PCAFC is, in part, conditioned upon the veteran or servicemember having a serious injury, which we define in this rulemaking as a single or combined service-connected disability rating of 70 percent or more. This level of service-connected disability means that a veteran is in receipt of VA disability compensation. Thus, we do not find it appropriate to exclude those in receipt of other VA benefits since that would exclude the population of eligible veterans on which we are focusing PCAFC. We are not making any changes based on this comment.

Another commenter requested VA elaborate on the number of post-9/11 veterans who will still be eligible for PCAFC under the new requirements. We note that the regulatory impact analysis for the final rule includes information on current participants who may no longer be eligible for PCAFC, based on specific assumptions we have made. We make no changes based on this comment.

Physical Disabilities Versus Mental Health and Cognitive Disabilities

Multiple commenters expressed concern that the eligibility requirements focus more on physical disabilities rather than mental health and cognitive disabilities, and requested the eligibility criteria account for non-physical disabilities (including mental, emotional, and cognitive disabilities), such as TBI, PTSD, and other mental health conditions, as the commenters asserted that veterans with these conditions often need as much, if not more, caregiver assistance as those with physical disabilities. Other commenters opposed removal of the phrase ''including traumatic brain injury, psychological trauma, or other mental disorder'' from current § 71.20 because they believe doing so would be contrary to the authorizing statute and Congressional intent. One commenter raised concerns that veterans may not be eligible for PCAFC despite being 100 percent disabled for conditions such as PTSD, particularly as ADLs do not take into account flash backs, dissociation, panic attacks, or other PTSD-related issues. One commenter opined that veterans with mental health conditions should not have to show they are physically unable to do something particularly if they do not mentally know how to do so. However, one commenter noted that if VA wants to elaborate on the specific injuries that would qualify for PCAFC, that would be appropriate.

We are not seeking to restrict PCAFC to veterans and servicemembers with only physical disabilities. Section 1720G(a)(2)(B) of title 38, U.S.C. is clear that the term ''serious injury'' includes TBI, psychological trauma, and other

mental disorders for purposes of PCAFC. Consistent with the statutory authority, the current and new PCAFC regulations are inclusive of the caregiving needs of veterans with cognitive, neurological and mental health disabilities, including those who suffer from PTSD and TBI. While we are removing the phrase ''including traumatic brain injury, psychological trauma, or other mental disorder'' from § 71.20, we are doing so because such conditions would be captured by our proposed definition of serious injury (*i.e.,* requiring a single or combined percent service-connected disability rating of 70 percent or more). Under the new regulations, we will still consider cognitive, neurological, and mental health disabilities as part of the definition of serious injury, and veterans who have such disabilities will still be eligible to apply for PCAFC. We further note that mental health care is among VA's top priorities in providing health care to veterans.

Additionally, VA's regulations, as revised through this rule, make clear that a veteran or servicemember can be deemed to be in need of personal care services based on either: (1) An inability to perform an ADL, or (2) a need for supervision, protection, or instruction. The term ''need for supervision, protection, or instruction'' means the individual has a functional impairment that impacts the individual's ability to maintain his or her personal safety on a daily basis. This term ''would represent and combine two of the statutory bases upon which a veteran or servicemember can be deemed in need of personal care services—'a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury,' and 'a need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired.' See 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii), as amended by Public Law 115–182, section 161(a)(2).'' 85 FR 13363 (March 6, 2020). We believe these two bases of eligibility are inclusive of the personal care service needs of veterans and servicemembers with a cognitive, neurological, or mental health impairment, to include TBI or PTSD. Furthermore, we do not believe elaborating or listing specific injuries that would qualify a veteran or servicemember for PCAFC would serve to broaden the bases upon which an individual may meet criteria for PCAFC, as doing so could suggest that PCAFC is limited to only those listed conditions. In defining ''need for supervision, protection, or instruction,'' it was VA's intent to broaden the current criteria so as not to limit eligibility to veterans and servicemembers with a predetermined list of impairments. Id. Instead of focusing on specific injuries, symptoms, or diagnoses, this term allows us to consider all functional impairments that may impact the veteran's or servicemember's ability to maintain his or her personal safety on a daily basis, among other applicable eligibility criteria. We are not making any changes based on these comments.

One commenter viewed the program as intended for older veterans, and felt that because the commenter is younger, he or she is viewed as being able to do things themselves when that is not the case. The commenter questioned how a veteran can have a 100 percent service-connected disability rating, but ''barely qualify'' for PCAFC. This commenter suggested the eligibility determinations should consider a list of diagnoses, including those listed in the DSM–5, instead of blanket questions that do not apply to each diagnosis. As previously discussed, we are standardizing the program to focus on veterans and servicemembers with moderate and severe needs based on their need for personal care services, not on their specific diagnoses. Further, as explained in the preceding paragraph, the definition need for supervision, protection, or instruction, allows VA to focus on the veteran's level of impairment and functional status as opposed to specific injuries, symptoms, or diagnoses, which could be too restrictive and limiting, and fail to focus on the specific needs of the eligible veteran. For example, two veterans have similar service-connected disability ratings for PTSD. One veteran has been engaged in treatment, has progressed in his or her level of independence such that he or she no longer requires a Family Caregiver, and thus is not in need of personal care services at this time. The other veteran has recently been diagnosed with PTSD, with symptoms that negatively impact his or her cognitive function such that personal care services are needed to maintain his or her safety on a daily basis. In this example, two veterans have similar service-connected disability ratings and diagnoses; however, they have vastly different levels of independence and needs for personal care services. Thus, we do not believe considering a list of specific diagnoses that would qualify a veteran or servicemember for PCAFC would be appropriate, as it would not account for the eligible veteran's need for personal care services. We make no changes based on this comment.

One commenter noted that PTSD is often accompanied by other health conditions that can exacerbate the underlying health condition (for example, PTSD with blindness, hearing problems, and diabetes), and suggested that we ''raise the percentage for additional handicaps compounded by PTSD.'' To the extent that this commenter is stating that veterans and servicemembers may have comorbid conditions that exacerbate one another and that such individuals may be in need of a caregiver, we agree. We encourage these individuals and their caregivers to contact their local VA treatment team and/or the local CSC to learn more about supports and services available to provide assistance, including PCAFC. If this commenter is requesting an increase to VA disability ratings for purposes of other VA benefit programs, such comment is outside the scope of this rulemaking. We make no changes based on this comment.

One commenter noted that VA should have better training and tools to assess dementia. To the extent the commenter believes VA should provide better training and tools to VA providers who assess dementia in general, unrelated to PCAFC, we believe this comment is beyond the scope of this rulemaking. To the extent the commenter believes such training and tools are necessary for purposes of determining PCAFC eligibility, we note that the PCAFC eligibility criteria do not focus on veterans' or servicemembers' specific diagnoses, but we believe an individual with dementia could qualify for PCAFC if the individual is determined to be in need of personal care services based on a need for supervision, protection, or instruction, for example, among other applicable eligibility criteria. Additionally, as we explain throughout this discussion, eligibility determinations for PCAFC will be based upon evaluations of both the veteran and caregiver applicant(s) conducted by clinical staff at the local VA medical center based upon input from the primary care team to the maximum extent practicable. These evaluations include assessments of the veteran's functional status and the caregiver's ability to perform personal care services. Additional specialty assessments may also be included based on the individual needs of the veteran or servicemember. When all evaluations are completed, the CEAT will review the evaluations and pertinent medical records, in order to render a determination. We note that we will provide in depth training and education

to clinical staff at local VA medical centers and CEATs to perform PCAFC assessments and evaluations, and eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC, respectively.

We make no changes based on this comment.

Removal of Current § 71.20(c)(4)

Several commenters expressed concern over the removal of current § 71.20(c)(4) (*i.e.,* a veteran rated 100 percent disabled for a serious injury and awarded SMC that includes an aid and attendance (A&A) allowance) as an eligibility criterion. Specifically, commenters were concerned that these veterans would be wrongly removed from PCAFC by CSP staff at medical centers or at the VISNs, and one commenter questioned why VA would not keep this as a criterion that meets eligibility and asserted that it serves as a safety net for those at most risk. Also, commenters asserted that an A&A allowance is paid to the veteran while the monthly stipend is paid to the caregiver so it would not be a duplication of benefits. Additionally, commenters incorrectly asserted that this criterion is a statutory requirement.

We agree that an A&A allowance and the monthly stipend rate would not be a duplication of benefits; however, to ensure that PCAFC is implemented in a standardized and uniform manner across VHA, we believe each veteran or servicemember must be evaluated based on whether he or she has an inability to perform an ADL or a need for supervision, protection, or instruction pursuant to § 71.20(a)(3)(i) and (ii). As discussed above regarding the definition for an inability to perform an ADL, VA will utilize standardized assessments to evaluate both the veteran or servicemember and his or her identified caregiver when determining eligibility for PCAFC. It is our goal to provide a program that has clear and transparent eligibility criteria that is applied to each and every applicant, and not all veterans and servicemembers applying for or participating in PCAFC will have been evaluated by VA for the ratings described in current § 71.20(c)(4). Thus, while we believe any veteran or servicemember who would qualify for PCAFC based on current § 71.20(c)(4) would likely be eligible under the other criteria in § 71.20(a)(3)(i) and (ii) (see 85 FR 13372 (March 6, 2020)), VA will still require a reassessment pursuant to § 71.30 to determine continued eligibility under § 71.20(a).-Also, as explained above regarding legacy participants and legacy applicants, VA will provide a transition period for those who do not meet the new eligibility criteria under § 71.20(a). Additionally, we are standardizing eligibility determinations and appeals to include the use of a CEAT to reduce the possibility of errors in PCAFC eligibility determinations, revocations, and discharges.

Finally, this criterion has never been a requirement under 38 U.S.C. 1720G, rather it is authorized by 38 U.S.C. 1720G(a)(2)(C)(iv) as a possible basis upon which an individual can be deemed in need of personal care services. As explained above and in VA's proposed rule, the Part 3 regulatory criteria governing award of SMC fail to provide the level of objectivity VA seeks in order to ensure that PCAFC is administered in a fair and consistent manner for all participants, and, we no longer believe this criterion is necessary or appropriate. We are not making any changes based on these comments.

Alternative Eligibility Requirements

One commenter suggested that all veterans have caregivers so all should qualify and be paid based on the percentage of their service-connected disability rating such that a caregiver for a veteran with a 10 percent service-connected rating would receive 10 percent of the monthly stipend rate. VA disability compensation provides monthly benefits to veterans in recognition of the effects of disabilities, disease, or injuries incurred or aggravated during active military service and the eligibility criteria are specific to determining a disability compensation. This is different from a clinical evaluation for determining whether a veteran or servicemember is eligible for PCAFC. PCAFC is a clinical program that requires a veteran or servicemember to have a serious injury and be in need of personal care services based on an inability to perform an ADL or a need for supervision, protection, or instruction. A veteran with a service-connected disability rating may or may not have a serious injury and be in need of personal care services from a caregiver for purposes of PCAFC. While a service-connected disability rating is part of the definition of serious injury, it is not used to determine a veteran's or servicemember's need for personal care services for purposes of PCAFC eligibility. Instead, we assess the clinical needs of the individual to determine whether he or she is in need for personal care services. Service-connected disability ratings are not commensurate with a need for personal care services. For example, a veteran may be 100 percent service-connected for PTSD however through consistent, ongoing treatments, has developed the tools to effectively manage symptoms associated with PTSD to the level of not requiring personal care services from another individual. Furthermore, the stipend rate for Primary Family Caregivers is based upon the amount and degree of personal care services provided. See 38 U.S.C. 1720G(a)(3)(C)(i). Therefore, it would not be appropriate for VA to pay a caregiver using the service-connected disability rating percentage as the percentage of the monthly stipend rate. In addition, we have separately addressed the commenter's recommendation for the stipend amount in the section discussing the monthly stipend rate and 38 CFR 71.40(c)(4). We are not making any changes based on this comment.

One commenter suggested veterans and servicemembers should apply on a case-by-case basis. Every application is reviewed individually; however, we believe standard eligibility criteria are necessary to increase transparency and ensure consistency nationwide. We are not making any changes based on this comment.

Permanent Program

Multiple commenters suggested that this should be a permanent program and requested we add language to the regulation to automatically determine those who are permanently and totally disabled as eligible for PCAFC. One commenter favored a permanent eligibility designation but inquired what that would be, while several others suggested that those with 100 percent permanent and total (P&T) disability ratings should receive automatic and/or permanent eligibility for PCAFC and that PCAFC eligibility should be treated similar to disability compensation ratings in which VA provides payment but otherwise leaves veterans alone, such that they are not further monitored, evaluated, or reassessed. Relatedly, one commenter suggested that those with 100 percent P&T disability rating, in addition to being enrolled in PCAFC for more than five years, should be permanently admitted to PCAFC. A 100 percent P&T disability rating applies to disabilities that are total (*i.e.,* any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation) and permanent (*i.e.,* impairment is reasonably certain to continue throughout the life of the disabled person). See 38 CFR 3.340. However, we reiterate that PCAFC is a

clinical program that requires a veteran or servicemember to have a serious injury incurred or aggravated in the line of duty, and be in need of personal care services based on an inability to perform an ADL or a need for supervision, protection, or instruction, and is designed to support the health and well-being of such veterans, enhance their ability to live safely in a home setting, and support their potential progress in rehabilitation, if such potential exists. See 85 FR 13367 (March 6, 2020). Thus, PCAFC is intended to be a program under which the eligible veteran's eligibility may shift depending on the changing needs of the eligible veteran. We do acknowledge that while some eligible veterans may improve over time, others may not, and PCAFC and other VHA services are available to ensure the needs of those veterans continue to be met. We note that participation in PCAFC may not always be appropriate to meet the needs of a veteran who has a 100 P&T disability rating. We conduct ongoing wellness contacts and reassessments to ensure the needs of the eligible veteran and Family Caregiver are met over time, and other care needs may be addressed through referrals to other VA and non-VA services, as appropriate. For example, over time, personal care services from a Family Caregiver at home may not be appropriate because nursing home care or other institutional placement may be more appropriate. Furthermore, it is also important to note that 38 U.S.C. 1720G(c)(2)(B) clearly articulates that the assistance or support provided under PCAFC and PGCSS do not create any entitlements. We are not making any changes based on these comments.

Another commenter supported having a permanent designation for PCAFC as caregivers often give up their careers to care for a veteran. As explained above, PCAFC is a clinical program that requires a veteran or servicemember to be in need of personal care services based on an inability to perform an ADL or a need for supervision, protection, or instruction. Furthermore, the monthly stipend payment provided under PCAFC is meant to be an acknowledgement of the sacrifices that Primary Family Caregivers make to care for eligible veterans. 76 FR 26155 (May 5, 2011). Thus, PCAFC is not intended to replace or supplement a caregiver's loss of income by giving up their careers. While we understand that some veterans and servicemembers may remain in PCAFC indefinitely, eligibility for PCAFC is based on the level of personal care needs of the eligible veteran, among other criteria, and not based on whether a caregiver has given up their career to care for the eligible veteran. We are not making any changes based on this comment.

Paying People To Not Get Better

Commenters raised concerns that PCAFC incentivizes veterans to not ''get better'' and remain sick and debilitated, when it should focus instead on improving health. Commenters were concerned that PCAFC benefits, such as the stipend, are too generous, cause dependency and discourage participants from working or contributing to society, resulting in depression and low self-esteem. We note that PCAFC is a clinical program and as such, the safety, health and wellbeing of those served by the program is a core objective. The potential for rehabilitation or increased independency occurs on a spectrum. While some eligible veterans have the ability to rehabilitate or gain independence from his or her caregiver, which we do support if there is such potential, we recognize that some eligible veterans may remain eligible for PCAFC on a long-term basis. This is particularly true as we expand to veterans and servicemembers of earlier eras. Thus, while we understand the commenters' concerns, we must be cognizant of the reality that not all eligible veterans will improve to the point of no longer being in need of personal care services. We note that our definition of in the best interest requires a consideration of whether participation in the program supports the veteran's or servicemember's potential progress in rehabilitation or potential independence, if such potential exists. Therefore, we will continue to evaluate whether PCAFC is in the best interest of eligible veterans and support those who have the potential for improvement, when such potential exists. Further, eligible veterans and Family Caregivers participating in PCAFC will engage in wellness contacts, which focus on supporting the health and wellbeing of both the eligible veteran and his or her Family Caregivers. During wellness contacts, VA clinical staff will engage with eligible veterans and their Family Caregivers to identify any current needs. For example, during a wellness contact, a clinician may recognize an eligible veteran struggling with depression or low self-esteem and intervene accordingly. Such intervention may include referrals to support groups or other services to address the specific needs of the eligible veteran. We also note that PCAFC is just one way VA supports eligible veterans and Family Caregivers and that PCAFC is not meant to replace an eligible veteran's ongoing engagement with his or her treatment team. We are not making any changes based on these comments.

PCAFC Should Operate Similar to Welfare Type Programs

One commenter suggested that PCAFC operate similar to welfare type programs, in which individuals are required to apply every time they have a need and have a responsibility to check-in with the agency. As indicated in the proposed rule, we will require both the eligible veteran and Family Caregiver(s) to participate in periodic reassessments for continued eligibility as well as to participate in wellness contacts, which focus on supporting the health and wellbeing of eligible veterans and his or her Family Caregivers. We note that failure to participate in either may lead to revocation from the program under § 71.45 Revocation and Discharge of Family Caregivers. We believe these requirements are sufficient to ensure continued eligibility and maintain open communication with VA. We are not making any changes based on this comment.

Technical Question

One commenter was confused about our reference to proposed § 71.20(a)(4) when explaining in the best interest under current § 71.20(d), and asserted that there is no § 71.20(a)(3) which would make (a)(4) impossible. As indicated in the proposed rule, we are restructuring current § 71.20 to accommodate temporary eligibility for legacy participants (§ 71.20(b)) and legacy applicants (§ 71.20(c)). As such, the current eligibility criteria under current § 71.20 have been revised and redesignated under § 71.20(a). Thus, current § 71.20(a) has been redesignated as § 71.20(a)(1); current § 71.20(b) has been revised and redesignated as § 71.20(a)(2); § 71.20(c) has been revised and redesignated as § 71.20(a)(3); and current § 71.20(d) has been revised as redesignated as § 71.20(a)(4). We make no changes based on this comment.

§ 71.25 Approval and Designation of Primary and Secondary Family Caregivers

Several commenters questioned how VA will conduct eligibility assessments, including who will conduct these assessments and requested additional information. Specifically, commenters asserted VA needs to identify who will conduct eligibility assessments and have limitations on who this may be. One commenter questioned how VA will ensure standardization for eligibility assessments and

reassessments. One commenter opined that VA has no consistent protocols for evaluating PCAFC applicants. Another commenter asked how VA will hold employees accountable for errors and asserted the need for independent reviews. We address these comments below.

Eligibility determinations for PCAFC will be based upon evaluations of both the veteran and caregiver applicant(s) conducted by clinical staff at the local VA medical center. These evaluations include assessments of the veteran's or servicemember's functional status and the caregiver's ability to perform personal care services. Additional specialty assessments may also be included based on the individual needs of the veteran or servicemember. When all evaluations are completed, the CEAT will review the evaluations and pertinent medical records, in order to render a determination on eligibility for PCAFC, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC.

The CEATs are comprised of a standardized group of inter-professional, licensed practitioners with specific expertise and training in the eligibility requirements for PCAFC. Furthermore, we will provide in depth training and education to clinical staff at local VA medical centers and CEATs, and conduct vigorous oversight to ensure consistency across VA in implementing this regulation including conducting regular audits of eligibility determinations. We make no changes based on these comments.

One commenter incorrectly asserted that neither the Caregivers Act nor VA's current regulations impose a time limit for completion by the Family Caregiver of such instruction, preparation, and training. Current § 71.40(d) provides a 45-day timeline to ''complete all necessary education, instruction, and training so that VA can complete the designation process no later than 45 days after the date that the joint application was submitted.'' Furthermore, VA may provide an extension for up to 90 days after the date the joint application was submitted. Additionally, current § 71.25(a)(3) permits an application to be put on hold for no more than 90 days, from the date the application was received, for a veteran or servicemember seeking to qualify through a GAF test score of 30 or less but who does not have a continuous GAF score available. As indicated in the proposed rule, we are proposing to eliminate use of the GAF score as a basis for eligibility under current § 71.20(c)(3). Therefore, we remove the language in current § 71.25(a)(3) referencing that an application may be put on hold for no more than 90 days. Additionally, while we already have the authority in § 71.40(d)(1) to extend the designation timeline for up to 90 days, we remove the 45-day designation timeline in current paragraph (d)(1) and add the 90-day designation timeline in § 71.25(a)(2)(ii), as we proposed and now make final. We are not making any changes based on this comment.

Several commenters took issue with the use of the word ''may'' in proposed § 71.25(a)(2)(ii). Specifically, one commenter stated it is clearly arbitrary to allow VA to reserve the right to deny an application even where the failure to meet the 90-day timeline is due to VA's own fault. Another commenter asserted it contradicts the preamble which states VA would not penalize an applicant if he or she cannot meet the 90-day timeline as a result of VA's delay in completing eligibility evaluations. While we would not penalize an applicant if he or she cannot meet the 90-day timeline as a result of VA's delay in completing eligibility evaluations, providing necessary education and training, or conducting the initial home-care assessment, we believe it is prudent to make this determination on a case-by-case basis. For example, we do not believe an applicant who is non-responsive to repeated attempts to conduct an initial in-home assessment through day 89 and then responds to VA on day 90 that he or she is available should receive an extension. However, an applicant who is responsive and agrees to an initial in-home assessment but VA cancels or reschedules the initial in-home assessment beyond the 90-day timeline, would receive an extension. We are not making any changes based on these comments.

One commenter expressed disappointment by the lack of description on the process by which current participants will be evaluated. We direct the commenter to our previous description of the eligibility process in this section. As indicated in the proposed rule, legacy participants and legacy applicants will be reassessed under § 71.30(e) for continued eligibility under § 71.20(a) within the one-year period beginning on the effective date of this rule. Further, § 71.40(c) provides a transition plan for Primary Family Caregivers who may experience a reduction in the monthly stipend or discharge from PCAFC as a result of the eligibility criteria in § 71.20(a). We make no changes based on this comment.

One commenter applauded VA for including assessment of the caregiver's wellbeing and we appreciate the comment. Another commenter questioned how VA will determine the competence of a caregiver to provide personal care services. The same commenter questioned whether VA will assess competence by demonstration and whether it will be a verbal or physical demonstration of the required personal care services. The determination that a caregiver is competent to provide personal care services is a clinical judgement which may include verbal or physical demonstration as necessary based on the individual circumstances of the veteran or servicemember and his or her caregiver. We make no changes based on this comment.

One commenter suggested we revise the regulation text to allow VA the flexibility to sub-contract a provider or providers to complete the initial home-care assessment to ensure that the 90-day period for application review is met by stating, ''VA, or designee, will visit the eligible veteran's home . . .'' in § 71.25(e). The same commenter further noted that the designee language can also be added to the reassessments and the wellness contacts sections. As previously discussed, VA does not believe the use of contracted services would provide standardized care for participants and would hinder VA's ability to provide appropriate oversight and monitoring. We make no changes based on this comment.

One commenter disagreed with the language ''the Family Caregiver(s) providing the personal care services required by the eligible veteran'' in § 71.25(f). Specifically, this commenter noted that insufficient justification was provided for this requirement, and it would be impossible based on the ''continuous'' requirement in the definition of unable to self-sustain in the community. This commenter asserted that there are numerous situations where excellent care is provided to the veteran where the designated ''caregiver'' acts like a caregiving manager by monitoring the quality of the care given by third parties with whom the designated caregiver may contract and pay for using the stipend provided. The same commenter further opined that nothing in Congressional deliberations and the proposed rule included a discussion of how caregivers who manage and monitor caregiving provided by others have been providing inadequate quality of care. Further, the same commenter stated that VA has been unable to provide a response to this issue during various meetings and follow-up requests

for information. We respond to this comment below.

As indicated in the proposed rule, part of the eligibility requirements for veterans and servicemembers is that they are in need of personal care services; thus, we believe it is reasonable to require that a Family Caregiver actually provides personal care services to an eligible veteran. 85 FR 13378 (March 6, 2020). Further, current § 71.20(e), which we are redesignating as § 71.20(a)(5), requires that personal care services that would be provided by the Family Caregiver will not be simultaneously and regularly provided by or through another individual or entity. This requirement is to ensure that the designation of a Primary Family Caregiver is authorized for those who do not simultaneously and regularly use other means to obtain personal care services. 76 FR 26151 (May 5, 2011). Additionally, 38 U.S.C. 1720G(a)(3)(A)(ii) specifically uses the phrase ''the primary provider of personal care services for an eligible veteran . . .'' Further, it is our intent to ensure that a Family Caregiver is not dependent on VA or another agency to provide personal care services that the Family Caregiver is expected to provide. 76 FR 26151 (May 5, 2011). If there is a desire by a veteran or servicemember and his or her caregiver to manage personal care services provided through other services, such as H/HHA, then we will refer applicants to other VA or non-VA services available to them. We make no changes based on this comment.

One commenter stated that it makes sense to require that the Primary Caregiver provide the personal care services to the veteran, but was concerned about the inclusion of the language that the Family Caregiver only be absent for ''brief'' periods of time. This commenter requested VA remove language that the Family Caregiver only be absent for ''brief'' periods of time or clearly define ''continuous'' and ''brief absences'' to ensure caregivers are not penalized for seeking employment or respite care. This commenter asserted that caregiving takes a significant toll on caregivers. Commenters also expressed concerns about whether VA expects the caregiver to always be present, including those who work. We clarify that it is not our intent to prevent caregivers from working as we are cognizant that the monthly stipend is an acknowledgement of the sacrifices made by caregivers but may fall short of the income a caregiver could receive if they were employed. The situation for each veteran or servicemember and his or caregiver is unique, and we understand that caregivers may not be present all of the time as long as they are available to provide the required personal care services. Furthermore, respite care is a benefit provided to Family Caregivers; thus, we would not penalize a Family Caregiver for the use of respite care. To the extent this commenter had concerns about the use of ''continuous'' in the definition of ''unable to self-sustain in the community,'' we further refer the commenter to the related discussions in the section on the definitions of ''need for supervision, protection, or instruction,'' and ''unable to self-sustain in the community.'' We are not making any changes based on these comments.

We received several comments that the proposed rule did not provide enough information to provide informed comments on the eligibility determination process and the initial assessment, and the lack of this information has forced commenters to accept a fundamentally flawed regulation because of the inability of VA to meet the legislative deadlines for PCAFC expansion. One commenter specifically stated that after the proposed rule was published, they requested additional information from VA about how the proposed eligibility evaluation/reassessment process will work, including any assessment instruments that VA staff will use. The same commenter stated that because VA did not adequately explain how the process will work, they still had questions and concerns about it and believe that VA should publish a supplemental notice of proposed rulemaking (NPRM) or an interim final rule (IFR) with this process explained to provide an opportunity for public comment. Additionally, commenters expressed concern that PCAFC has been marked by deep systemic structural defects which can only be resolved by placing these procedures into regulation as opposed to policy. We believe we provided sufficient information within the proposed rule and disagree with the assertion that VA should publish a supplemental NPRM or an IFR. Additionally, VA has the ability to determine certain aspects of PCAFC through policy and we believe it is necessary to have the flexibility to modify processes to address the changing needs of the program, which we are able to do more quickly through policy change than through rulemaking. We are not making any changes based on these comments.

Several commenters asserted that a Family Caregiver should live with the eligible veteran regardless of whether they are a family member. We appreciate the commenters' concerns; however, the restrictions that a Family Caregiver be a member of the eligible veteran's family (*i.e.,* spouse, son, daughter, parent, step-family member, or extended family member), or if not a family member, live with the eligible veteran, or will do so if designated as a Family Caregiver, are set forth in 38 U.S.C. 1720G(d)(3). We make no changes based on these comments.

One commenter expressed concern that there are no rules regarding how many veterans a caregiver can care for and that seems to be more of a business model versus a family caregiving model as the caregiver will be at high risk for burn out. The commenter is correct that we do not have restrictions in place for how many eligible veterans a Family Caregiver may be assigned to as the individual circumstances for each eligible veteran and his or her Family Caregiver are unique. However, we believe that the criteria in part 71 to include a determination of in the best interest, wellness contacts, and revocation based on a Family Caregiver's neglect, abuse, or exploitation of the eligible veteran, establish safeguards to protect both the eligible veteran and his or her Family Caregiver in circumstances where the Family Caregiver provides personal care services to more than one eligible veteran. We make no changes based on this comment.

One commenter emphasized the need for continued training for Family Caregivers, beyond the initial eligibility requirements. Another commenter asserted VA should partner with the National Alliance for Mental Illness (NAMI) to provide mandatory training to an eligible veteran's care team and Family Caregiver. Although we do not have an explicit requirement for continued education, we do provide continuing instruction, preparation, training and technical support to caregivers; this includes training outside of the core curriculum. Also, we are establishing an explicit requirement for both the eligible veteran and his or her Family Caregiver to participate in reassessments and wellness contacts, pursuant to § 71.30 and § 71.40(b)(2) respectively. Additionally, these reassessments and wellness contacts will allow VA to assess whether a Family Caregiver requires any additional training to provide the personal care services required by the eligible veteran. We appreciate the suggestion to partner with NAMI and will consider it. We make no changes based on these comments.

Multiple commenters expressed concern over the vetting process for Family Caregivers and one suggested that VA verify the identity of a Family

Caregiver and conduct background checks (*e.g.,* criminal, financial, legal). As part of VA Form 10–10CG, Application for the Program of Comprehensive Assistance, veterans and Family Caregivers are required to provide identifying information including name, and date of birth. Further, applicants are required to certify the information provided is true and sign the form. While we do not require a Social Security Number (SSN) or Tax Identification Number (TIN) for the application, an SSN or TIN is required in order for a stipend payment to be issued. These commenters were also concerned about the potential for abuse of the eligible veteran and asserted VA should do its due diligence prior to providing a stipend to Family Caregivers. We believe a veteran or their surrogate has the right to designate a caregiver of their choosing and that as long as we do not determine there is neglect, abuse, or exploitation of the eligible veteran, we will approve the caregiver the eligible veteran designates, if all other eligibility requirements are met. As part of PCAFC, we have mechanisms in place, and regulated in part 71, to ensure that there is no fraud, neglect, abuse, or exploitation. For example, when determining eligibility for PCAFC, a determination of no abuse or neglect is part of the clinical evaluation. Additionally, pursuant to § 71.45, we can revoke or discharge an eligible veteran or Family Caregiver in instances of fraud, or neglect, abuse, or exploitation. We note that background checks are typically conducted for purposes of determining suitability for employment and we note that participation in PCAFC is specifically not considered an employment relationship. We make no changes based on these comments.

§ 71.30 Reassessment of Eligible Veterans and Family Caregivers

Several commenters expressed general disagreement with VA's proposal to conduct reassessments and asserted that once a veteran or servicemember is admitted into the program, it should be permanent with no annual reassessments. Specifically, one commenter asserted VA is making the false comparison to the most severely and catastrophically disabled veterans, to whom the commenter asserts we believes this permanent designation should apply, and the entire population of veterans. Another commenter asserted that they do not accept the Department's contention that ''we do not believe that Congress intended for PCAFC participants' eligibility to never be reassessed after the initial assessment determination, particularly as an eligible veteran's and Family Caregiver's continued eligibility for the program can evolve.'' The same commenter asserted the closest the law comes to identifying any such requirement is 38 U.S.C. 1720G(a)(9) which only says ''The Secretary shall monitor the well-being of each eligible veteran . . .'' and ''Visiting an eligible veteran in the eligible veteran's home to review directly the quality of personal care services provided . . .'' The same commenter further stated that nowhere does it say there has to be any type of reevaluation or review, let alone of any particular periodicity. We address these comments below.

PCAFC is a clinical program, and similar to any other clinical program, a reassessment is appropriate to assess both the condition and needs of the eligible veteran and the Family Caregiver. This is particularly true given the unique circumstances for each eligible veteran and his or her Family Caregiver as we expand to include veterans and servicemembers from all eras. For example, an eligible veteran may be admitted into PCAFC at the lower-level stipend (*i.e.,* 62.5 percent of the monthly stipend rate) and eventually be determined to be unable to self-sustain in the community and thus his or her Primary Family Caregiver would be eligible to receive the higher-level stipend (*i.e.,* 100 percent of the monthly stipend rate). Also, an eligible veteran's condition may deteriorate to the point where it is no longer safe to maintain the eligible veteran in the home because he or she requires hospitalization or a higher level of care. Additionally, the condition of an eligible veteran who is initially determined to be unable to self-sustain in the community may improve to the point where he or she no longer meets this definition but is still in need of personal care services and thus his or her Primary Family Caregiver would receive a lower-level stipend (*i.e.,* 62.5 percent of the monthly stipend rate). Furthermore, an eligible veteran's condition may improve such that he or she is no longer in need of personal care services and thus his or her Family Caregiver would be discharged from the program. Although we agree that some eligible veterans may not have the opportunity for improvement due to the nature of their condition/disease progression, we do not agree that VA has no obligation to continue to reassess the eligible veteran and Family Caregiver ''as eligible veterans' needs for personal care services may change over time as may the needs and capabilities of the designated Family Caregiver(s).'' 85 FR 13378 (March 6, 2020). Additionally, 38 U.S.C. 1720G(c)(2)(A) clearly articulates that the assistance or support provided under PCAFC and PGCSS do not create any entitlements; thus, VA may conduct reassessments for PCAFC to determine continued eligibility under § 71.20(a). Further, we believe the VA MISSION Act of 2018 clearly articulated Congress's intent to ensure continued engagement between VA and PCAFC participants by requiring VA to ''periodically evaluate the needs of the eligible veteran and the skills of the [F]amily [C]aregiver of such veteran to determine if additional instruction, preparation, training, or technical support . . . is necessary.'' 38 U.S.C. 1720G(a)(3)(D), as amended by Public Law 115–182, section 161(a)(5). For these reasons, we believe VA has the statutory authority to require reassessments for all PCAFC participants regardless of the condition of the eligible veteran. We are not making any changes based on these comments.

Several commenters stated that a yearly reassessment would be too burdensome, specifically for veterans or servicemembers who have a 100 percent P&T disability rating, and one commenter stated it would be insulting to require periodic assessments, even if annually. Another commenter stated that it would not be a good use of taxpayer resources or the precious time of caregivers and veterans to require those with certain conditions (*e.g.,* ALS, MS) to be reassessed annually or even on a less frequent basis and that VA should develop a list of these serious injuries that do not warrant continued reassessment for purposes of eligibility. As explained above, VA believes it is necessary to conduct reassessments for all PCAFC participants regardless of the condition of the eligible veteran, and this same principle applies regardless of whether he or she has a 100 percent P&T disability rating or a specific health condition. However, as indicated in the proposed rule, we recognize that an annual reassessment may not be required for each eligible veteran (*e.g.,* an eligible veteran whose condition is expected to remain unchanged long-term because he or she is bed-bound and ventilator dependent, and requires a Family Caregiver to perform tracheotomy care to ensure uninterrupted ventilator support). Therefore, § 71.30(b) states that reassessments may occur on a less than annual basis if a determination is made by VA that an annual reassessment is unnecessary. We note, that even if VA

is conducting a reassessment less frequently than annually, VA would continue to conduct ongoing wellness contacts pursuant to § 71.40(b)(2). We are not making any changes based on these comments.

One commenter asserted that VA should re-evaluate more often and increase stipends accordingly should the eligible veteran's personal care needs justify such an increase. As indicated in the proposed rule, VA will conduct annual reassessments, however such reassessments may occur more frequently if a determination is made and documented by VA that a more frequent reassessment is appropriate. Examples that may necessitate a more frequent assessment include treatment or clinical intervention that reduces an eligible veteran's level of dependency on his or her Family Caregiver, or instances in which there is a significant increase in the personal care needs of the eligible veteran due to a rapidly deteriorating condition or an intervening medical event, such as a stroke, that results in further clinical impairment. Additionally, VA would continue to conduct ongoing wellness contacts pursuant to § 71.40(b)(2) which may result in a reassessment. We are not making any changes based on these comments.

One commenter questioned why an annual reassessment would ever be found unnecessary when this program was designed to be a rehabilitative program. As previously explained, VA recognizes that not all eligible veterans have the potential for rehabilitation or independence, and this is particularly true as we expand to veterans and servicemembers of all eras. Therefore, we believe it is necessary to allow some flexibility in conducting reassessments to address the individual circumstances for each eligible veteran and his or her Family Caregiver(s). We are not making any changes based on this comment.

Another commenter stated it was not clear how many staff visits will be done and when. As previously explained, VA will conduct annual reassessments that may include a home visit, but reassessments may occur more or less frequently than annually as determined and documented by VA based on the individual circumstances of the eligible veteran and the Family Caregiver(s). We are not making any changes based on this comment.

Several commenters opined about how reassessments will be conducted, including suggestions to include specific guidelines about the process. Specifically, one commenter asserted that there needs to be a quantitative assessment and that decisions not be left to staff's subjective opinions. Another commenter encouraged VA to develop specific guidelines around which veterans would not require an annual reassessment as their status will not change in the future. Also, one commenter suggested VA limit assessments to not more than annually since more frequent assessments would otherwise be left to local providers to determine. While we appreciate and understand the commenter's concerns with regard to establishing objective and specific guidelines, PCAFC is a clinical program and as a result, we will not be able to eliminate all subjectivity. However, we will standardize the process as much as possible to include the use of standardized assessments for both the eligible veteran and the Family Caregiver. Reassessments will be conducted by trained and licensed clinical providers. Additionally, reassessment determinations will be determined by the CEATs, that are specifically trained in the eligibility criteria for PCAFC. As previously explained, VA will conduct annual reassessments, but these reassessments may occur more or less frequently than annually as determined and documented by VA based on the individual circumstances of the eligible veteran and the Family Caregiver(s). VA's determination of the need for reassessment more or less frequently may stem from information gleaned during a routine medical appointment, through a planned or unplanned interaction with a CSC, or even at the request of the eligible veteran or Family Caregiver, if appropriate. As mentioned below, through policy we would require documentation of the clinical factors relied upon in concluding that a less than or more frequent reassessment is needed. As stated above more or less frequent annual reassessments can be conducted due to the changing needs of the eligible veteran in order to provide the necessary support and services. We are not making any changes based on these comments.

We received multiple comments regarding the inclusion of the primary care team during reassessments. Specifically, one commenter stated that collaboration among providers, which include clinical staff conducting home visits, is a desirable characteristic of primary care. Another commenter requested VA preserve the role of the veteran's or servicemember's treating clinician in the eligibility and reassessment process. While we note these comments were primarily focused on the use of primary care teams during the initial eligibility assessment, we believe these comments are equally applicable to a reassessment, the results of which will determine an eligible veteran's continued eligibility for participation in PCAFC and whether an eligible veteran is unable to self-sustain in the community for purposes of the monthly stipend rate under § 71.40(c)(4)(i)(A). Thus, we believe it is necessary to collaborate with the primary care team during reassessments in addition to the initial evaluation of PCAFC applicants to the maximum extent possible. For these reasons, we are revising § 71.30(a) and (e) by replacing the phrase ''the eligible veteran and Family Caregiver will be reassessed by VA'' with ''the eligible veteran and Family Caregiver will be reassessed by VA (in collaboration with the primary care team to the maximum extent practicable)''. We make no other changes based on these comments.

One commenter stated that the lack of specificity in the proposed rule for extending that periodicity is very likely to introduce huge variance into assessment and re-eligibility decisions. Specifically, it could even introduce corruption if caregiver eligibility assessment officials decided they could exact benefits from veterans or caregivers in exchange for longer periods between reassessments. To the extent the commenter is concerned about the determination of how frequently reassessments will occur, we refer to the previous paragraphs that provide examples for when a reassessment may be conducted more or less frequently than on an annual basis. Also, PCAFC will refer all suspected fraudulent or illegal activities, including such situations that may involve VA employees, to VA's OIG and actively participate in VA OIG cases. We are not making any changes based on this comment.

One commenter suggested that VA have a well-defined process to monitor the documented changes by all entities who monitor the eligible veterans' health conditions to warrant a reassessment. VA is responsible for determining and documenting the frequency requirements for assessments that deviate from the annual schedule. Additionally, through policy we would require documentation of the clinical factors relied upon in concluding that a less than or more frequent reassessment is needed. Furthermore, clinical providers are subject to chart and peer reviews to ensure proper documentation in VA's electronic health care record. We are not making any changes based on this comment.

One commenter asked if the caregiver can be with the veteran when they are

reassessed since the caregiver has a better view of what the veteran needs and what the veteran can and cannot do. Relatedly, one commenter asserted that VA should pay attention to feedback from caregivers and their concerns. VA does and will continue to accept and consider feedback from Family Caregivers. Specifically, Family Caregiver(s) are required to participate in reassessments and wellness contacts pursuant to §§ 71.30 and 71.40(b)(2), respectively. VA will also incorporate the Family Caregiver(s) feedback both during the initial assessment and annual reassessment. We are not making any changes based on these comments.

Another commenter asserted that the rule is missing 38 U.S.C. 1720G(a)(3)(C)(iii)(I), *i.e.,* assessment by the Family Caregiver of the needs and limitations of the veteran; and requested that VA should strike down the rule because VA ignored this requirement. First, we note that it is not a legal requirement to explicitly regulate the requirement of section 1720G(a)(3)(C)(iii)(I) in 38 CFR part 71; however, VA does have a legal duty to meet this requirement. Second, as indicated in the proposed rule, a ''reassessment would provide another opportunity for Family Caregivers and eligible veterans to give feedback to VA about the health status and care needs of the eligible veteran. Such information is utilized by VA to provide additional services and support, as needed, as well as to ensure the appropriate stipend level is assigned.'' 85 FR 13379 (March 6, 2020). We also note that we would take the information from the caregiver into account when determining whether a veteran or servicemember is unable to self-sustain in the community (as defined in § 71.15). We are not making any changes based on this comment.

One commenter requested clarification on the impact a reassessment will have on a legacy participant. Specifically, the commenter asked if a legacy participant will no longer be eligible for PCAFC and revoked if a reassessment determines that he or she does not meet the new eligibility requirements under § 71.20(a). As indicated in the proposed rule, all legacy participants and legacy applicants will be reassessed within one year of the effective date of the final rule to determine continued eligibility in PCAFC. Upon the completion of the one-year period, legacy participants and legacy applicants who are no longer eligible pursuant to § 71.20(a) will be provided a discharge notice of not less than 60 days and will receive a 90-day extension of benefits. We are not making any changes based on this comment.

§ 71.35 General Caregivers

One commenter opined that PGCSS is good but should only be contained to veterans enrolled in VA care and not any caregiver that exists because that is what community programs are for. PGCSS is only provided to a general caregiver providing personal care services to a covered veteran (*i.e.,* a veteran who is enrolled in the VA health care system). 38 U.S.C. 1720G(b)(1) and 38 CFR 71.30(b). Additionally, we did not propose any changes to this section other than to redesignate current § 71.30 as new § 71.35. We are not making any changes based on this comment.

Another commenter suggested that VA should not be overly restrictive with the eligibility requirements of PGCSS and provide training and education, selfcare courses, peer support, and the Caregiver Support Line to caregivers of covered veterans. The same commenter also asserted that there is no statutory or regulatory requirement that a general caregiver must provide personal care services in person. Further, the same commenter suggested VA consider allowing an enrolled veteran to participate in PGCSS if he or she is a caregiver to a non-veteran spouse, partner, friend, or relative and that this would increase the veteran's wellbeing and health. We appreciate the commenter's suggestions and note that the definition for personal care services as used by PGCSS does not require a general caregiver to provide in person personal care services. As indicated in the proposed rule, we believe the definition for ''personal care services'' is still appropriate for purposes of 38 U.S.C. 1720G(b) with respect to PGCSS and a new definition of ''in need of personal care services'' has been added to delineate whether such services must be provided in person for purposes of PCAFC.

Additionally, as explained above, PGCSS is only provided to a general caregiver providing personal care services to a covered veteran (*i.e.,* a veteran who is enrolled in the VA health care system). 38 U.S.C. 1720G(b)(1) and 38 CFR 71.30(b). Thus, we do not have the authority to provide PGCSS to veterans providing personal care services to a non-covered veteran. Furthermore, we did not propose any changes to § 71.30 other than to redesignate current § 71.30 as new § 71.35. We are not making any changes based on this comment.

§ 71.40 Caregiver Benefits

Wellness Contacts

One commenter suggested VA include language in the final rule to state that a wellness visit cannot result in reassessment of a veteran, unless it would result in being assigned to a higher tier. It is VA's intent that the purpose of wellness contacts is to review both the eligible veteran's and Family Caregiver's wellbeing, and the adequacy of care and supervision being provided to the eligible veteran by the Family Caregiver. During a wellness contact, the clinical staff member conducting such contact may identify a change in the eligible veteran's condition or other such change in circumstances whereby a need for a reassessment may be deemed necessary and arranged accordingly pursuant to § 71.30. We note that wellness contacts and reassessments are distinct and separate processes. As explained above in the discussion on § 71.30, a reassessment may occur more or less frequently than on an annual basis based on the individual care needs of the eligible veteran. Furthermore, 38 U.S.C. 1720G(c)(2)(A) clearly articulates that the assistance or support provided under PCAFC and PGCSS do not create any entitlements; thus, the monthly stipend rate may be decreased based on a reassessment and the determination of whether an eligible veteran is unable to self-sustain in the community or no longer meets the eligibility requirements under § 71.20(a). Therefore, we disagree with the commenter's suggestion that a wellness visit cannot result in a reassessment, unless it would result in being assigned a higher tier. We make no changes based on this comment.

Several commenters opposed the change from 90 days to 180 days for monitoring (*i.e.,* wellness contacts) and encouraged VA to continue the 90-day requirement to ensure veterans and their caregivers needs are met. Specifically, commenters asserted that maintaining the 90-day monitoring requirement will provide effective oversight to ensure the well-being and safety of the eligible veteran and Family Caregiver, especially those veterans who are most vulnerable and susceptible to abuse. Relatedly, we note that one commenter stated that they do not find the 90-day requirement to be burdensome and do not wish for the visits to change because the commenter relies on the visits for support. The same commenter noted that prior to being part of PCAFC, they struggled with not being able to obtain caregiver support. Commenters also asserted that VA has provided no medically sound justification for this

change, and they believe it is an inadequate time period for monitoring veterans who are seriously ill or injured, especially those who are in the aging population with increased and evolving needs. These commenters note that more frequent wellness checks would ensure PCAFC participants have the support and resources needed to remain safe in their home setting. Commenters further noted that VA should retain the current 90-day monitoring requirements as this would be consistent with acceptable industry standards, including HHS and CMS, whereas the proposed wellness contacts of once every 180 days would not. We address these comments below.

We appreciate the comments received and agree with the commenters that increasing the frequency of these visits from 90 days to 180 days may not provide adequate monitoring of an eligible veteran and his or her caregiver, especially as we expand to an aging population. Therefore, we have revised the regulation to state that wellness contacts ''will occur, in general, at a minimum of once every 120 days,'' as we believe this is reasonable. We note that 120 days establishes a minimum baseline for the frequency of wellness contacts and that these contacts may occur more frequently, if needed, to address the individual needs of the eligible veteran and his or her Family Caregiver. Additionally, we have added the phrase ''in general'' to provide scheduling flexibility for both VA and the eligible veteran and his or her caregiver. As indicated in the proposed rule, eligible veterans and his or her Family Caregiver are required to participate in wellness contacts. Furthermore, we believe a 120-day frequency will accommodate those eligible veterans whose conditions are generally unchanged and would experience a significant disruption in the daily routine when having to make scheduling changes to accommodate a wellness contact. We make no additional changes based on these comments.

Another commenter encouraged VA to require wellness contacts on at least a quarterly basis, to ensure that wellness contacts include a full assessment of a veteran's health needs based on the input of the primary care team providing treatment to the veteran, and adjust the eligible veteran's and caregiver's benefits without having to wait for an annual reassessment if warranted based on the wellness contact. This commenter believes that these changes would be consistent with the overall intent of PCAFC and will better serve the veteran, especially in light of VA OIG's findings that VA has not consistently monitored current veterans in PCAFC. As explained above, the purpose of a wellness contact is to review both the eligible veteran's and Family Caregiver's wellbeing, the adequacy of care and supervision being provided to the eligible veteran by the Family Caregiver, and provide the opportunity to offer additional support, services, or referrals for services needed by the eligible veteran or Family Caregiver. Additionally, as explained above, reassessments may occur on a more or less frequent basis than annually and a wellness contact may result in a reassessment pursuant to § 71.30, as necessary, which would include a determination of whether the eligible veteran is unable to self-sustain in the community for purposes of the monthly stipend rate. We are not making any changes based on this comment.

Commenters also opined that requiring a minimum of one annual in home/in person wellness contact is substandard for purposes of monitoring and evaluating the eligible veteran and Family Caregiver, and suggested VA provide the same level of staff monitoring as would be expected if VA needed to hire a professional home health aide for a veteran. Additional commenters noted that CSP does not know whether and to what extent personal care services are being provided, and thus it is impossible to assess the well-being of the eligible veteran and Family Caregiver without direct observation by a qualified medical professional. Commenters also asserted that VA will be unable to properly monitor veteran's and caregiver's well-being or determine whether personal care services are being provided appropriately if VA is conducting wellness contacts semi-annually via phone. Commenters noted that CMS requires onsite visits, by a registered nurse or other appropriate skilled professional, ranging from 14 days to 60 days in instances when home health aide services are provided to a patient. We appreciate the commenters' concerns; however, we note that the regulation establishes a minimum baseline for how many visits must occur in the eligible veteran's home on an annual basis and that additional or all of the these contacts may occur in the eligible veteran's home, if needed, to address the individual needs of the eligible veterans and his or her Family Caregiver. We are not making any changes based on these comments.

Commenters stated that these wellness contacts would contradict VHA policy for patients residing in a community nursing home, which requires that a registered nurse or social worker from the contracting VA facility conduct follow-up visits on all patients at least every 30 days except in certain situations. As explained above, we are revising the frequency of contacts from 180 days to 120 days. Additionally, 120 days establishes a minimum baseline for the frequency of wellness contacts, and these contacts (including home visits) may occur more frequently, if needed, to address the individual needs of the eligible veteran and his or her Family Caregiver. Furthermore, PCAFC is a distinct program that provides benefits to Family Caregiver(s) for the provision of personal care services to an eligible veteran in his or her home; thus, we do not believe the frequency of wellness contacts must align with VHA policy for patients residing in a community nursing home, with which we contract. We are not making any changes based on this comment.

Commenters identified there has been a lack of monitoring and accountability with the administration of PCAFC, resulting in fraud, waste, and abuse (which has been documented by VA OIG), however, they opined that the wellness contacts will do little to address these issues, as VA has failed to effectively run PCAFC by not establishing a governance system to promote accountability. Some commenters noted that the program has become too large as a result of this lack of accountability, which they believe led to participants being kicked out of PCAFC in 2015. As indicated in the proposed rule, we acknowledge that we have experienced difficulty conducting monitoring due to limited resources. 85 FR 13380 (March 6, 2020). Transitioning the frequency of wellness contacts to generally every 120 days as well as increased staffing for the program is expected to mitigate resource limitations. In addition, we have developed an improved infrastructure at the VISN and medical center level to better oversee the delivery of PCAFC. Further, as explained previously in this rulemaking, we will provide robust training and education to our staff, implement an audit process to review eligibility determinations, and conduct vigorous oversight to ensure consistency across VA in implementing this regulation. We also anticipate that the regulations and additional training will create more consistency and standardization across VA, which believe will reduce any fraud, waste, and abuse within PCAFC. We thank the commenters for their concerns;

however, we make no changes based on these comments.

One commenter implied that the proposed rule stated that OIG found monitoring is resource intensive and burdensome. We correct this commenter's misunderstanding by stating that OIG did not determine that monitoring was resource intensive or burdensome, rather the proposed rule acknowledged that we have failed to meet the 90-day requirement due to limited resources, and we note that some PCAFC participants have informed VA that they find the 90-day requirement to be burdensome. As explained above, we will be conducting wellness contacts every 120 days, which we believe is a reasonable frequency for wellness contacts. We make no changes based on this comment.

One commenter opined that these proposed wellness contacts do not meet the requirements in 38 U.S.C. 1720G(a), as VA is required to monitor the well-being of eligible veterans by directly reviewing the quality of the personal care services in the veteran's homes and taking corrective action. This commenter also asserted that reassessments of veteran eligibility for PCAFC and monitoring the well-being of the eligible veteran are simply not analogous. First, 38 U.S.C. 1720G does not require VA conduct monitoring of the eligible veteran's wellbeing in the home or take related corrective action; instead, section 1720G(a)(9) requires VA establish procedures to ensure appropriate follow-up, which may include monitoring the wellbeing of the eligible veteran in the home and taking corrective action, including suspending or revoking the approval of a Family Caregiver. We note these latter provisions are discretionary. Second, we note that we currently perform periodic monitoring pursuant to 38 CFR 71.40(b)(2) and consistent with 38 U.S.C. 1720G(a)(9)(A). Section 161(a)(5) of the VA MISSION Act of 2018 amended 38 U.S.C. 1720G(a)(3)(D) to additionally require VA to periodically evaluate the needs of the eligible veteran and the skills of the Family Caregiver to determine if additional instruction, preparation, training, and technical support is necessary. Consistent with section 1720G, the purpose of wellness contacts is to review both the eligible veteran's and Family Caregiver's wellbeing, and the adequacy of care and supervision being provided to the eligible veteran by the Family Caregiver. We note that we would require at least one wellness contact occur in the eligible veteran's home on an annual basis. Reassessments will be conducted to evaluate the eligible veteran's and Family Caregiver's eligibility, including the Family Caregiver's continued eligibility to perform the required personal care services, and whether the eligible veteran is unable to self-sustain in the community for purposes of the monthly stipend. As indicated in the proposed rule, we believe the combination of wellness contacts and reassessments meet the periodic evaluation requirement in 38 U.S.C. 1720G(a)(3)(D), as we would determine whether any additional instruction, preparation, training, and technical support is needed in order for the eligible veteran's needs to be met by the Family Caregiver. We further note that to the extent that we would need to take corrective action pursuant to section 1720G(a)(9), we may revoke or discharge a caregiver or veteran from PCAFC pursuant to 38 CFR 71.45, as appropriate. We are not making any changes based on this comment.

A commenter incorrectly stated that VA has never met the statutory requirement to complete monitoring assessments no less than every 90 days; however, that is not a requirement established in the statute, but rather in regulation by VA. We are not making any changes based on this comment.

Several commenters stated that the proposed 180-day requirement is too much and that these visits can be easily conducted by the phone rather than in person. Additionally, commenters asserted that these visits be waived for eligible veterans who have a 100 percent P&T service-connected disability rating or receive other VBA or SSA disability benefits. As previously explained, the purpose of wellness contacts is to review both the eligible veteran's and Family Caregiver's wellbeing, and the adequacy of care and supervision being provided to the eligible veteran by the Family Caregiver. Also, while we understand that the condition of some eligible veterans will remain unchanged, VA has a statutory requirement to periodically evaluate the needs of the eligible veteran and the skills of the Family Caregiver to determine if additional instruction, preparation, training, or technical support is necessary. See 38 U.S.C. 1720G(a)(3)(D). Additionally, as explained above, we are revising the requirement from 180 days to 120 days, which we believe will accommodate those eligible veterans whose condition is generally unchanged and would experience a significant disruption in the daily routine when having to make scheduling changes to accommodate a wellness contact. Further, while we agree that some visits can be conducted by phone or other telehealth modalities, we believe that at least one wellness contact should occur in the eligible veteran's home to provide direct observation of the personal care services provided and assess the wellbeing of the veteran and Family Caregiver. We are not making any changes based on these comments.

Several commenters requested clarification on frequency of contacts and one commenter suggested that the frequency of these contacts be adjusted to accommodate individual circumstances for eligible veterans and Family Caregivers. As previously explained, 120 days establishes a minimum baseline for the frequency of wellness contacts and these contacts may occur more frequently if needed, to address the individual needs of the eligible veteran and Family Caregiver. We are not making any changes based on these comments.

One commenter stated that using the term ''wellness contact'' is inconsistent with the provision of Home and Community Based Services and standard medical terminology, specifically the annual wellness visit which is a yearly appointment with a primary care provider to create or update a personalized prevention plan. The commenter asserts that when all members of the healthcare team use the same terminology, they can understand what is on the patient's chart and provide them with the best possible care. As indicated in the proposed rule, we believe changing the terminology from ''monitoring'' to ''wellness contacts'' is a more accurate description of the purpose of these visits as it includes a review of the wellbeing for both the eligible veteran and Family Caregiver. Additionally, we have found that people find the term ''monitoring'' to be punitive. We are not making any changes based on this comment.

Monthly Stipend Rate

VA proposed several changes to the methodology and calculation of monthly stipend payments for Primary Family Caregivers. In particular, we proposed to use the OPM's GS Annual Rate for grade 4, step 1, based on the locality pay area in which the eligible veteran resides, divided by 12. We further proposed to discontinue the use of the combined rate, which is based on the Bureau of Labor Statistics (BLS) hourly wage rate for home health aides at the 75th percentile in the eligible veteran's geographic area of residence, multiplied by the Consumer Price Index for All Urban Consumers (CPI–U).

One commenter supported the use of the OPM GS Annual Rate for grade 4,

step 1, and stated that it will lend significant standardization and greatly increase the ease of program administration. Another commenter similarly supported this change and described the GS rate as more accurate and standardized. We appreciate these comments and do not make any changes based upon them.

Some commenters were concerned with VA using GS instead of BLS. In particular, commenters stated that the transition from BLS to GS is wholly inadequate, unreasonable, illogical, arbitrary, inconsistent with law, and an effort to reduce the amount of stipends that will be paid. Other commenters opposed transitioning from the combined rate (using BLS rates) to the monthly stipend rate (using GS rates), and one commenter urged VA to keep the current rate. Another commenter expressed concern that using the GS rate would treat caregivers like government employees.

We disagree with the commenters above and find that the use of the GS scale is not only reasonable and consistent with the law but will also result in an equal or increased payment for the majority of participants. As we explained in the proposed rule, we believe it is reasonable to use the GS rate instead of the combined rate because of challenges we had using the BLS rate. 85 FR 13382 (March 6, 2020). We tried to identify other publicly available rates that we could use for calculating the monthly stipend that would meet the statutory requirements in 38 U.S.C. 1720G(a)(3)(C)(ii) and (iv), but were unable to locate any. We found that the GS wage rates address some of the challenges we have had using the BLS rate. Id. We further found that the GS wage rates meet our needs for administering the stipend payment, as it is publicly available, easy to locate, is developed entirely outside of VA with a defined process for updating the rates, and provides geographic variation. However, after publication of the proposed rule and in considering public comments such as the reference to caregivers being treated like federal employees, VA examined the challenges associated with making retrospective pay corrections in instances when OPM announces retrospective changes to the GS scale tables later in the year. Such adjustments would complicate VA's goal, as stated in the proposed rule, of adopting the GS wage rates to ''ensure more consistent, transparent, and predictable stipend payments,'' (85 FR 13382 (March 6, 2020)) and our proposal to pay stipends monthly by dividing the annual rate by 12 (rather than using the same pay period structures that most federal employees are paid through). Such retrospective payments would increase the risk of improper payments, be administratively impracticable for VA, and would be anticipated to only represent a few percentage points' change in retrospective pay over a relatively short period of time. Thus, VA will not make retroactive stipend payments resulting from retrospective changes to GS wage rates by OPM and accordingly amends the regulation text to indicate that adjustments under § 71.40(c)(4)(ii)(A) take effect ''prospectively following the date the update to such rate is made effective by OPM.'' This change only applies to § 71.40(c)(4)(ii)(A) and would not impact the retroactive adjustments in § 71.40(c)(4)(ii)(C)(*2*)(*i*) as a result of a reassessment conducted by VA under § 71.30.

In addition, we analyzed the GS and BLS wage rates to determine whether the GS wage rates tracked the private sector wages for home health aides, and we found that these closely tracked in the past both at a national level and for GS adjusted localities. Id. As we explained in the proposed rule, we determined the appropriate GS grade and step for stipend payments by comparing against BLS wage rates for commercial home health aides, and found that for 2020, the BLS national median wage for home health aides (adjusted for inflation) is equivalent to the base GS rate at grade 3, step 3 (without a locality pay adjustment). Id. We also found that in most U.S. geographic areas for 2020, the GS rate at grade 3, step 3 would be equal to or higher than the BLS median wage for home health aides in the same geographic areas. Id. at 13383. We considered using a unique GS grade and step based on the median home health aide wage rate in each of the geographic areas where the 2020 GS rate at grade 3, step 3 was less, but determined that would not be appropriate or practicable for the reasons previously explained in the proposed rule. Id. As a result, we proposed to use the slightly higher GS rate at grade 4, step 1 for all localities, which is consistent with the requirements of section 1720G(a)(3)(C)(ii), (iv) (*i.e.,* that to the extent practicable, the stipend rate is not less than the monthly amount a commercial home health care entity would pay an individual to provide equivalent personal care services in the eligible veteran's geographic area or geographic area with similar costs of living).

We note that we do not view Family Caregivers as government employees, and use of the monthly stipend rate (*i.e.,* GS Annual Rate for grade 4, step 1, based on the locality pay area in which the eligible veteran resides, divided by 12) instead of the combined rate using the BLS rate does not change our view. The stipend payment is not intended to compensate Family Caregivers as if they were government employees, but rather acknowledge the sacrifices these Family Caregivers have made to care for eligible veterans. The benefits of using the GS Annual Rate, as explained in the proposed rule and further described herein, outweigh any potential concerns that use of this rate could result in caregivers being treated like government employees. Additionally, we expressly state in 38 CFR 71.40(c)(4)(iii), as made final within this rule, that nothing in this section shall be construed to create an employment relationship between VA and a Family Caregiver. We make no further changes based on these comments.

Other commenters were concerned that the monthly stipend rate would be too low. In particular, commenters were concerned that the rate will not properly compensate Primary Family Caregivers for the care they provide, does not reflect the actual rates of home health aides, and is less than the proposed minimum wage of $15 per hour. Another commenter found the GS rate to be inadequate because the USA National Average for cost of in-home care is $52,624 as reported in the AARP Genworth Study. Others emphasized sacrifices made by caregivers to take care of loved ones, including lost employment wages.

We reiterate from the proposed rule that the stipend rate is consistent with the statutory requirements of 38 U.S.C. 1720G(a)(3)(C)(ii) and (iv), which requires that to the extent practicable, the stipend rate be not less than the monthly amount a commercial home health care entity would pay an individual to provide equivalent personal care services in the eligible veteran's geographic area or geographic area with similar costs of living. See 85 FR 13382–13383 (March 6, 2020).

In response to the commenters who shared their personal stories and expressed concern that the stipend rate is too low, we understand and appreciate the many sacrifices these caregivers make on a daily basis to care for our nation's veterans. We are incredibly grateful for the care and valuable service they provide. These caregivers greatly impact veterans' ability to remain safely in their homes for as long as possible. We note that PCAFC is just one of the ways in which VA is able to recognize and thank these caregivers for their service and sacrifice.

In particular, the monthly stipend is an acknowledgement for the sacrifice Family Caregivers make to care for eligible veterans. See 76 FR 26155 (May 5, 2011). It was never intended to compensate Primary Family Caregivers for their services or lost wages.

In response to the commenter who was concerned that the monthly stipend rate may be less than the proposed minimum wage of $15 per hour, we note that the stipend payment, to the extent practicable, must be no less than the annual salary paid to home health aides in the commercial sector. 38 U.S.C. 1720(G)(3)(C)(ii), (iv). Thus, by law, we are required to look at the national median for home health aides. We reviewed 2018 data of the national median for home health aides (adjusted for inflation to 2020), and found that the national median was $12.60 per hour. The higher monthly stipend rate of 100 percent of the GS Annual Rate at grade 4, step 1 would receive $14.95 per hour in 2020. We note that that is the hourly rate for the Rest of the United States, and that Primary Family Caregivers may receive more based on their locality since the Rest of the United States would be the lowest rate possible for purposes of calculating the stipend rate based on locality. However, Primary Family Caregivers may receive a lower stipend payment if they receive the lower stipend rate (*i.e.,* 62.5 percent of the GS Annual Rate at grade 4, step 1.) It is also important to further note that the monthly stipend payment is a nontaxable benefit. We recognize that some Primary Family Caregivers will receive less than $15 an hour however, we believe that the stipend rate meets the statutory requirement for payment and is appropriate given the intent of the benefit. As previously explained, the monthly stipend is intended to acknowledge the sacrifices Family Caregivers make and was never intended to compensate for their services.

In response to AARP Genworth Study, we note that this study reflects the cost of contracted in-home care (as the rate listed is the rage charged by a non-Medicare certified, licensed agency), and is not reflective of the actual wages of the home health aides who provide care. The cost of contracted in-home care also includes both overhead and profits for the agency, which are not passed on to home health aides. Second, we acknowledge that the cost of institutional or in-home care is more than the monthly stipend. Pursuant to 38 U.S.C. 1720G(a)(3)(C)(ii),(iv), we are required to look at the wages of home health aides to determine the stipend rate, and the stipend rate must be no less than the monthly amount a commercial home health care entity would pay an individual. While the Primary Family Caregiver and the services he or she provides complement the clinical care provided by commercial home health care entities to eligible veterans, the Primary Family Caregiver is not intended to be a replacement or substitute for such care. We also note that the Primary Family Caregiver does not necessarily have the same specialized training and education as those providing clinical care, and that the cost of care billed by a licensed agency may include multiple caregivers. Thus, we do not believe it would be reasonable or consistent with the statute to pay Primary Family Caregivers the cost of care billed by licensed agencies. We make no changes based on these comments.

One commenter noted that the reduction in the stipend amount may result in the caregiver working outside the home which can hurt the veteran who cannot survive without the caregiver. While we recognize that some current participants may have a reduced stipend amount based on changes we are making to the stipend methodology, the transition from BLS to GS should result in the majority of current participants receiving an increase in their stipend amount. As we explained in the proposed rule and reiterate within this final rule, we will provide a period of transition for legacy participants to minimize any negative impact. We further note that as part of this rulemaking, we are providing financial planning services as an additional benefit available to Primary Family Caregivers. This new benefit can assist these Family Caregivers with managing their finances. To the extent an eligible veteran requires more care than the Primary Family Caregiver is able to provide, PCAFC is one of many programs that may be available to meet the needs of eligible veterans. In such instances, we recommend speaking with VA about other care options that may be available, such as home based primary care, and Veteran-Directed care. We make no changes based on this comment.

Other commenters asserted that VA's proposed changes will result in stipend amounts that are too high. In particular, one commenter expressed concern that the stipend payments are in some cases higher than disability compensation that veterans receive. Other commenters believe the stipend payments can result in the veteran or caregiver mismanaging the stipend, encourage individuals not to work, and are inconsistent with the purpose of the stipend to assist the Family Caregiver rather than pay for mortgages and similar expenses.

Consistent with our explanation in the proposed rule and as explained directly above, we believe the monthly stipend rate will not result in stipend rates that are too high because the monthly stipend rate is consistent with the statutory requirements of 38 U.S.C. 1720G(a)(3)(C)(ii) and (iv), by being not less than the monthly amount a commercial home health care entity would pay an individual to provide equivalent personal care services in the eligible veteran's geographic area or geographic area with similar costs of living. See 85 FR 13382 (March 6, 2020). Additionally, as explained in the proposed rule and in this section, we determined that the monthly stipend rate tracks with the national median wage for home health aides. Id.

To the extent that commenters were concerned that monthly stipend payments can be higher than the disability compensation that veterans receive, we recognize that this may possibly occur. However, it is important to note that disability compensation and PCAFC are two distinct and separate programs with different purposes. In deciding the monthly stipend methodology, we considered whether disability compensation payments would be less than Primary Family Caregiver monthly stipend payment, but determined that the advantages of using the GS rate to calculate the monthly stipend payment outweigh any concerns with respect to the veteran's disability compensation payment compared to the monthly stipend payment.

To the extent that commenters asserted that the monthly stipend encourages individuals not to work, we respectfully disagree. We are aware that many Primary Family Caregivers have already given up employment so that they can care for eligible veterans. For those who are unable to afford to care for an eligible veteran without working, we recognize that this monthly stipend may provide Primary Family Caregivers with the flexibility to care for the eligible veteran. The monthly stipend is one of many benefits available to Primary Family Caregivers as a way to acknowledge their sacrifices in caring for eligible veterans and their valuable contributions to society. We also note that since the monthly stipend for Primary Family Caregivers is a benefit payment, and not based on an employment relationship, it does not involve employer contributions to old-age, survivors, and disability Insurance (commonly known as ''Social Security'') or participation in a defined-contribution or defined-benefit

retirement program. Given this and the fact that the stipend is nontaxable (and thus is not taxed at a higher tax bracket if there is other taxable income from employment or other sources), we do not believe there is an incentive for Primary Family Caregivers who would otherwise work outside of the caregiving role to leave the labor market because of their participation in PCAFC.

To the extent that commenters believe the stipend payment will lead to mismanagement and it can be used to pay a mortgage or other similar expenses, we do not impose any requirements or limitations on how a Primary Family Caregiver spends the monthly stipend he or she receives, and we decline to establish such requirements or limitations. However, we do note that as part of the improvements we are making to part 71 as part of this rulemaking, Primary Family Caregivers will be eligible to receive financial planning services, which can assist the Primary Family Caregiver with managing the stipend payment.

Other commenters recommended alternative approaches to determine the monthly stipend amount. Specifically, one commenter requested that the stipend be the rate of the salary the caregiver earned in their past occupation and commensurate with the caregiver's education, because many caregivers leave their jobs to become a caregiver, and many are healthcare providers providing high level of care that a home health aid is not trained or permitted to perform. This commenter also noted that this would be cost efficient for VA since they would not have to put the veteran in a skilled nursing home at VA's expense. Another commenter recommended the stipend more closely align to the pay of a VA registered nurse. This same commenter urged VA to compare the salary of a home health care worker (with a median pay in 2018 of $24,060) to a live-in home health care worker (which can average $4,800 per month for 40 hours per week of in-home care costs). Additionally, one commenter recommended that VA assign the GS–4, Step 10 rate to those with extreme disabilities that require 24/7, 365 care. Another commenter suggested caregivers should be paid as if enlisted in active duty. One commenter recommended the stipend be calculated by what it would cost to the government for institutionalization or inpatient care of the eligible veteran reduced by 10–20 percent. Finally, another commenter suggested the percentage of the GS rate at grade 4, step 1, be based on the veteran's service-connected disability rating percentage, and further suggested that caregivers provide care full time and should be recognized more like a social worker or nurse.

We reiterate that the monthly stipend is an acknowledgement for the sacrifices Family Caregivers make to care for eligible veterans. See 76 FR 26155 (May 5, 2011). While we recognize that some individuals may give up their jobs to become a Family Caregiver, the monthly stipend is not meant to be commensurate with the income a Family Caregiver received from previous employment (including as a healthcare provider) or with their education. It is also not meant to transfer any savings VA may receive by not paying for a skilled nursing home or other institutionalization or inpatient care of the veteran to the Family Caregiver. The monthly stipend is also not meant to replace or substitute clinical care that eligible veterans receive. The care that Family Caregivers provide to eligible veterans is in addition to and supportive of the increased quality of life or maintenance of such. We note that services that Family Caregivers provide is not meant to replace institutional or inpatient care, and that, in addition to PCAFC, eligible veterans may be eligible for additional VHA services such as skilled nursing home care, home based primary care, and Veteran-Directed care. We acknowledge that there are commenters that believe their contributions exceed that of a home health aide. However, the reason that we use the wages of a home health aide for determining the stipend rate is based on the requirement in 38 U.S.C. 1720G(a)(3)(C)(ii), (iv) (to the extent practicable, the stipend is not less than the ''amount a commercial home health care entity would pay an individual in the geographic area of the eligible veteran [or similar area]''). Additionally, as indicated in the proposed rule and reiterated in this section, we believe the GS rate for grade 4, step 1 is, to the extent practicable, not less than the annual salary paid to home health aides in the commercial sector, particularly after considering that the monthly personal caregiver stipend is a nontaxable benefit. 85 FR 13383 (March 6, 2020).

To the extent that commenters suggested VA base the stipend on other occupations, such as nurses (including registered nurses) and social workers, we decline to do so as 38 U.S.C. 1720G(a)(3)(C)(ii) is clear that the stipend be no less than the salary paid to a home health aide. Similarly, we decline to adopt the suggestion that we compare the salary of a home health care worker (with a median pay in 2018 of $24,060) to a live-in home health care worker (which can average $4,800 per month for 40 hours per week of in-home care costs). Section 1720G(a)(3)(C)(ii) is clear that the stipend be no less than the salary paid to a home health aide, not a live-in home health care worker. Thus, we used home health aide wages for determining the rate to use for the monthly stipend.

To the extent that a commenter suggested that we base the stipend on enlisted active duty, we are unclear as to this commenter's specific suggestion since they did not provide any additional information, and their comment was in the context of providing caregivers benefits similar to veterans. We note that active duty enlisted pay is based on military rank (*i.e.,* E–1 to E–9) and years of service. As the commenter did not suggest the level of active duty enlisted pay we should consider using for the stipend rate (or whether to include non-wage forms of compensation received by active duty enlisted personnel), we cannot further address their comment. Additionally, we did not consider the pay of active duty enlisted because the statute requires us to determine the stipend rate based on the salary paid to a home health aide.

With regards to the commenter that suggested we use the GS Annual Rate at grade 4, step 10 for the stipend payment for Primary Family Caregivers who care for eligible veterans with extreme disabilities that require 24/7, 365 days of care, we decline to do so as those with the highest level of need, which we believe would likely include an individual who needs around-the-clock care, would fall under the higher stipend level (*i.e.,* 100 percent of the monthly stipend rate) under 38 CFR 71.40(c)(4)(i)(A)(2). The intent of having higher and lower stipend levels was to distinguish between those who are determined to be unable to self-sustain in the community and those who are not, as these are different levels of need. We decided not to use multiple GS grades and steps as we wanted to ensure we had standardization and transparency about the rate that we were using. More levels of pay would result in more subjectivity in the assignment of rates. To the extent that this commenter believes that 24/7 care is required, we note that this is not the level of care we expect to be provided. We believe it is likely that an individual who needs 24/7 care would need additional clinical care from a skilled health care provider. We also note that this level of care would be beyond the scope of the level of personal care services that is intended under PCAFC,

particularly as that is not the level of training we provide to Family Caregivers for the purpose of PCAFC. If an individual needs 24/7 care, we are willing to provide referrals to other VHA services that may be appropriate.

Lastly, in response to the commenter that suggested the percentage of the GS rate at grade 4, step 1, be based on the veteran's service-connected disability rating percentage, we decline to do so. We note that as part of this final rule, and explained previously in this rulemaking, we are defining serious injury to mean any service-connected disability that (1) is rated at 70 percent or more by VA; or (2) is combined with any other service-connected disability or disabilities, and a combined rating of 70 percent or more is assigned by VA. If we adopted this suggestion, only Primary Family Caregivers of those veterans with a 70 percent or higher service-connected disability rating would be eligible for the stipend rate so veterans that do not meet the definition of serious injury would not qualify for PCAFC. We note that while service-connected disability rating is part of the definition of serious injury, it is not used to determine a veteran's or servicemember's need for personal care services for purposes of PCAFC eligibility. Instead, we assess the clinical needs of individuals to determine whether he or she has a need for personal care services. Service-connected disability rating is not commensurate with a need for personal care services, and to use the disability rating for that purpose would not be appropriate. We also note that we will have two levels for the stipend payment, with the higher level (*i.e.,* 100 percent) based on whether the eligible veteran is unable to self-sustain in the community. All other Primary Family Caregivers will receive the stipend payment at the lower rate (*i.e.,* 62.5 percent). These stipend levels are not based on service-connected disability rating, but rather whether the veteran is unable to self-sustain in the community. Having two levels for the stipend rate will ensure that those Primary Family Caregivers of eligible veterans with severe needs receive the higher stipend rate.

We make no changes to the regulation based on these comments.

Multiple commenters took issue with VA's statement that reliance on the combined rate has resulted in stipend rates well above the average hourly rate of a home health aide in certain geographic areas, including one commenter who suggested that this has been ''solved by the current *BLS.gov/oes* contracting process which eliminated outliers in the May 2019 Survey.'' We address these comments below.

We recognize that BLS data has been adjusted to account for outliers. However, as explained previously in this discussion on the monthly stipend rate, we have determined that OPM's GS rate will better address the needs of PCAFC. We note that the current combined rate uses the most recent data from the BLS on hourly wage rates for home health aides as well as the most recent CPI–U, unless using this most recent data for a geographic area would result in an overall BLS and CPI–U combined rate that is lower than that applied in the previous year for the same geographic area, in which case the BLS hourly wage rate and CPI–U that was applied in the previous year for that geographic area will be utilized to calculate the Primary Family Caregiver stipend. See 80 FR 1397 (January 9, 2015). This was put in place to ensure that Primary Family Caregivers would not unexpectedly lose monetary assistance upon which they had come to rely. Id. In contrast to the BLS rate, OPM's GS scale provides a more stable data set from year to year, drastically reducing the probability of geographic regions experiencing inflated stipend rates. A more detailed explanation is provided within the regulatory impact analysis.

We make no changes based on these comments.

Consequences of Potential Decrease in Stipend

One commenter asked that Primary Family Caregivers of legacy participants continue to be paid based on the BLS rate (*i.e.,* combined rate) while in the program. The commenter believes BLS to be more comprehensive in calculating living wages and indicated that the transition to the monthly stipend rate will cut their stipend in half and they use their current stipend to cover in home treatments and other treatments out-of-state that would otherwise be unavailable to them.

Initially, we note that PCAFC is complementary to other VHA health care services and we encourage PCAFC participants to learn about other health care benefits that may help meet the needs of the eligible veteran. Similar to our earlier discussion about grandfathering in PCAFC participants, we believe it would be inequitable to allow the Primary Family Caregivers of legacy participants to receive their previous stipend rate indefinitely while applying the monthly stipend rate for legacy applicants and new participants. Doing so would result in Primary Family Caregivers of post-9/11 veterans and pre-9/11 veterans who are similarly situated in all respects receiving different stipend amounts, which would continue the inequity between different eras of service. It would also be administratively prohibitive to utilize two different stipend payment methodologies as we expand PCAFC to pre-9/11 veterans. As mentioned further above, the majority of Primary Family Caregivers of legacy participants will receive increases in the amount of their stipend as a result of the transition from BLS to GS. However, some may experience a decrease in their stipend amount, which is why we provide a period of transition (*i.e.,* to minimize the negative impact of changes to the stipend methodology). We note that the stipend amount for the Primary Family Caregivers of legacy participants will generally remain unchanged during the one-year period beginning on the effective date of this rule, unless it is to their benefit, and so long as the legacy participant does not relocate to a new address. We are not making any changes based on this comment.

Another commenter indicated that VA's changes will result in a decrease in the commenter's stipend amount. The commenter indicated an understanding of the transition period outlined in the proposed rule, but asked whether there will be a cost of living increase for those who ''already make to [sic] much'' under the previous stipend payment methodology. On the effective date of this rule, part 71 will no longer refer to the combined rate, and as explained in VA's proposed rule, VA will no longer make annual adjustments to the combined rate (85 FR 13358 (March 6, 2020)), including for Primary Family Caregivers of legacy participants who continue (for one year after the effective date) to receive the same stipend amount they were eligible to receive the day before the effective date of the final rule pursuant to the special rule in § 71.40(c)(4)(i)(D). To the extent the commenter is asking about adjustments to stipend payments under the new stipend payment methodology (based on the monthly stipend rate) that result from OPM's updates to the GS scale, this is addressed in § 71.40(c)(4)(ii)(B). As explained in VA's proposed rule, the GS pay schedule is usually adjusted annually each January based on nationwide changes in the cost of wages and salaries of private industry workers. 85 FR 13388 (March 6, 2020). Any adjustment to stipend payments that result from OPM's updates to the GS Annual Rate for grade 4, step 1 for the locality pay area in which the eligible veteran resides, will take effect

prospectively following the date the update to such rate is made effective by OPM. See § 71.40(c)(4)(ii)(A). We are not making any changes based on this comment.

Periodic Assessments

One commenter requested VA include a statement in the final rule that VA will post the findings of its assessments of the monthly stipend rates on a public website so that stakeholders are able to easily evaluate the impact of this change on Family Caregivers in the program. We proposed to add § 71.40(c)(4)(iv) which states that in consultation with other appropriate agencies of the Federal government, VA shall periodically assess whether the monthly stipend rate meets the requirements of 38 U.S.C. 1720G(a)(3)(ii) and (iv). We will consider making findings of these assessments publicly available in an effort to be as transparent as possible. We are not making any changes based on this comment.

Unable To Self-Sustain in the Community

VA proposed to add a new definition for the phrase ''unable to self-sustain in the community,'' for purposes of determining the monthly stipend level under § 71.40(c)(4)(i)(A). Unable to self-sustain in the community was proposed as the sole criterion to establish eligibility for the higher level stipend and would mean that an eligible veteran (1) requires personal care services each time he or she completes three or more of the seven activities of daily living (ADL) listed in the definition of an inability to perform an activity of daily living in § 71.15, and is fully dependent on a caregiver to complete such ADLs; or (2) has a need for supervision, protection, or instruction on a continuous basis. Commenters raised numerous concerns with the definition, including but not limited to the definition lacking clarity and objectivity, use of a double negative in the proposed rule discussion, that few veterans will be eligible for the higher stipend level and that it will promote total reliance on caregiver, that it is arbitrary and too strict, and that it is economically unfair. Commenters also provided suggested edits to parts of the definition and requested we continue to use the current three tiers instead of two levels for purposes of the monthly stipend rate. While we make no changes to the regulation based on these comments, we address them in the discussion below.

One commenter stated that the new definitions seem to be easier to understand, but is concerned the requirements may still be left to interpretation. While the commenter did not specify which definitions were easier to understand, we believe the commenter to be referring to unable to self-sustain in the community, as the comment also referred to the new stipend levels. Another commenter stated that the proposed rule lacked adequate information on what being unable to self-sustain in the community means although it is a determining factor for which level a veteran is assigned. Relatedly, an additional commenter raised concerns about the definition of ''unable to self-sustain in the community'' as being meaningless and flawed, in part because there are no objective criteria for need for supervision, protection, or instruction. Another commenter, seeking clarification of the definition, said that ''VA's failure to provide an objective operational definition of supervision, protection or instruction . . . seems quite contradictory based on the examples offered,'' and asked if VA has an objective clinical reference for this definition. One commenter noted that this definition is problematic because it is based on the definition of the ''need for supervision, protection, or instruction'' of which they believe there are no objective criteria. Lastly, one commenter also expressed concern that without clear protocols and definitions for determining whether a veteran or servicemember is unable to self-sustain in the community, inconsistency would persist across VA.

We appreciate the commenters' concerns, but note that this definition is intended to distinguish between the level and amount of personal care services that an eligible veteran needs for purposes of determining the appropriate stipend level. We note that at least one commenter stated that they found the definition of ''unable to self-sustain in the community'' to be clear.

We believe the definition of ''unable to self-sustain in the community'' contains objective, clear, and standardized requirements that can be consistently implemented across PCAFC. We believe it is specific enough to allow us to make objective determinations about whether a veteran or servicemember has a higher level of need such that he or she meets the definition of unable to self-sustain in the community. The definition provides the frequency with which personal care services need to be provided by a Family Caregiver of an eligible veteran who is determined to be ''unable to self-sustain in the community,'' and can be distinguished, for purposes of determining the monthly stipend level, from a Family Caregiver of an eligible veteran who does not meet this threshold. For example, an eligible veteran that qualifies for PCAFC under the definition of ''inability to perform an ADL'' would meet the definition of ''unable to self-sustain in the community'' if he or she requires personal care services each time he or she completes three or more ADLs, and is fully dependent on a caregiver to complete such ADLs. This is distinct from the definition of ''inability to perform an ADL'' which only requires assistance with at least one ADL each time the ADL is completed. This distinction between the definitions allows us to differentiate between those who have moderate needs versus those who have a higher level of need for purposes of determining the appropriate monthly stipend level, as we are required by 38 U.S.C. 1720G(a)(3)(C)(i) to base the stipend rate on the amount and degree of personal care services provided.

Additionally, an eligible veteran that qualifies for PCAFC under the definition of ''need for supervision, protection, or instruction'' would meet the definition of ''unable to self-sustain in the community'' if they have a need for supervision, protection, or instruction on a continuous basis. This is distinct from the definition of ''need for supervision, protection, or instruction'' as such definition does not require the same frequency of personal care services needed. As previously discussed, the terms daily and continuous relate to the frequency of intervention required in order to maintain an individual's personal safety that is directly impacted by his or her functional impairment at the lower and higher stipend levels, respectively. Veterans and servicemembers who are eligible for PCAFC based on a need for supervision, protection, or instruction may only require intervention at specific and scheduled times during the day to maintain their personal safety on a daily basis. In contrast, a veteran or servicemember who is unable to self-sustain in the community, has a need for supervision, protection, or instruction on a continuous basis.

Distinguishing a daily versus a continuous need for supervision, protection, or instruction is a clinical decision, based upon an evaluation of the individual's specific needs. This distinction is discussed in more detail above in the discussion of the definition of need for supervision, protection, or instruction in § 71.15.

As we explained in the proposed rule, in determining whether an eligible veteran is in need of supervision,

protection or instruction on a continuous basis, VA would consider the extent to which the eligible veteran can function safely and independently in the absence of such personal care services, and the amount of time required for the Family Caregiver to provide such services to the eligible veteran consistent with 38 U.S.C. 1720G(a)(3)(C)(iii)(II) and (III), as amended by section 161(a)(4)(B) of the VA MISSION Act of 2018. Id. For example, an individual with dementia would have a need for supervision, protection, or instruction on a continuous basis if such individual requires daily instruction for dressing, wanders outside the home when left unattended for more than a few hours, and has a demonstrated pattern of turning on the stove each time the individual enters the kitchen due to disorientation; however, an individual with dementia who only requires step-by-step instruction with dressing daily which includes some physical demonstration of the tasks, would not have a need for supervision, protection, or instruction on a continuous basis.

We also note that we will provide robust training and education to our staff, implement an audit process to review eligibility determinations, and conduct vigorous oversight to ensure consistency across VA in implementing this regulation, to include this definition.

To the extent commenters raised specific concerns about the definition of ''unable to self-sustain in the community'' based on concerns they had with the underlying definitions of inability to perform an ADL or need for supervision, protection, or instruction, we refer the commenters to those specific sections that discuss the definitions of inability to perform an ADL and need for supervision, protection, or instruction.

We make no changes based on these comments.

While we are not entirely certain, it appeared that one commenter, in the context of their comment concerning the lower-level stipend, suggested that the definition of ''need for supervision, protection, or instruction'' focuses on supervision and safety necessary due to cognitive or mental health issues. As discussed above in the context of ''inability to perform an activity of daily living,'' a need for supervision, protection, or instruction is inclusive of a veteran or servicemember with cognitive, neurological, or mental health issues. We are not making any changes based on this comment.

Another commenter was confused about this definition in the proposed regulation and the FAQs posted on VA's website about the proposed rule because this commenter asserts that in the FAQs we use a double negative for explaining when someone meets the lower stipend level, and the examples we provided are not consistent with our goal of focusing PCAFC on eligible veterans with moderate and severe needs and providing more objective criteria for clinicians evaluating PCAFC eligibility. We are unclear which examples the commenter is referring to but note that we provide examples throughout the proposed rule in order to help explain how certain criteria may be applied. Relatedly, another commenter raised similar concerns about the language, ''not determined to be unable to self-sustain in the community'' because they assert this definition is circular.

To the extent that the commenter asserts that the examples we provided for purposes of this definition are inconsistent with our intent to focus on veterans with moderate and severe needs and to provide more objective criteria for PCAFC, we respectfully disagree, and note that we are unable to further respond since this commenter did not identify the examples to which they are referring. In response to the commenters' concerns that we used a double negative for explaining the lower stipend, we acknowledge that we did state that an individual would meet the lower stipend level if they are determined not to be unable to self-sustain in the community. While we understand that this use of ''determined not to be unable to self-sustain in the community'' can be confusing and appear circular, we used this language to clearly distinguish between those who are determined to be ''unable to self-sustain in the community,'' and those who are not, for purposes of determining the stipend level. Those eligible veterans who meet the definition of ''unable to self-sustain in the community'' are those with severe needs while those eligible veterans who do not meet this definition would be those with moderate needs. We intentionally did not use the phrase ''able to self-sustain in the community'' in reference to those veterans eligible at the lower stipend level. We note that the ability to self-sustain is considered on a continuum with unable to self-sustain at one end. If an eligible veteran does not meet the definition of unable to self-sustain in the community, that does not mean that he or she is able to self-sustain in the community, as he or she may fall somewhere in between on the continuum. We are not making any changes based on these comments.

Some commenters raised concerns about using ''continuous'' in the definition of unable to self-sustain in the community. One commenter recommended using ''frequent'' instead of ''continuous'' based on the assertion that continuous creates a presumption that conditions must have continuous symptomatology in order to qualify for the higher level stipend. The same commenter asserted that a continuous requirement would create an unrealistic standard that few, if any, veterans would be able to meet; and the term frequent is more aligned with how symptoms of impairments actually occur. One commenter raised concerns about what ''continuous'' means in the context of this definition, and asserted that a veteran who needs 24/7 care is in crisis and would need higher level care or hospitalization. This commenter recommended that VA better define this higher tier for veterans requiring a severe level of supervision, protection, or instruction. Relatedly, one commenter noted that use of ''continuous'' sets an untenable standard when the only alternative is ''daily'' for purposes of consistently administering a national program. The commenter also asserted that ''varying types of functional impairment that can give rise to a need for supervision, protection, or instruction do not lend themselves to clear distinctions when attempting to distinguish between daily and continuous needs'' and that the ''definition would fail to provide intended improvements to PCAFC consistency and transparency.'' Another commenter alleged that the definition of unable to self-sustain in the community may require continuous supervision, which they allege is contrary to prior regulatory statements VA has made about considering and rejecting requests to increase the amount of caregiving to more than 40 hours per week.

We appreciate the commenters' concerns and suggestions; however, as indicated in the proposed rule, ''continuous'' is used to address the frequency with which an eligible veteran is in need of supervision, protection, or instruction, rather than the frequency of symptomatology of a specific condition. For example, an individual with a diagnosis of moderate to severe dementia may require instruction with dressing daily and due to a demonstrated pattern of wandering during the day, may meet the criteria for the higher level due to a ''continuous'' need for active intervention to ensure his or her daily safety is maintained. That does not mean the individual would be required to actually wander

on a constant basis in order to be determined as unable to self-sustain in the community. We find the use of continuous to be sufficient for purposes of distinguishing between the higher and lower levels of stipend when a veteran has a need for supervision, protection, or instruction. As we explained in the proposed rule and reiterated in this discussion, the distinction of ''continuous'' in this definition in contrast to ''daily'' in the definition of ''need for supervision, protection, or instruction'' allows us to differentiate between those who have moderate needs versus those who have a higher level of need for purposes of determining the appropriate monthly stipend level. 85 FR 13384 (March 6, 2020). We believe that the discussion above regarding ''need for supervision, protection, or instruction'' under § 71.15 provides clarification to explain how VA will distinguish between veterans and servicemembers who have a need for supervision, protection, or instruction (*i.e.,* whose functional impairment directly impacts the individual's ability to maintain his or her personal safety on a daily basis) versus those who meet the definition of unable to self-sustain in the community (*i.e.,* those who have a need for supervision, protection, or instruction on a continuous basis).

We note that ''continuous'' does not mean constant or 24/7 supervision, protection, or instruction, and it is not our intent for PCAFC to require 24/7 care from a Family Caregiver. The definition is not meant to imply that an individual requires hospitalization or nursing home care; rather, eligible veterans meeting this definition will qualify for the higher-level stipend based on a higher level of personal care needs. Need for supervision, protection, or instruction on a continuous basis could be demonstrated by a regular, consistent, and prevalent need. We note that services provided by Family Caregivers are meant to supplement or complement clinical services provided to eligible veterans. As part of PCAFC, we do not require Family Caregivers provide 24/7 care to eligible veterans. PCAFC is one of many in-home VA services that are complementary but not necessarily exclusive to each other. As a result, an eligible veteran and his or her caregiver may participate in more than one in-home care program, as applicable and based on set requirements, and we can refer such individuals to other VA services and programs as needed.

We make no changes based on these comments.

One commenter appeared to confuse the different levels of the monthly stipend rate and questioned how a veteran with a serious cognitive impairment who is unable to self-sustain in the community would not require a caregiver to be physically present the remainder of the day. First, we clarify that the definition of need for supervision, protection, or instruction does not require such supervision, protection, or instruction be provided on a continuous basis, but in order to qualify for the higher stipend level, an individual would be required to have a need for supervision, protection, or instruction on a continuous basis. To the extent the commenter is referring to a veteran or servicemember who meets the definition of unable of self-sustain in the community due to a need for supervision, protection, or instruction on a continuous basis, we agree with the commenter that such individual may require a caregiver to be physically present the remainder of the day. For example, an eligible veteran with dementia who needs step-by-step instruction in dressing each morning and has a demonstrated pattern of wandering outside the home at various times throughout the day may meet this definition. Because of the demonstrated pattern of wandering outside the home at various times, the veteran cannot function safely and independently in the absence of a caregiver, and the Family Caregiver would actively intervene through verbal and physical redirection multiple times throughout the day. This veteran would have a continuous need for an active intervention to ensure his or her daily safety is maintained. In discussing the definition of need for supervision, protection, or instruction above, we also provided an example of a veteran or servicemember with TBI who has cognitive impairment resulting in difficulty initiating and completing complex tasks, such as a grooming routine, who may require step-by-step instruction in order to maintain his or her personal safety on a daily basis. If such veteran or servicemember also experiences daily seizures because of an uncontrolled seizure disorder due to the TBI, such that seizures occur at unpredictable times during the day, the individual may be determined to be in need of supervision, protection, or instruction on a continuous basis. In another example, a veteran or servicemember who has a diagnosis of schizophrenia who experiences active delusions or hallucinations and requires daily medications for those symptoms may require daily support with medication management from another individual due to the paranoid thoughts that prevent the individual from independently taking the medication (that is, he or she may think the medication is harmful), and thus may be determined to have a need for supervision, protection, or instruction to maintain his or her personal safety on a daily basis. If such veteran or servicemember also responds to the delusions or hallucinations in a manner such as engaging in violent or self-harm behaviors at various and unpredictable times during the day, the individual may be determined to have a need for supervision, protection, or instruction on a continuous basis. We are not making any changes based on this comment.

One commenter stated that the definition does not meet the intended or accepted health care industry standards, including those related to safely remaining in the home or community. We are unclear as to what intended or accepted health care industry standards the commenter is referring. However, we note that PCAFC is a program unique to VA, and the statute requires us base the stipend payment on ''the amount and degree of personal care services provided.'' 38 U.S.C. 1720G(a)(3)(C)(i). The intent of this definition of ''unable to self-sustain in the community'' is to meet this statutory requirement by distinguishing between two levels of care. This definition is intended to cover those eligible veterans with severe needs, consistent with PCAFC's focus on veterans with moderate and severe needs.

One commenter appeared to allege that the lower stipend level for ADLs was too low of a bar and, thus this definition would be inconsistent with current VA Case Mix Tools for Homemaker and/or H/HHA service authorizations. To the extent that this commenter is referring to the purchased HCBS Case-Mix and Budget Tool, that tool is an instrument that provides a uniformed and standard way of allocating Purchased HCBS to veterans based on functional need that allows them to remain independently in their homes and communities. Completion of the tool results in a case-mix score or level that correspond to a monthly dollar amount; inclusive of costs for selected Purchased HCBS programs. The Purchased HCBS programs covered by the Purchased HCBS Case-Mix and Budget Tool includes H/HHA, Community Adult Day Health Care (CADHC), In-Home Respite and Veteran-Directed Home and Community Base Services (VD–HCBS). We note that the intent and use of this tool is distinct

from PCAFC as the tool is used to determine hours of care for services other than PCAFC.

To the extent the commenter is referring to H/HHA eligibility requirements under VHA Handbook 1140.6 Purchased Home Health Care Services Procedures, we respectfully disagree with the commenter's assertion. Eligibility determinations for H/HHA under VHA Handbook 1140.6, target the population of eligible veterans who are most in need of H/HHA services as an alternative to nursing home care. An interdisciplinary assessment is used to determine whether a veteran has specific clinical conditions to include three or more ADL dependencies, or significant cognitive impairment. Also, in the instance a veteran only has two ADL dependencies, an additional two conditions are considered including a dependency in three or more IADLs or if the veteran is seventy-five years old, or older. We believe the definition of unable to self-sustain in the community is not a departure from the clinical conditions listed with respect to H/HHA services in VHA Handbook 1140.6, as it similarly includes certain eligible veterans that require assistance with three or more ADLs or have a need for supervision, protection, or instruction on a continuous basis which is similar to having a significant cognitive impairment. Additionally, we note that the definition for ''unable to self-sustain in the community'' is used to determine the higher level stipend (*i.e.,* 100 percent of the monthly stipend rate) for the Primary Family Caregiver. A Primary Family Caregiver would receive the stipend at the lower-level if the eligible veteran does not meet the definition of unable to self-sustain in the community but is still in need of personal care services for a minimum of six continuous months based on either an inability to perform an ADL, which means the eligible veteran requires personal care services each time he or she completes one or more of the seven listed ADLs in § 71.15, or a need for supervision, protection or instruction, which means the individual has a functional impairment that directly impacts the individual's ability to maintain his or her personal safety on a daily basis. Further, PCAFC is one of many clinical programs available to veterans and servicemembers, as applicable, that are complementary but are not required to be identical in terms of eligibility requirements. We are not making any changes based on this comment.

One commenter was not supportive of definitions to ensure that veterans can ''self-sustain'' in the community and urged VA to define eligibility to ensure that veterans and Family Caregivers not only self-sustain but thrive in the community. First, we note that the definition of unable to self-sustain in the community is focused on the eligible veteran; not the Family Caregiver. Second, we note that ''self-sustain'' is meant to describe the eligible veteran's clinical condition, while thriving in the community may be open to various interpretations and is not a recognized or specific clinical term. ''Unable to self-sustain in the community'' is used only for the purposes of defining eligibility for the higher level stipend and is not intended to describe clinical objectives or long-term treatment goals. We do not think it would be appropriate to add the language ''thrive in the community'' to the definition since not all veterans and servicemembers who qualify for PCAFC will be able to ''thrive'' in the community. We also note that it may also not be their goal. We are not making any changes based on this comment.

Another commenter stated that the inequity in the two stipend levels would be economically unfair to Primary Family Caregivers of eligible veterans who are determined to be unable to self-sustain in the community. We refer this commenter to the related discussions in this section on the monthly stipend rate and on the specific number of caregiver hours or tasks.

Another commenter noted that VA should reconsider this requirement because few veterans will be eligible for the higher-level stipend, and the definition will work against VA's efforts to foster independence among veterans and will promote total reliance on a caregiver. The commenter recommended that VA remove the requirement for ''full dependence.'' Similarly, another commenter opined that the fully dependent language was too strict, but appeared to confuse the requirement of ''fully dependent'' for three ADLs in the definition of unable to self-sustain in the community with the definition of inability to perform an ADL.

First, we note that the definition of ''unable to self-sustain in the community'' requires that an eligible veteran need personal care services each time he or she completes three or more ADLs listed in the definition of inability to perform an ADL in § 71.15, and is fully dependent on a caregiver to complete such ADLs; or has a need for supervision, protection, or instruction on a continuous basis. This definition, and in particular the requirement to be ''fully dependent'' on a caregiver to complete at least three ADLs, is not required to be met in order to be eligible for PCAFC; it is solely used for purposes of determining the stipend level. The definition of inability to perform an ADL, which is one basis upon which a veteran or servicemember may be deemed in need of personal care services, requires that the veteran or servicemember need assistance each time that he or she completes at least one ADL; it does not require the eligible veteran be ''fully dependent'' on a caregiver to complete at least three ADLs. Thus, an eligible veteran who does not require personal care services each time he or she completes three or more ADLs, could still be eligible for PCAFC; however, the Primary Family Caregiver would receive the lower-level stipend (*i.e.,* 62.5 percent of the monthly stipend rate).

This recommendation to remove the ''fully dependent'' language relates to the first part of the definition of unable to self-sustain in the community that refers to the eligible veteran requiring personal care services each time he or she completes three or more of the seven ADLs listed in the definition of an inability to perform an ADL, and is fully dependent on a caregiver to complete such ADLs. We decline to make this change to the definition to remove the ''fully dependent'' language because we believe this language is necessary. We clarify in this rulemaking that fully dependent is the degree of need required for this prong of the definition. To be fully dependent means the eligible veteran requires the assistance of another to perform each step or task related to completing the ADL. We acknowledge this may be a high standard to meet, but it will target those eligible veterans with severe needs. We note that ''fully dependent'' is consistent with the clinical term, dependence, which is used to define and assess a higher level of care needed by a veteran, and ensures that the public understands this term. While dependence is considered along a spectrum, fully dependent is at the top of the spectrum. Thus, the fully dependent language is intended to cover those eligible veterans with severe needs for purposes of determining the higher stipend level. While we support each eligible veteran's ability to be as functional and independent as possible, we acknowledge that we do not anticipate that many eligible veterans who qualify under this definition will have much independence, as these would be those eligible veterans with

the highest needs. We do not make any changes based on these comments.

One commenter disagrees with the requirements of this definition and requests that VA retain the clinical ratings for determining stipend tiers in the current regulations. The same commenter asserts that this change from the current regulations unnecessarily and arbitrarily limits the flexibility of VA to consider all relevant factors in determining how much help an eligible veteran needs. The commenter further asserts that VA's proposed approach impedes VA's ability to consider the factors in 38 U.S.C. 1720G(a)(3)(C)(iii) by allowing VA to ignore a Family Caregiver's input and based on their assertion that the amount of time required to provide supervision, protection, and instruction would be irrelevant. One commenter stated that the language suggests that in order to be considered for the higher tier, a veteran would likely need to be in or nearing the geriatric based population, a requirement that would omit many of the program's current participants from being eligible or qualifying for the higher tier. Similarly, another commenter was concerned that this change for determining stipend levels and the definition of unable to self-sustain in the community will arbitrarily and adversely impact veterans PCAFC is intended to help, contrary to Congressional intent, as it will be harder for Family Caregivers to qualify for the higher stipend level which will reduce the benefit they receive and result in family members being less likely to serve as a Family Caregiver. This commenter asserted that an eligible veteran may be fully dependent on a Family Caregiver for assistance with performing only two ADLs or need supervision for 18 hours a day, but would not qualify under the definition of unable to self-sustain in the community, even though they need a caregiver for 40 hours per week. Another commenter stated that the higher level was too stringent, and appeared to confuse the definitions of ''inability to perform an ADL'' and ''unable to self-sustain in the community,'' such that they believed the requirements related to ADLs under the definition of ''unable to self-sustain in the community'' must be met in order to qualify for PCAFC.

First, we note that the definition of ''unable to self-sustain in the community'' requires that an eligible veteran need personal care services each time he or she completes three or more ADLs listed in the definition of inability to perform an ADL in 71.15, and is fully dependent on a caregiver to complete such ADLs; or has a need for supervision, protection, or instruction on a continuous basis. This definition is not required to be met in order to be eligible for PCAFC; it is solely used for purposes of determining the stipend level and is intended to cover those eligible veterans with severe needs. The definition of inability to perform an ADL, which is one basis upon which a veteran or servicemember may be deemed in need of personal care services, requires that the veteran or servicemember need assistance each time that he or she completes at least one ADL. Thus, an eligible veteran who does not require personal care services each time he or she completes three or more ADLs and may only need assistance with two, could still be eligible for PCAFC; however, the Primary Family Caregiver would receive the lower-level stipend (*i.e.,* 62.5 percent of the monthly stipend).

We note that the higher level is not intended to cover only those eligible veterans who are geriatric or nearing geriatric, and age is not a determining factor for purposes of the definition of unable to self-sustain in the community. Instead, the higher level is based on whether the eligible veteran meets the definition of unable to self-sustain in the community, which considers the amount and degree of need for personal care services. This definition is meant to address those eligible veterans that have severe needs, regardless of age, and this definition of unable to self-sustain in the community provides a way for us to distinguish between those who have severe needs and those who have moderate needs for purposes of the stipend level.

This definition will be used to determine the higher- and lower-level stipend payments, and VA believes it is necessary to establish a clear delineation between the amount and degree of personal care services provided to eligible veterans, as required by 38 U.S.C. 1720G(a)(3)(C)(i). We believe two levels will allow us to better focus on supporting the health and wellness of eligible veterans and their Family Caregivers, and will address the challenges we identified in using three levels. As we explained in the proposed rule and reiterate here, the utilization of three tiers has resulted in inconsistent assignment of ''amount and degree of personal care services provided,'' and a lack of clear thresholds that are easily understood and consistently applied has contributed to an emphasis on reassessment to ensure appropriate stipend tier assignment. 85 FR 13383 (March 6, 2020). We believe that such issues would be exacerbated by the addition of more tiers or levels, and that using only two levels will allow VA to better focus on supporting the health and wellness of eligible veterans and their Family Caregivers. We believe that two levels will provide the clearest delineation between the amount and degree of personal care services provided by the Family Caregiver.

As we explained in the proposed rule, while the changes we proposed to the PCAFC stipend methodology and levels would result in an increase in stipend payments for many Primary Family Caregivers of legacy participants, for others, these changes may result in a reduction in the stipend amount that they were eligible to receive before the effective date of the rule. 85 FR 13385 (March 6, 2020). We acknowledge that some legacy participants that are currently receiving stipend payment at tier three may not meet this definition of unable to self-sustain in the community for purposes of the stipend payment and may receive the stipend payment at the lower level. To help minimize the impact of such changes, we would make accommodations for Primary Family Caregivers of eligible veterans who meet the requirements of proposed § 71.20(b) and (c) (*i.e.,* legacy participants and legacy applicants) to ensure their stipend is not reduced for one year beginning on the effective date of the rule, except in cases where the reduction is the result of the eligible veteran relocating to a new address. Id. We do not agree that the changes to the stipend levels will deter family members from caring for eligible veterans, who may have been providing care to the eligible veteran even before approval and designation as a Family Caregiver under PCAFC. Additionally, the stipend is not intended to incentivize family members to be caregivers, but rather an acknowledgment of the sacrifices caregivers make to care for eligible veterans. 76 FR 26155 (May 5, 2011).

Further, the determination of whether an eligible veteran is unable to self-sustain in the community will occur during the initial assessment of eligibility and during reassessments, both of which will provide the Family Caregiver with the opportunity to provide input on the needs and limitations of the eligible veteran, and consider the assistance the Family Caregiver provides, including both assistance with ADLs and supervision, protection, and instruction.

For all of these reasons as explained above, we believe this definition fulfills VA's statutory requirement, and allows for VA consideration of those factors in

38 U.S.C. 1720G(a)(3)(C)(iii). We are not making any changes based on these comments.

One commenter noted that Family Caregivers do not have the skills or extensive training to assist veterans in need of assistance with 3 ADLs, and that veterans that qualify for these services should receive care from in-home care providers. We note that PCAFC provides additional options to eligible veterans and their Family Caregivers who may wish to remain in the home. Family Caregivers receive training and education to help them support the eligible veteran's care needs. We do not expect Family Caregivers to replace the need for medical professionals that provide specialized medical care that requires advanced skill and training. PCAFC is one of many options available for veterans who wish to remain in the home. Other programs available include Veteran-Directed care, home based primary care services, and adult day health care. As necessary and appropriate, we will make referrals to other VA programs and services. We make no changes based on this comment.

One commenter disagreed with the definition of ''unable to self-sustain in the community,'' based on the experience of one of their fellows who is the Family Caregiver of a paraplegic, who has suffered significant muscle damage in his lower extremities. They noted that while this individual can complete most ADLs independently, he has shoulder damage resulting from overuse, and the Family Caregiver provides support and assistance on most days. They further noted that without the Family Caregiver's support on completing less than three ADLs, this individual would not be able to remain in the community. As we explained in the proposed rule and reiterated in this discussion, the definition of unable to self-sustain in the community is intended to provide a distinction for purposes of the higher- and lower-level stipend rate; it is not used for determining whether an individual is eligible for PCAFC. It is our intent that those eligible veterans with severe needs would meet the definition of unable to self-sustain in the community and qualify for the higher-level stipend. As we explained above, if an eligible veteran does not meet the definition of unable to self-sustain in the community, that does not mean they are ineligible for PCAFC. To determine eligibility for PCAFC, VA would assess the veteran or servicemember's eligibility under 38 CFR 71.20(a), including whether the individual is in need of personal care services based on an inability to perform an ADL or a need for supervision, protection, or instruction. We make no changes based on this comment.

One commenter raised concerns about language in the proposed rule, in which we explained the difference between the need for supervision, protection, or instruction on a daily basis versus continuous basis by stating that ''. . . an individual with dementia who only experiences changes in memory or behavior at certain times of the day, such as individuals who experience sundowning or sleep disturbances, may not be determined to have a need for supervision, protection, or instruction on a continuous basis.'' See 85 FR 13384 (March 6, 2020). This commenter further stated that ''[t]he standard should was, in the veteran were not care for by a caregiver, would the VA or a Social Service division have to provide some type of regular aid.'' We are unable to determine whether this commenter thinks this ''standard'' should be for PCAFC eligibility or for the higher stipend level, but note that the commenter's examples repeat examples VA provided in the context of explaining ''unable to self-sustain in the community.''

First, we note that the definition of ''unable to self-sustain in the community'' requires that an eligible veteran need personal care services each time he or she completes three or more ADLs listed in the definition of inability to perform an ADL in 71.15, and is fully dependent on a caregiver to complete such ADLs; or has a need for supervision, protection, or instruction on a continuous basis. This definition is not required to be met in order to be eligible for PCAFC; it is solely used for purposes of determining the stipend level. The definition of need for supervision, protection, or instruction, which is one basis upon which a veteran or servicemember may be deemed in need of personal care services, requires that the veteran or servicemember have a functional impairment that directly impacts the individual's ability to maintain his or her personal safety on a daily basis; it does not require the eligible veteran to need supervision, protection, or instruction on a continuous basis. Thus, an eligible veteran who does not require need for supervision, protection, or instruction on a continuous basis could still be eligible for PCAFC; however, the Primary Family Caregiver would receive the lower-level stipend (*i.e.,* 62.5 percent of the monthly stipend rate).

As we explained in the proposed rule, an eligible veteran who has a need for supervision, protection, or instruction on a continuous basis, thus qualifying them for the higher stipend level, would require more frequent and possibly more intensive care and the Family Caregiver would thus provide a greater amount and degree of personal care services to the eligible veteran. 85 FR 13384 (March 6, 2020). We refer the commenter to the discussion of ''need for supervision, protection, or instruction'' above where we distinguish the terms ''daily'' and ''continuous.''

We make no changes based on this comment.

Two Stipend Levels

VA proposed to establish two levels for the stipend payments versus the three tiers that are set forth in current § 71.40(c)(4)(iv)(A) through (C). Whether a Primary Family Caregiver qualifies for a stipend at the higher level will depend on whether the eligible veteran is determined to be ''unable to self-sustain in the community'' (as that term will be defined in § 71.15). The lower stipend level will apply to all other Primary Family Caregivers of eligible veterans such that the eligibility criteria under proposed § 71.20(a) will establish eligibility at the lower level. VA received multiple comments about the two stipend levels that are addressed below.

We received several comments that indicate confusion about the two levels for stipend payments. In particular, some commenters believed that the eligible veteran's type of disability, whether it be physical or related to cognition, neurological or mental health, will be a determinative factor in the stipend level. One commenter stated the higher- level leans too heavily on physical disabilities and believes that the lower level was for eligible veterans with needs related to supervision and safety. The commenter noted how difficult it is to perform the tasks associated with supervision and protection. The commenter further inquired as to how VA will address veterans who are eligible for both levels. The commenter was also concerned that by assuming that physical disabilities are greater than invisible injuries, VA would not be helping the suicide problem. Relatedly, another commenter believed that the higher level focused on ADLs. Another commenter also expressed general confusion about the lower stipend level.

To clarify, all eligible veterans who qualify for PCAFC will meet the criteria for the lower-level stipend. However, a Primary Family Caregiver will receive the higher-level monthly stipend rate if the eligible veteran is determined to be unable to self-sustain in the

community.as defined in § 71.15. The definition of ''unable to self-sustain in the community'' covers both ''inability to perform an ADL'' and ''need for supervision, protection and instruction'' and this accounts for both physical disabilities and cognitive, neurological, and mental health disabilities. Thus, eligible veterans can meet the requirements of unable to self-sustain in the community because of physical disabilities leading to impairments or disabilities leading to cognitive, neurological or mental health impairment. Therefore, we do not believe that the higher stipend level is primarily for or focused on veterans with physical disabilities. To the extent a commenter raised concerns that VA would not be helping the suicide problem, we refer the commenter to the discussion on veteran suicide in the miscellaneous comments section. We are not making any changes based on these comments.

Several commenters expressed concern with VA's proposal to have more than one level of stipend payment. Multiple commenters disagreed with placing percentages on how much help a veteran can receive. One commenter asserted that everyone should be paid equally. Another commenter recommended there be one level, and that having two will present challenges, appeals, and confusion. The determination of whether a Primary Family Caregiver receives the lower-level stipend (*i.e.,* 62.5 percent of the monthly stipend rate) or the high level stipend (*i.e.,* 100 percent of the monthly stipend rate) is based on whether the eligible veteran is unable to self-sustain in the community. The percentages are assigned only for the purposes of calculating stipend payments. While we believe the percentages are consistent with the time and level of personal care services required by an eligible veteran from a Family Caregiver at each level (85 FR 13384 (March 6, 2020)), the percentages are not intended to equate to a specific amount of care related to the personal care services being received by the eligible veteran.

While we understand the commenters' concern that having multiple levels could present challenges, appeals, or confusion, section 1720G of title 38, U.S.C., requires that the amount of the monthly personal caregiver stipend be determined in accordance with a schedule established by VA that specifies stipends based on upon the amount and degree of personal care services provided. See 38 U.S.C. 1720G(a)(3)(C)(i). We interpret this to mean that the schedule must account for variation between the amount and degree of personal care services provided. Accordingly, we believe the statute requires VA to establish at least two PCAFC stipend levels; thus, we are unable to pay every Primary Family Caregiver the same monthly stipend. We are not making any changes based on these comments.

One commenter was concerned that because the veteran the commenter cares for suffers from PTSD, TBI, depression, and pain-related issues, they may no longer qualify for the program and requested more tiers, not less. We wish to clarify that the assignment of tiers (in the current regulations) or levels (as the regulations are revised by this rulemaking) is used to determine the amount of the monthly stipend payment issued to the designated and approved Primary Family Caregiver and is not used to determine eligibility. To the extent that the commenter is requesting that we add additional stipend tiers or levels for additional stipend rates, we decline to make those changes. As VA explained in the proposed rule, the utilization of three tiers has resulted in inconsistent assignment of ''amount and degree of personal care services provided,'' and a lack of clear thresholds that are easily understood and consistently applied has contributed to an emphasis on reassessment to ensure appropriate stipend tier assignment. 85 FR 13383 (March 6, 2020). We believe that such issues would be exacerbated by the addition of more tiers or levels, and that using only two levels will allow VA to better focus on supporting the health and wellness of eligible veterans and their Family Caregivers. We believe that two levels will provide the clearest delineation between the amount and degree of personal care services provided by the Family Caregiver. We also note that the eligibility criteria for PCAFC and the higher stipend level account for veterans and servicemembers with personal care needs related to cognitive, neurological, and mental health conditions are considered under the definition of serious injury, and further refer the commenter to our discussion of the eligibility criteria in § 71.20(a) and in the discussion of the term unable to self-sustain in the community. We make no changes based on this comment.

Several commenters suggested that certain VA disability ratings, including a 100 percent permanent and total service-connected disability rating and certain aid and attendance awards, should automatically qualify an eligible veteran for the highest stipend rate. While the eligibility requirements for these disability ratings and awards referenced by the commenters may seem similar, we note these are not synonymous with VA's definition of ''unable to self-sustain in the community,'' and we do not believe the criteria for those benefits are a substitute for a clinical evaluation of whether a veteran or servicemember is unable to self-sustain in the community. We believe that in order to ensure that PCAFC is implemented in a standardized and uniform manner across VHA, each veteran or servicemember must be evaluated based on the same criteria, including the criteria to qualify for the higher-level stipend. To that end, VA will utilize standardized assessments to evaluate both the veteran or servicemember and his or her identified caregiver when determining eligibility for PCAFC and the applicable stipend level, as applicable. It is our goal to provide a program that has clear and transparent eligibility criteria that is applied to each and every applicant.

Additionally, we do not believe it would be appropriate to consider certain disability ratings as a substitute for a clinical evaluation of whether a veteran or servicemember is unable to self-sustain in the community, as not all veterans and servicemembers applying for or participating in PCAFC will have been evaluated by VA for such ratings, and because VA has not considered whether additional VA disability ratings or other benefits determinations other than those recommended by the commenters may be appropriate for establishing that a veteran or servicemember is unable to self-sustain in the community for purposes of PCAFC. Finally, it should be noted in that VA disability ratings under VA's schedule for rating disabilities are intended to evaluate the average impairment in earning capacity in civil occupations resulting from various disabilities or combinations of disabilities. 38 U.S.C. 1155. They are not designed to take into account the amount and degree of personal care services provided the eligible veteran. Thus, they would provide a very imprecise guide to determining stipend rates. We are not making any changes based on these comments.

Several commenters raised concerns about the hours or responsibilities associated with the stipend levels. Multiple commenters provided their personal stories about caring for a veteran in the current program and believed that the current hours were not indicative of the how long the caregiver actually spends taking care of the eligible veteran or expressed concerns

that the new stipend level would be insufficient for the number of hours required. Some stated that the 10-hour category was insufficient, another shared that the tasks required 14 hours a day, every day and that the new program would not adequately compensate for the required hours, another commenter explained that the care required was 24/7 and requested that VA require caregivers to provide a log of the activities that they perform, and another stated that the current system was insufficient and the regulations do not account for the amount of time required. Another commenter questioned whether that there will be an expectation for caregivers to provide 24/7 care. One commenter was concerned that most of the current caregivers receiving stipends at tier three will be excluded because the higher stipend level will require 24/7 care.

Foremost, we thank the caregivers who are providing personal care services to their family members and the sacrifices that they make. Further, it has never been VA's intent that the monthly stipend directly correlates with a specific number of caregiving hours. See 80 FR 1369 (January 9, 2015). We note that to the extent commenters are dissatisfied with the current criteria, we understand and have removed the references to numbers of hours, and instead will rely on a percentage of the GS rate when determining the monthly stipend. While we know that some Family Caregivers provide in excess of 40 hours or more of caregiving a week, we reiterate that the stipend payment does not represent a direct correlation to the number of hours a Family Caregiver provides. Additionally, eligible veterans who require 24/7 care may be eligible for additional support services, such as homemaker or home health aide, to supplement the personal care services provided by the Family Caregiver. In addition, we note that the reference in the definition of ''unable to self-sustain in the community'' to an eligible veteran who has a need for supervision, protection, or instruction on a ''continuous basis,'' was not intended to mean that the eligible veteran requires or that the Family Caregiver provides 24/7 or nursing home level care. This is not VA's intent or expectation of Family Caregivers. Further, VA does not believe it is necessary to require caregivers to provide a log of the activities they perform. Participation in PCAFC is conditioned, in part, upon the Family Caregiver providing personal care services to the eligible veteran. Through wellness contacts and reassessments, VA will provide oversight and monitoring of the adequacy of care and supervision being provided by the Family Caregiver. We are making no changes based on these comments.

One commenter expressed concern over how VA plans to adjust for bias towards those with higher ratings in the new two-level system. This commenter asked whether the individual conducting the assessment would have access to the veteran's rating decision and be persuaded to place the veteran in the more financially beneficial category if the veteran has a higher rating than 70 percent, and asserted that this factor and others must be addressed. We thank the commenter for their concern and clarify that a 70 percent single or combined service-connected disability rating is used to determine whether an eligible veteran has a serious injury; however, an eligible veteran's service-connected disability rating has no bearing on the determination of whether an eligible veteran is in need of personal care services or whether he or she is unable to self-sustain in the community for purposes of the monthly stipend. Determinations of whether an eligible veteran is unable to self-sustain in the community are made by CEATs, which are informed by evaluations and assessments of the veteran's functional needs for which the specific service-connected rating has no bearing. Through training, VA will ensure this is clear to those rendering determinations of whether an eligible veteran is unable to self-sustain in the community. We are not making any changes based on this comment.

One commenter recommended that assessment of the stipend level be completed ''with the Primary doctor and Primary Caregiver,'' and potentially a licensed occupational therapist, but disagreed with allowing others such as a nurse, social worker, physical therapist, or kinesiologist to complete such assessments as that can lead to inconsistencies. As stated above, eligibility determinations for PCAFC will be based upon evaluations of both the veteran and caregiver applicant(s) conducted by clinical staff at the local VA medical center, with input from the primary care team, including the veteran's primary care provider, to the maximum extent practicable. These evaluations include assessments of the veteran's functional status and the caregiver's ability to perform personal care services. Additional specialty assessments may also be included based on the individual needs of the veteran. When all evaluations are completed, the CEAT will review the evaluations and pertinent medical records, in order to render a determination regarding eligibility, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC. The CEATs are comprised of a standardized group of inter-professional, licensed practitioners with specific expertise and training in the eligibility requirements for PCAFC and the criteria for the higher-level stipend.

While primary care teams will not collaborate directly with the CEATs on determining eligibility, documentation of their input in the local staff evaluation of PCAFC applicants will be available in the medical record for review. This documentation will be used by the CEATs to help inform eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC. We are not making any changes based on this comment.

One commenter commended VA for proposing a more streamlined approach to determining the monthly stipend, and we appreciate the comment. However, multiple commenters believed that VA did not provide sufficient rationale for going from three tiers to two levels. One commenter asserted that little information and rationale was provided on why it is necessary to move from three tiers to two levels, and that this change will disadvantage veterans and their caregivers. Similarly, one commenter stated that the two levels should be better defined to ensure the program is consistently implemented across VHA. One commenter stated that VA provided no explanation on why the current evaluation and scoring is no longer sufficient. Another commenter disagreed with the change to two levels and asked for the theoretical or conceptual basis for this change. Two commenters expressed concern that there are no specific criteria defining the two levels and asserted that VA provided no explanation as to why the current clinical scoring is no longer sufficient.

As indicated in the proposed rule, VA has found that the utilization of the current three tiers has resulted in inconsistent assignment of the ''amount and degree of personal care services provided.'' See 85 FR 13383 (March 6, 2020). Further, there can often be little variance in the personal care services provided by Primary Family Caregivers between assigned tier levels (*e.g.,* between tier 1 and tier 2, and between tier 2 and tier 3) which has led to a lack of clear thresholds. Id. These tier assignments were based on criteria and

a subsequent score that were subjective in nature due to the lack of clear delineations between the amount and degree of required personal care services based on the veteran's or servicemember's inability to perform an ADL or need for supervision and protection based on symptoms or residuals of neurological or other impairment or injury. For example, providers surmised the difference between the level of assistance needed to complete a task or activity when assigning a ''score.'' Additionally, the sum of all ratings lacked clear delineation between tiers. For example, the difference between a rating of 12 and 13 was the difference between tier one and tier two. This subjectivity has led to lack of clear threshold and thus confusion and frustration for both PCAFC participants and VA staff. Assessing the needs and functional impairments of a veteran is complex and we believe transitioning from a subjective rating which attempts to delineate degrees of need in specific ADLs and impairments, to an assessment of the veteran's overall level of impairment will simplify the determination, which will in turn result in consistency and standardization throughout PCAFC in determining the appropriate level for stipend payments. Additionally, as previously explained, we are standardizing PCAFC to focus on veterans and servicemembers with moderate and severe needs. Therefore, VA believes it is necessary to base stipend payments on only two levels of need that establish a clear delineation between the amount and degree of personal care services provided to eligible veterans. Id. We are not making any changes based on these comments.

Concern for Current Legacy Participants, Including Those Receiving Lowest Tier Stipend

Several commenters expressed concern for current participants who may no longer be eligible for PCAFC or whose stipends may be reduced. In recognizing the focus on eligible veterans with moderate and severe needs, one commenter recommended that VA identify other services and supports available to current participants who may be impacted by this change and verify that these other programs are available consistency across the country and effective in delivering support. The commenter specifically mentioned Veteran-Directed care, home based primary care, respite care, and homemaker and home health aide services, and asserted that they are often underfunded by VA, and urged VA to ensure the success and viability of these programs. Another commenter urged VA to rethink the adjustment from three tiers to two levels, and asserted that VA needs to ensure eligible veterans and their caregivers do not fall through the cracks and jeopardize their financial stability, specifically current PCAFC participants. Another commenter believed that, although the role is not changing, VA was changing the acknowledgement of the validity of the role and indicating that it is not worth as much. The commenter further stated that by removing the necessary funding the access to the program will be greatly diminished.

While we are making no changes based on these comments, we emphasize that we do not believe that the sacrifices made by caregivers are not worthwhile. Family Caregivers play a significant role in the lives of veterans and servicemembers, and we thank them for their service. We wish to emphasize that PCAFC is one way VA supports eligible veterans and the Family Caregivers. For those who may no longer qualify, CSCs are available to assist in identifying the needs of the veterans and their caregivers, and making referrals and connections to alternative services as appropriate. VA offers a menu of supports and services that supports caregivers caring for veterans such as homemaker and home health aides, home based primary care, Veteran-Directed care, and adult day care health care to name a few. In addition, VA offers supports and services provided directly to caregivers of covered veterans through PGCSS including access to CSCs located at every VA medical center, a caregiver website, training and education offered online and in person on topics such as self-care, peer support, and telephone support by licensed social workers through VA's Caregiver Support Line.

While offering assurance of funding and availability of specific services in specific areas is outside the scope of this rulemaking, we note that VA is actively improving and expanding PGCSS, including the establishment of General Caregiver Support staff to ensure nationwide support at each medical center.

In addition, as explained in the proposed rule, we understand that Primary Family Caregivers may have their stipend amount impacted by changes to the stipend payment calculation. We take this opportunity to highlight that the VA MISSION Act of 2018 expanded benefits available to Primary Family Caregivers, which includes Primary Family Caregivers of legacy participants and legacy applicants, to include financial planning services, as that term is defined in § 71.15. These services may be helpful to those who will be adjusting to a lower stipend amount. Family Caregivers also have access to mental health services that can provided support as needed. We are not making any changes based on these comments.

Several commenters disagreed with the change in the tiers, especially the elimination of current PCAFC participants who qualify at the lowest tier (tier one). Another commenter noted that VA presumes the lowest tier does not include veterans with moderate to severe needs for personal care services, and asserted that VA provided no data, literature, or study to support this presumption. This commenter disagrees with this presumption and asserted that VA must provide data and analysis to support it. To further clarify, VA's assumption that the current tier one participants will be removed from PCAFC as a result of eligibility changes in part 71 was used for estimating the potential impact of the regulation on VA's budget. VA made this assumption because per the current rating criteria, Tier 1 is indicative of a low amount of need. As VA expands PCAFC to include eligible veterans of all eras and makes other changes to focus on veterans with moderate and severe needs it is possible that the current tier one participants may not meet the eligibility criteria in § 71.20(a). VA will not automatically discharge current PCAFC participants whose Primary Family Caregivers receive stipends at tier one. Instead, VA will conduct reassessments for all legacy participants and legacy applicants, regardless of assigned tier to determine continued eligibility in PCAFC, and for those who are eligible, the applicable stipend rate. We are not making any changes based on these comments.

Specific Number of Caregiver Hours or Tasks

One commenter appreciated the idea of moving into different tiers but was not sure if this was the appropriate direction, especially as it is difficult to calculate time providing care. Other commenters raised concerns about being placed in the lowest tier level when they provide more than 10 hours of caregiving per week. Some commenters noted that the stipend is based on 40 hours of care per week, when they may be providing more than that and otherwise the veteran would have to be institutionalized. This new pay scale would not cover those situations, and one commenter recommended basing the stipend amount on the actual number of hours of care provided.

Relatedly, one commenter stated that VA should consider the daily, weekly, monthly tasks caregivers perform when determining the level of stipend. One commenter asserted that the two levels is economically unfair to caregivers of eligible veterans who are unable to self-sustain in the community. We respond to these comments below.

As indicated in the proposed rule, it has never been VA's intent that the monthly stipend directly correlates with a specific number of caregiving hours. See 80 FR 1369 (January 9, 2015). Further, VA recognizes that the reference to a number of hours in the current regulation has caused confusion; therefore, we are seeking to change the stipend calculation to use a percentage of the monthly stipend rate based on the eligible veteran's level of care need. See 85 FR 13384 (March 6, 2020). Similarly, as we standardize PCAFC to focus on veterans and servicemembers with moderate and severe needs, we do not believe it is necessary to consider the number of tasks a Family Caregiver performs as we believe a determination on the level of care need (*i.e.,* whether an eligible veteran is unable to self-sustain in the community) is appropriate for determining the monthly stipend amount that is commensurate with the needs of the veteran. We are not making any changes based on these comments.

Multiple Residences

One commenter asked for clarification that families who live at more than one address during the year are eligible for PCFAC and for the calculation method that would be used to determine their stipend rate. Living in multiple locations during the year does not disqualify an otherwise eligible participant from participation in PCFAC. The address on record with PCAFC determines the geographic location for purposes of calculating the monthly stipend rate. It is presumed that the address on record is where the eligible veteran consistently spends the majority of his or her time and where they receive VA care. Therefore, a temporary move or vacation would not affect the monthly stipend rate. However, we note that we require notification of a relocation within 30 days from the date of relocation and will seek to recover overpayments of benefits if VA does not receive timeline notification of a relocation. We recognize that in some cases, a temporary move to an out-of-town relative may be planned as respite for a short period, say one month, but perhaps unforeseen circumstances could arise, whereby the return to the veteran's home is delayed. In this instance, the veteran's home remains their intended permanent address. Additionally, we are aware of cases in which a veteran may have a 'summer' residence and a 'winter residence.' In these cases, VA would expect notification of the veteran's address change, not only for the purposes of calculating the stipend payment but also to allow VA to conduct the required wellness contact, which is required generally every 120 days. Such cases would be reviewed on a case by case basis. VA will develop written guidance to guide consistent determinations of these circumstances.

Change to Heading in § 71.40(c)(4)(i)(D)

In the proposed rule, we included a heading for new § 71.40(c)(4)(i)(D) which establishes a special rule for Primary Family Caregivers of legacy participants subject to decrease as a result of VA's transition from the combined rate to the new monthly stipend rate. As part of this final rule, we are removing the heading, ''Special rule for Primary Family Caregivers subject to decrease because of monthly stipend rate'' as this heading is unnecessary. We make no other changes to this paragraph.

Additional Benefits

Several commenters requested VA provide additional benefits for Primary Family Caregivers to include, Military Airlift Command flights, retirement options, dental care (for both an eligible veteran who is rated below 100 percent service-connected disability and his or her caregiver), long-term care benefits, assistance with mortgage and survivor benefits. We address these comments below.

Section 71.40(b) and (c) of 38 CFR implement the benefits provided to Secondary Family Caregivers and Primary Family Caregivers, respectively, under 38 U.S.C. 1720G(a)(3)(A). Secondary Family Caregivers are generally eligible for all of the benefits authorized for General Caregivers, based on our interpretation and application of section 1720G(a)(3)(A) and (B), in addition to benefits specific to the Secondary Family Caregiver provided in § 71.40(b)(1)–(6). See 76 FR 26153 (May 5, 2011). Similarly, Primary Family Caregivers are authorized by section 1720G(a)(3)(A)(ii)(I) to receive all of the benefits that VA provides to Secondary Family Caregivers in addition to a higher level of benefits authorized only for Primary Family Caregivers provided in § 71.40(c)(2)–(6). Id. VA is unable to provide additional benefits as suggested above (*e.g.,* Military Airlift Command flights, retirement options, dental care, long-term care benefits, assistance with mortgage, survivor benefits) because these benefits are not authorized under 38 U.S.C. 1720G(a)(3)(A). Furthermore, to the extent one commenter believes VA should provide dental care to veterans who have less than 100 percent service-connected disability rating, we believe this is beyond the scope of this rulemaking. We make no changes based on these comments.

One commenter requested that Secondary Family Caregivers be allowed to obtain CHAMPVA benefits. Additionally, one commenter requested that CHAMPVA include coverage for pre-existing conditions due to natural disasters after suffering dental injury from a hurricane. 38 U.S.C. 1720G(3)(A) delineates between benefits provided to ''family caregivers of an eligible veteran'' and ''family caregivers designated as the primary provider of personal care services for an eligible veteran.'' Under section 1720G(a)(3)(A)(ii)(IV), VA must provide certain Primary Family Caregivers with medical care under 38 U.S.C. 1781 and VA administers section 1781 authority through the CHAMPVA program and its implementing regulations. See 76 FR 26154 (May 5, 2011). Therefore, VA lacks the statutory authority required to provide CHAMPVA benefits to Secondary Family Caregivers as they are not designated as the primary provider of personal care services. To the extent the commenter believes CHAMPVA should provide coverage for pre-existing conditions, there is currently no restriction in the services provided under CHAMPVA based on pre-existing conditions. To the extent commenters further suggest or request that VA should revise the CHAMPVA regulations, those comments are beyond the scope of this rulemaking. We are not making any changes based on these comments.

One commenter requested more access to caregiver support groups. Another commenter asserted that in addition to offering financial services, VA should include increased vocational rehabilitation services to those who are no longer eligible for the monthly stipend to help them find meaningful employment. While we are making no changes based on these comments, we note that as part of PGCSS, we offer peer support mentoring, local caregiver support groups, education and skills training for caregivers, REACH (Resources for enhancing All Caregivers Health) VA Telephone support groups and Spanish-Speaking telephone support groups. We are ensuring that a consistent menu of these services is

available across all VA facilities to any caregiver providing personal care services to an enrolled veteran. We also note that VA has a toll-free Caregiver Support Line, staffed by licensed social workers to provide information about services that are available to caregivers. Social workers assess caregiver's psychosocial needs, and provide counseling, education, and advocacy to problem solve stressors associated with caregiving. The Caregiver Support Line can also connect caregivers with CSCs at local VA medical facilities and with other VA and community resources.

§ 71.45 Revocation and Discharge of Family Caregivers

General

One commenter asserted that it is extremely difficult to discharge a veteran or caregiver in PCAFC but did not provide any additional information regarding that assertion. The changes to 38 CFR 71.45 that we proposed and now make final are intended to clarify for eligible veterans, Family Caregivers, and staff the various reasons for which a Family Caregiver may be subject to discharge and revocation from PCAFC, and will allow VA to take any appropriate action that is necessary when those situations described in § 71.45 occur. We make no changes based on this comment.

One commenter asked what veterans and caregivers can expect from VA in terms of being discharged from PCAFC, as VA has strict guidelines for clinical discharge planning, and how VA plans to smoothly transition veterans and Family Caregivers after PCAFC benefits, supports, and services are terminated to ensure that the veteran's need for personal care services are met. As explained in the proposed rule, we would establish a transition plan for legacy participants and legacy applicants who may or may not meet the new eligibility criteria and whose Primary Family Caregivers may have their stipend amount impacted by changes to the stipend payment calculation. We also described in proposed § 71.45 instances when VA would provide 60 days advanced notice of discharge and when benefits would continue for a period of time, as we believe both advanced notice of discharge and extended benefits would assist with the adjustment of being discharged from PCAFC. We also note that Family Caregivers can transition to PGCSS, which provides a robust array of services such as training, education, peer support, and ability to connect with VA Caregiver Program staff, who can refer Family Caregivers and veterans to local VA and community resources. We make no changes based on this comment.

One commenter requested that VA ensure both eligible veterans and Family Caregivers are aware and comprehend the revocation and discharge procedures as part of the initial PCAFC training. We agree with this commenter and will provide information on revocation and discharge procedures as part of the roles, responsibilities, and requirements that are discussed with Family Caregivers and eligible veterans when approved for PCAFC. However, we would not make any changes to the regulation based on this comment, as training information would be more appropriate for internal VA policy and training materials. We make no changes based on this comment.

One commenter asserted that the changes we are making to part 71 will provide VA avenues to remove veterans from the existing program. We note that we have had the ability to revoke the Family Caregiver from PCAFC pursuant to 38 CFR 71.45 in multiple instances, including when an eligible veteran or Family Caregiver no longer meets the requirements of part 71. We make no changes based on this comment.

Revocation for Cause

One commenter recommended discharge be swifter, as fraud is fraud. We believe this commenter was referring to revocation, as we proposed using fraud as a basis for revoking the Family Caregiver's designation. Another commenter was concerned about numerous instances they are aware of in which individuals are abusing PCAFC and committing fraud, and generally suggested VA do more to address fraud. As explained in the proposed rule, we would revoke Family Caregiver designation when fraud has been committed, discontinue benefits on the date the fraud began (or if VA cannot identify when the fraud began, the earliest date that the fraud is known by VA to have been committed, and no later than the date on which VA identifies that fraud was committed), and would seek to recover overpayment of benefits (benefits provided after the fraud commenced). We believe that the revocation date in cases of fraud in the proposed rule is swift, and that any earlier date would be premature. Also, we do not tolerate fraud in PCAFC, and believe that this is reflected in the revocation actions outlined in the proposed rule. However, we also acknowledge that PCAFC is a clinical program and PCAFC staff are not investigators; thus, we refer instances of potential fraud to VA's OIG and work with OIG to the fullest extent to identify and address instances of fraud within PCAFC. We make no changes based on these comments.

Revocation Due to VA Error

One commenter did not oppose revocation of the Family Caregiver due to VA error if the error was designating a Family Caregiver who is not actually a family member and who does not live with the veteran. However, this commenter asked what if VA erred in determining the veteran's eligibility for PCAFC. This commenter expanded upon this question by further asking what action VA would take if VA made an administrative error in the veteran's eligibility and later determined the veteran was not eligible, and would VA discharge the veteran and his or her caregiver from the program. While we note that the reasons for VA error may vary based on individual cases, if VA erred in determining a veteran eligibility for PCAFC, we would revoke the Family Caregiver's designation from PCAFC pursuant to § 71.45(a)(1)(iii). For example, we would revoke their status if VA erred in finding a veteran eligible for PCAFC despite the veteran not meeting the minimum service-connected disability rating. We make no changes based on this comment.

One commenter appeared to suggest that VA should fully recoup benefits provided in instances in which VA erred in determining a veteran or servicemember and his or her Family Caregiver eligibility for PCAFC when they never met the requirements of part 71, and suggested VA error include legacy participants who never met the requirements of part 71. As we explained in the proposed rule, eligibility under new § 71.20 (b) or (c) would not exempt the Family Caregiver of a legacy participant or legacy applicant from being revoked or discharged pursuant to proposed § 71.45 for reasons other than not meeting the eligibility criteria in proposed § 71.20(a) in the one-year period beginning on the effective date of the rule. For example, the Family Caregiver could be revoked for cause, non-compliance, or VA error, or discharged due to death or institutionalization of the eligible veteran or the Family Caregiver, as discussed in the context of § 71.45 below. 85 FR 13373 (March 6, 2020).

We assume this commenter was suggesting recoupment of overpayments of all benefits received; not just those as of the date of the error. As explained further in the proposed rule, the date of revocation would be the date of the error, and if VA cannot identify when the error was made, the date of

revocation would be the earliest date that the error is known by VA to have occurred, and no later than the date on which the error is identified. This is our current practice, which we would continue, unless the error is due to fraud which is separately addressed in the regulation and in which case, we could make revocation effective retroactively and recoup overpayments of benefits provided after the fraud commenced. We believe this is reasonable to prevent VA from providing any more benefits to a Family Caregiver and veteran, including legacy participants, who are not eligible for PCAFC. We note that we would not recoup all overpayments of benefits received as that could result in hardship to the Family Caregiver and veteran, and as a matter of fairness, as the error was on the part of VA, and the Family Caregiver and/or veteran may not have been aware of the error. We do not make any changes based on this comment.

Revocation for Noncompliance

One commenter expressed concern with ''noncompliance,'' stating that it would become VA's new ''in the best interest of'' and requesting VA provide a detailed set of data for dismissals, and that noncompliance particularly be scrutinized. While it is not entirely clear what aspect of § 71.45(a)(1)(ii) the commenter's concern is directed towards, we assume this commenter is expressing concern over the language in § 71.45(a)(1)(ii)(E). We believe that this commenter is requesting that this language be further defined, so that all the reasons for revocation based on noncompliance be included in this section. Another commenter generally opposed any catch-all language in the proposed rule. As such, we believe that the commenter was expressing objection to the language in § 71.45(a)(1)(ii)(E), which amounts to a catch-all provision, as we explained in the preamble for the proposed rule. This commenter seemed to indicate that such language is problematic because it gives VA too much discretion to do what they want or cover circumstances as they see fit.

We disagree that this language gives VA too much discretion, as this language is consistent with VA's authority to revoke the Family Caregiver under 38 U.S.C. 1720G(a)(7)(D)(i) and (a)(9)(C)(ii)(II). In addition, this language is meant to ensure that PCAFC is available only to eligible veterans and Family Caregivers who meet the requirements of part 71. Also, to the extent that the commenter indicated that all the reasons for revocation based on noncompliance be included in this section, we do not believe that this is necessary. As we proposed, 38 CFR 71.45(a)(1)(ii) describes all the reasons for revocation from PCAFC due to noncompliance. In paragraph (a)(1)(ii), we further describe the areas of noncompliance under part 71 that would lead to revocation, which included a catch-all category in paragraph (a)(1)(ii)(E). Paragraphs (a)(1)(ii)(A) through (D) of § 71.45 are the most common reasons for noncompliance that we have identified, which is why they are specifically enumerated here. However, there may be other instances of noncompliance that may arise, and as such, a catch-all category would be appropriate as such other instances may not be as frequent, and to list all the requirements of Part 71 under paragraph (a)(1) would be overly lengthy. This catch-all category would allow us to have a clear basis for revocation if the eligible veteran or Family Caregiver(s) are not in compliance with part 71 outside of those that are enumerated in § 71.45(a)(1)(ii)(A) through (D). Moreover, we do intend to monitor the usage of paragraph (a)(1)(ii)(E). As we noted in the preamble to the proposed rule, if we find that this basis for revocation is frequently relied upon, we would consider proposing additional specific criteria for revocation under this section in a future rulemaking. We make no changes based on these comments.

Discharge Due to no Longer in the Best Interest

One commenter opposed VA determining that the caregiver relationship is not in the veteran's ''best interest,'' particularly if both individuals are consenting adults with capacity to make informed decisions, and that the best interest standard is only applicable in situations in which the veteran lacks decision-making capacity. As discussed above, the definition for ''in the best interest'' here is not focused on the relationship and quality of a veteran's or servicemember's relationship with their Family Caregiver, rather it is focused on whether it is in the best interest of the eligible veteran to participate in PCAFC, and this is a clinical decision guided by the judgement of a VA health professional on what care will best support the health and well-being of the veteran or servicemember. Moreover, 38 U.S.C. 1720G(a)(1)(B) provides that support under PCAFC will only be provided if VA determines it is in the best interest of the eligible veteran to do so. We make no changes based on this comment.

Discharge Due to Incarceration

Several commenters suggested VA discharge veterans from PCAFC, without extended benefits, when the eligible veteran has been incarcerated for 60 or more days. Commenters opposed VA providing eligible veterans and Family Caregivers who are incarcerated with extended benefits because they indicated that it was inappropriate and contradicted 38 CFR 17.38, and similarly opposed VA's inclusion of jail and prison in the proposed definition of institutionalization. Other commenters opposed the inclusion of jail or prison in the definition of institutionalization because it conflicts with the common use of the term by health care providers and other federal programs. Additionally, commenters asserted that VHA does not have independent access to city, county, state, or Federal prison databases and questioned whether PCAFC can leverage existing Federal databases or agreements, similar to VBA, to obtain veteran incarceration data.

We disagree with the comments indicating that providing extended benefits to Family Caregivers who are discharged due to the Family Caregiver or veteran being in jail or prison contradicts § 17.38, since the authorities for the provision of VA health care and PCAFC differ. Promulgated pursuant to 38 U.S.C. 1710, 38 CFR 17.38 describes the medical care and services (*i.e.,* the medical benefits package) for which eligible veterans under §§ 17.36 and 17.37 may receive, and excludes the provision of hospital and outpatient care for a veteran who is either a patient or inmate in an institution of another government agency if that agency has a duty to give the care or services. Paragraph (h) of 38 U.S.C. 1710 explicitly authorizes such exclusion of providing care to veterans, such as those who are incarcerated, when another agency of Federal, State, or local government has a duty under law to provide care to the veteran in an institution of such government. We note that PCAFC is governed by section 1720G, which does not contain any similar language to section 1710 authorizing exclusion of the provision of PCAFC benefits in the instance of incarceration. It is also important to note that PCAFC is a program unique to VA, and that no other Federal, State, or local government agencies have a duty under law to provide these same benefits. Thus, we find the authorizing statutes, 38 U.S.C. 1710 and 1720G, to be distinguishable.

We acknowledge that institutionalization in the health care context, including in other federal health care programs, usually refers to long-term health care and treatment; not jail or prison. However, we include jail and prison in the definition of institutionalization, as referenced for purposes of continuation of benefits in cases of discharge from PCAFC, because it provides Family Caregivers time to transition and minimizes the negative impact that may result from their discharge from PCAFC due to an eligible veteran being placed in jail or prison, which may often happen unexpectedly. We note that PCAFC is intended to support the Family Caregiver, and we believe continuation of benefits in such an instance would be consistent with that intent. Also, we include jail and prison in the definition of institutionalization, as referenced for purposes of continuation of benefits in cases of discharge from PCAFC, because it provides a period of transition for the veteran to replace the Primary Family Caregiver due to the Family Caregiver being placed in jail or prison, which may also often happen unexpectedly.

We also note that it is administratively difficult to treat institutionalization due to jail or prison differently from other reasons for institutionalization (*e.g.,* nursing home, assisted living facility). Further, the eligible veteran or Family Caregiver being placed in jail or prison is a very rare occurrence.

While we understand the support and rationale for the position that those who are incarcerated should not be discharged from PCAFC with extended benefits, we are not making any changes to 38 CFR 71.45 or the definition of institutionalization based on these comments, as we would need to spend more time collecting and reviewing data to better understand this issue and determine whether benefits should not be extended and whether we should revise the definition of institutionalization. Based on this review, we would then consider proposing changes to the definition of institutionalization and the revocation and discharge section in a future rulemaking.

We are not making changes based on these comments.

Discharge Due to Family Caregiver Request

One commenter asserted that the proposed rule provides incentive to caregivers to make false allegations of abuse and does not adequately protect eligible veterans from abuse and exploitation. This same commenter inquired as to the required burdens of proof for caregivers who allege abuse to receive extended benefits. Additionally, this commenter asked about the measures that will be taken to ensure veterans receive continuity of care so that a veteran who is being abused/exploited can discharge the caregiver without fear of being left without assistance with necessary Activities of Daily Living. This same commenter also opined that there are inherent risks associated with providing a spouse with the veteran's health information and asked how VA will protect the veteran's health information from unauthorized use or disclosure for non-medical purposes.

While Primary Family Caregiver allegations of abuse could result in discharge from PCAFC with extended benefits, we disagree that that creates an incentive to make false allegations as Family Caregiver designation will still be discharged, which will ultimately lead to discontinuation of benefits. It is also important to note that we require certain documentation to be provided if the Family Caregiver requests discharge due to domestic violence or intimate partner violence, such as police reports or records of arrest, protective orders, or disclosures to a treating provider, which we believe further acts as a disincentive for making false allegations. See 85 FR 13356, at 13410–13411 (March 6, 2020).

In order to protect eligible veterans from abuse and exploitation, we would conduct wellness contacts and reassessments (including in home visits) in which we would be able to identify potential vulnerabilities for the eligible veteran. If we determine there is abuse occurring, participation in PCAFC may be revoked under 38 CFR 71.45(a)(1)(i)(B). Current 38 CFR 71.45(c) addresses actions we may take if we suspect that the safety of the eligible veteran is at risk. In order to better describe the appropriate protocol and response to be taken in such situations, we proposed revising this paragraph to state that VA may suspend the caregiver's responsibilities, and facilitate appropriate referrals to protective agencies or emergency services is needed, to ensure the welfare of the eligible veteran, prior to discharge or revocation. See 85 FR 13411 (March 6, 2020). Measures that VA may take to ensure eligible veterans continue to receive care when a Primary Family Caregiver is discharged may include assisting the eligible veteran, or surrogate, in identifying another individual to perform the required personal care services, or assist with the designation of a new Primary Family Caregiver. Additionally, local VA staff can work with the eligible veteran to determine whether their needs may be met by other VA programs or community resources, and can further refer, as appropriate. We note that when requesting discharge, benefits continue for a period of time so that the eligible veteran has time to adjust to the discharge.

To the extent that the commenters raised concerns about protecting veterans' health information from Primary Family Caregivers, we consider such comments out of the scope of this rulemaking. We note that being a Primary Family Caregiver does not necessarily mean such individuals have access to the health records of the veteran, as generally the veteran would need to consent to such access by the Primary Family Caregiver, although there may be exceptions to this, such as instances in which the Primary Family Caregiver is the legal guardian. We do not provide information on the eligible veteran to the Primary Family Caregiver solely on their status as the Primary Family Caregiver, and VA has procedures in place for authorizing release of records in compliance with Federal laws. It is also important to note that we cannot protect against all risks that may exist when an eligible veteran's caregiver is their spouse and the parties enter into divorce proceedings, in which the eligible veteran's information may be used against them. We make no changes based on these comments.

One commenter suggested VA allow other reasonable standards of proof to substantiate claims of intimate partner violence for purposes of extended benefits, as the proposed standard of proof differs from those accepted for the arrest of a perpetrator (*i.e.,* witness statements, videos, taped 911 calls, photographs of injuries or destroyed property, medical treatment records), and differs from those required for receipt of benefits for conditions related to physical assault, such as military sexual trauma. We decline to make any changes based on this comment, as it would put us in an awkward position of assessing and evaluating the authenticity and legitimacy of statements, videos, and 911 calls; and could lead to further confusion about what documentation would be sufficient. However, if the Primary Family Caregiver presented such information to VA to request discharge and establish an extension of benefits, but they did not have the documents required under § 71.45, we would refer them to the intimate partner violence/domestic violence (IPV/DV) office and/or to a therapist or counselor to assess

his or her safety and provide assistance in obtaining any required documentation.

This same commenter opposed treating family caregivers who are dismissed ''for cause'' better than those who relinquish caregiving duties due to unsubstantiated IPV. This commenter noted that those dismissed for cause must receive notice of revocation from VA within 60 days and may receive 90 days of continued services. This commenter also noted that when a veteran dies, is institutionalized or whose condition improves to the extent that services are no longer necessary, the Primary Family Caregiver is provided 60 days to notify VA of the change followed by 90 days of continued benefits. This commenter thus suggested providing Primary Family Caregivers a minimum of 60 days to notify VA of their request for discharge when it is due to abuse. Under § 71.45(b)(3)(i), a Primary Family Caregiver who requests discharge due to unsubstantiated IPV can provide the present or future date of discharge. If they do not, VA will contact the Primary Family Caregiver to request a date. As a result, the Primary Family Caregiver is able to set the date of discharge, after which they will receive 30 days of continued benefits. We do not agree that a Primary Family Caregiver whose designation is revoked for cause will receive more favorable treatment than a Primary Family Caregiver discharged due to unsubstantiated IPV, as a Primary Family Caregiver who is revoked for cause will not receive an advanced notice of findings and would not receive continued benefits per § 71.45(a)(2) and (3). Also, as previously mentioned, a Primary Family Caregiver who requests discharge due to unsubstantiated IPV can select a future date to be discharged. Additionally, as explained in the response to the preceding comment, if a Primary Family Caregiver does not have the documents required under § 71.45(b)(3)(iii)(B) to substantiate IPV/DV, we would refer them to the IPV/DV office and/or to a therapist or counselor to assess his or her safety and provide assistance in obtaining any required documentation. Also, we would like to clarify that, contrary to the commenter's statement concerning improvement in the veteran's condition, death, and institutionalization, the minimum of 60 day notice that is provided for discharge due to improvement in the veteran's condition is provided by VA and not the Primary Family Caregiver, and there is no minimum of 60 day advanced notice from VA for discharge due to death or institutionalization.

One commenter commended VA for extending services and support to caregivers dealing with IPV/DV, but requested VA add shelter coordinators and safe home coordinators to the list of those designated to provide documentation to VA to allow for a more inclusive list of professionals who work with those who have experienced IPV/DV. We make no changes based on this comment, as the regulation lists VA clinical professionals that may directly treat individuals experiencing IPV/DV and those that frequently work with individuals experiencing IPV/DV and have necessary and important expertise in this area to be able to assess and address these issues. While this list of professionals is not intended to be an exhaustive list, we note that shelter coordinators and safe home coordinators are not treating providers, as they generally are not required to hold licenses like those professionals listed in the regulation.

Advanced Notice

One commenter supported VA's proposal to provide advanced notice of decisions, which would also provide veterans and family caregivers the opportunity to voice disagreement with VA's findings before benefits are reduced or terminated. We thank this commenter for their support.

Another commenter suggested VA provide 90 days' notice to an eligible veteran before reducing any PCAFC benefit or revoking their participation in PCAFC, particularly in cases of non-compliance. As explained in the proposed rule, we believe 60 days is a sufficient and appropriate period of time to give notice that the stipend is being decreased or that a Family Caregiver is revoked or discharged since this would balance the desire to provide sufficient opportunity for eligible veterans and Family Caregivers to dispute VA's findings while ensuring benefits are not provided beyond a reasonable time to participants who are determined to be eligible at a lower stipend rate or no longer eligible for PCAFC. Consistent with that rationale, we believe that 90 days is too long, and we make no changes based on this comment.

This commenter also recommended that such notice should include the following information, to the extent applicable: The specific reduction in benefit, if any; a detailed explanation of the basis for the determination to reduce the benefit; each specific eligibility requirement with respect to which VA claims the veteran or caregiver is noncompliant; a detailed explanation for how the veteran or caregiver is noncompliant with each such requirement; the identity of all personnel involved in the decision to reduce the benefit or revoke the veteran's participation in PCAFC; all information and copies of all documentation relied upon by VA in making its determination to reduce the benefit or in making its determination of noncompliance. This commenter also recommended VA allow the veteran to respond to any such notice and provide information or explanations for why the reduction in benefits or revocation should not be implemented; and such response should generally be due within 60 days of receipt of the notice, but the veteran should be permitted to request an extension of 60 days to provide the response, which should be granted in the absence of any determination that such request is being made in bad faith. This commenter added that if a veteran requests a 60-day extension, VA should not be permitted to implement the reduction in benefits or revocation until at least 30 days after such extension. This commenter also recommended that VA give good-faith consideration to any response provided by the veteran, and to consider additional input from the veteran's primary care team. Lastly, this commenter recommended VA be required to provide a written decision, after considering the veteran's response; and if VA still determines to reduce the veteran's benefits or revoke the veteran's participation in PCAFC, such action should not be effective until at least 30 days after VA provides its written decision to the veteran.

The commenter mentioned above who supported VA's proposal to provide advanced notice of decisions also urged VA to propose a standard format containing a minimum set of information required in these notices, such as those elements described under 38 U.S.C. 5104(b) (identification of the issues adjudicated; a summary of the evidence considered by the Secretary; a summary of the applicable laws and regulations; identification of findings favorable to the claimant; in the case of a denial, identification of elements not satisfied leading to the denial; an explanation of how to obtain or access evidence used in making the decision; and if applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation). We appreciate both commenters' feedback, and will consider this when developing any future changes to the appeals process and related policies. We note that this would be in policy rather than regulation to be consistent with how we

handle clinical appeals within VHA. Because PCAFC decisions are medical determinations, we provide PCAFC participants with the opportunity to dispute decisions made under PCAFC through the VHA clinical appeals process, which is already established in VHA Directive 1041, Appeal of VHA Clinical Decisions. Also, as explained in the proposed rule and reiterated in this final rule, we will issue advanced notices before stipend payment decreases and certain revocations and discharges. We make no changes based on these comments.

§ 71.47 Collection of Overpayment

Several commenters disagreed with VA's definition of overpayment as it would allow VA to collect any overpayments due to VA errors, such as erroneous determinations of eligibility. These commenters opined that VA should not collect in such circumstances as it would be contrary to VA's authority to provide equitable relief pursuant to 38 U.S.C. 503(b) and 38 CFR 2.7. One commenter noted that if VA sought collection of overpayments, caregivers would file requests for equitable relief, which would cost VA time and resources to process and would not be in VA's or the taxpayers' best interest. That same commenter noted that collecting overpayments when it was VA's error creates financial hardship for the caregiver, the veteran, and their family.

While we understand the concerns the commenters raise, VA is required to create a debt even in instances when overpayments are due to VA error, and may collect on such overpayment. Collection of overpayments is not unique to PCAFC, and does occur in other VA programs, such as compensation and pension, as well as with employees who incur debts as a result of overpayment in salary and benefits. Individuals who incur a debt that VA attempts to collect can seek equitable relief from VA as well as waiver of the debt. As one of the commenters noted, VA's authority to grant equitable relief is found at 38 U.S.C. 503(b) and 38 CFR 2.7. VA may provide equitable relief due to administrative errors made by VA. Section 2.7 specifically states that if the Secretary determines that any. . . person, has suffered loss, as a consequence of reliance upon a determination by the Department of Veterans Affairs of eligibility or entitlement to benefits, without knowledge that it was erroneously made, the Secretary is authorized to provide such relief as the Secretary determines equitable, including the payment of moneys to any person equitably entitled thereto. Additionally, VA has the authority to waive debts that are incurred from participation in a benefit program, including PCAFC, administered under any law by VA when it is determined by a regional office Committee on Waivers and Compromises that collection would be against equity and good conscience. See 38 CFR 1.962. In evaluating whether collection is against equity and good conscience, these local committees consider the following elements: The fault of the debtor, balancing of faults, undue hardship, defeat the purpose, unjust enrichment, changing position to one's detriment. See 38 CFR 1.965.

While we anticipate that we should not have errors in PCAFC that would result in overpayment, especially in light of the changes we are making as part of this rulemaking, we acknowledge that errors can occur. In the instance that VA has erred resulting in overpayment, an individual can still seek equitable relief or waiver of the debt to avoid collection by VA. However, there is no guarantee that either of these will be granted, as the individual facts of such requests will need to be reviewed and determined on a case by case basis. We make no changes based on these comments.

One commenter requested VA clarify that it will not initiate collections of overpayments to legacy participants when it is determined they do not meet eligibility requirements, including situations when they were initially approved in error. Another commenter agreed with collecting overpayments due to VA error to ensure VA is being a good financial steward of the taxpayers' dollar, and that VA should similarly collect overpayments from legacy participants who have never met the requirements of part 71. This commenter asserted that VA has a duty to recover overpayments due to erroneous determinations by VA, as all improper payments degrade the integrity of government programs and compromise trust in the government.

We agree that we should collect overpayments pursuant to 31 U.S.C. 3711 and in accordance with the Federal Claims Collection Standards, and 38 U.S.C. 5302 and 5314. In instances of VA error, we would go back to the earliest date possible to collect improper payments that we made to individuals. This determination will vary based on the facts of each individual case. For example, if a Family Caregiver is determined eligible for PCAFC under the new criteria and VA erred in making that determination, VA would need to collect that overpayment from the date VA erred (*i.e.,* the date the determination of eligibility for PCAFC was made). However, we note that this may vary for legacy participants depending on the circumstances. For example, if a legacy participant is reassessed under the new eligibility criteria, and is determined to be ineligible under the new criteria, they will be discharged from PCAFC and we will not recoup any benefits previously received based on the fact that they are ineligible under the new criteria. If a legacy participant is reassessed under the new criteria and we erred in our initial determination that the participant was eligible for PCAFC when they were not, and they do not qualify for PCAFC under the new eligibility criteria, we would discharge them from PCAFC. We would not recoup any benefits received as a matter of fairness and because we believe that would result in hardship to the participant.

We further note that waiver of the debt and equitable relief may be available to eliminate the debt that VA is trying to collect. However, we cannot guarantee that either debt waiver or equitable relief would be granted since these will need to be evaluated on a case by case basis.

We make no changes based on these comments.

One commenter opined that PCAFC is a program susceptible to significant improper payments; and the Office of Management and Budget (OMB) should identify PCAFC as such and put in place measures to determine the amount and causes of improper payments, which will allow PCAFC to focus on corrective action plans to address these issues. We consider this comment outside the scope of this rulemaking and note that we cannot direct OMB to take any action. We make no changes based on this comment.

Another commenter requested that VA provide eligible veterans and Family Caregivers with information during the initial training to fully understand collection of overpayments. We make no changes to the regulation based on this comment. We would not provide this information during initial training, but we will provide this information in fact sheets which will be available to eligible veterans and Family Caregivers upon approval for PCAFC.

One commenter noted that there are multiple instances of catch-all within the proposed regulations (*e.g.,* in the preamble discussion of proposed § 71.47) of which they have concerns that this will allow VA to do what it wants, which the commenter considers a ''red flag.'' We responded to this

comment in the discussion on revocation and discharge, above, and refer the commenter to that response. We make no changes based on this comment.

Miscellaneous Comments

We received many comments that did not directly relate to any regulatory sections from the proposed rule, but that expressed concerns with VA's administration of PCAFC and PGCSS. Although we do not make changes to the proposed rule based on these comments because they are beyond the scope of the proposed rule or address issues that would be best addressed through policy, we summarize the comments below by topic.

Appeals

We received many comments related to VA's appeals process with regard to PCAFC, which primarily argued that PCAFC determinations should be subject to the jurisdiction of the Board of Veterans' Appeals (BVA) and expressed concerns with the current PCAFC appeals process. Commenters asserted that PCAFC services are benefits that should be subject to BVA review to ensure consistency and fairness across PCAFC. Specifically, some commenters suggested that the first sentence in 38 CFR 20.104(b) allows for PCAFC determinations to be appealed to BVA. One commenter specifically suggested it is contrary to 38 U.S.C. 7104 and 511(a) to restrict PCAFC determinations from the jurisdiction of BVA, and that VA should amend or waive 38 CFR 20.104(b) to allow PCAFC determinations to be appealed to BVA (we note that although the commenter referred to both 38 CFR 20.10(b) and 20.101(b), based on the content of the comment, we believe that the intended reference was § 20.104(b) as § 20.10(b) does not exist and § 20.101(b) was redesignated as § 20.104(b) (84 FR at 177 (January 18, 2019)). Several commenters asserted that applicants are deprived of due process if they cannot further appeal PCAFC determinations to BVA. One commenter opined that the authorizing statute, 38 U.S.C. 1720G, does not consider all decisions under PCAFC to be medical determinations; only those ''affecting the furnishing of assistance or support,'' thus those non-medical determinations should be appealable to BVA. Other commenters suggested that BVA should have jurisdiction over PCAFC determinations because they are more similar to other VHA determinations over which BVA has jurisdiction. One commenter asserted that because VHA provides expert medical review of cases for BVA, VA should be able to utilize BVA in reviewing its cases of PCAFC clinical appeals decisions. Additionally, some commenters asserted that by expanding the definition of serious injury to include a service-connected disability that is 70 percent or more, or a combined rating of 70 percent or more, VA should expand the ability to appeal PCAFC decisions to BVA since PCAFC would be using VBA criteria and decisions to influence VHA clinical determinations. Commenters also expressed that the current appeals process for PCAFC determinations, the VHA clinical appeals process, was unfair and inconsistent; and some commenters recommended that PCAFC establish its own unique appeals process. Some commenters also recommended setting forth the appeals process for PCAFC determinations in regulation, in order to provide clarity, consistency, and an opportunity for public comment. We address these comments below.

First, we note that while 38 U.S.C. 1720G confers benefits, which would typically be subject to 38 U.S.C. 7104(a) and 511(a) and confer BVA jurisdiction, Congress specifically intended to further limit review of PCAFC determinations with the language set forth by section 1720G(c)(1), which states that ''[a] decision by the Secretary under this section affecting the furnishing of assistance or support shall be considered a medical determination.'' Medical determinations are not subject to BVA's jurisdiction under 38 CFR 20.104(b) which describes BVA's appellate jurisdiction over VHA determinations. The first sentence in § 20.104(b) states that BVA's appellate jurisdiction extends to questions of eligibility for hospitalization, outpatient treatment, and nursing home and domiciliary care; for devices such as prostheses, canes, wheelchairs, back braces, orthopedic shoes, and similar appliances; and for other benefits administered by VHA. However, the second sentence of § 20.104(b) clarifies that medical determinations, such as determinations of the need for and appropriateness of specific types of medical care and treatment for an individual, are not adjudicative matters and are beyond BVA's jurisdiction. Id. Therefore, because 38 U.S.C. 1720G establishes that PCAFC decisions are medical determinations, such decisions are not appealable to BVA. Accordingly, we disagree with the assertion that the first sentence in 38 CFR 20.104(b) allows for PCAFC determinations to be appealed to BVA. For these same reasons, regardless of whether or not PCAFC determinations are more similar to other VHA determinations that BVA has jurisdiction over and despite the extent to which VHA provides expert medical review of cases for BVA, PCAFC determinations cannot be appealed to BVA. Accordingly, we disagree with commenters asserting that BVA should have jurisdiction over PCAFC determinations on these grounds.

We also disagree with the assertion that 38 CFR 20.104(b) as applied to PCAFC determinations is contrary to 38 U.S.C. 7104(a) and 511(a), thus requiring that PCAFC appeals be reviewed by BVA. In addition, we disagree with the assertion that 38 U.S.C. 1720G does not consider all decisions under the PCAFC to be medical determinations (*e.g.,* procedural and factual questions, such as whether an applicant has furnished all required information, whether VA has contributed to a delay in an applicant caregiver completing his or her training and education requirements in a timely manner, whether a veteran's serious injury was incurred or aggravated in the line of duty, when a serious injury was incurred or aggravated, or whether an applicant's disability rating meets or exceeds 70 percent). As mentioned above, while 38 U.S.C. 1720G confers benefits, which would typically be subject to 38 U.S.C. 7104(a) and 511(a), Congress specifically intended to further limit review of PCAFC determinations by designating such determinations as ''medical determinations.'' Congress also specifically intended that all decisions under PCAFC be considered medical determinations by stating broadly that decisions ''affecting the furnishing of assistance or support'' under section 1720G would be considered a medical determination. PCAFC benefits under section 1720G consist of assistance and support services, and as such, any decision under the PCAFC would affect the furnishing of assistance or support under this section, including the examples relating to PCAFC eligibility provided by the commenter. As explained in the final rule implementing PCAFC and PGCSS, ''[t]he plain language of section 1720G(c)(1) removes any doubt that Congress intended to insulate even decisions of eligibility from appellate review under [PCAFC], and VA's regulation at § 20.10[4](b) cannot circumvent a statutory requirement. 'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the

unambiguously expressed intent of Congress.' *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–43 (1984). Further, Congress is presumed to know what laws and regulations exist when it enacts new legislation, and it is reasonable to infer that Congress knew that medical determinations were not appealable under § 20.10[4], and subsequently used that precise phrase in the statute to limit appeals of decisions in the [PCAFC]. *See California Indus. Products, Inc.* v. *United States,* 436 F.3d 1341, 1354 (Fed. Cir. 2006) ('These regulations are appropriately considered in the construction of [this particular statute] because Congress is presumed to be aware of pertinent existing law.').'' 80 FR at 1366 (January 9, 2015).

We further note that, to the extent commenters contend that the exclusion of medical determinations from the jurisdiction of BVA is invalid and that VA should amend or waive 38 CFR 20.104(b), we believe that this is beyond the scope of this rulemaking. As previously explained, § 20.104(b) restricts medical determinations from BVA's appellate jurisdiction. However, we did not propose changes to this regulation as part of this rulemaking; therefore, any requests to amend or waive § 20.104(b) is beyond the scope of this rulemaking.

Additionally, we believe that expanding the definition of serious injury to include a 70 percent service-connected disability rating, or a combined rating of 70 percent or more, does not change the jurisdictional limitations of BVA concerning PCAFC determinations discussed above. A determination under PCAFC that a veteran or servicemember does not have a serious injury because he or she has a service-connected disability rating, or a combined rating, below 70 percent, is still a PCAFC determination and would therefore still be deemed a medical determination and not subject to BVA's jurisdiction. However, if a veteran or servicemember believes that his or her service-connection rating is incorrect, he or she may seek correction of their service-connection rating from VBA or appeal their rating to BVA, if appealable.

Commenters asserted that applicants are deprived of due process if they cannot further appeal PCAFC determinations to BVA. In particular, one commenter suggested that PCAFC creates an entitlement, such that applicants have a constitutional right to due process to further appeal PCAFC determinations. However, we note that PCAFC is not an entitlement. Section 1720G(c)(2)(B) of 38 U.S.C. specifically states that the statute does not create any entitlement to any assistance or support provided under PCAFC. Notwithstanding this explicit language, the commenter contends that this provision is not dispositive of whether otherwise nondiscretionary, statutorily mandated benefits create an entitlement protected by the constitution. However, these benefits are not nondiscretionary; they are discretionary, as they can be granted or denied within VA's discretion. In this regard, 38 U.S.C. 1720G(a)(1)(B) specifically states, ''[t]he Secretary shall only provide support under the program required by subparagraph (A) to a family caregiver of an eligible veteran if the Secretary determines it is in the best interest of the eligible veteran to do so.'' Therefore, we disagree with the commenter's assertion that PCAFC benefits create a constitutional due process right to further appeal such determinations to BVA. *See Cushman* v. *Shinseki,* 576 F.3d 1290, 1297 (2009) (''A benefit is not a protected entitlement if government officials may grant or deny it in their discretion.''). However, we further note that despite this, VA nonetheless provides applicants with due process through the VHA clinical appeals process. Under the VHA clinical appeals process, veterans and Family Caregivers have access to a fair and impartial review of disputes regarding clinical decisions. Thus, because the process for appealing clinical decisions, such as PCAFC determinations, is set forth in policy rather than regulation, we would make no changes to the regulations to include appeals of PCAFC decisions. Moreover, VA has provided a new advanced notice provision in the PCAFC regulations where VA must provide no less than 60-days advanced notice prior to a decrease in the monthly stipend payment, revocation, or discharge (as applicable) from PCAFC. This 60-day period will provide an opportunity to contest VA's findings before a stipend decrease, revocation, or discharge (as applicable) become effective. We believe providing advanced notice and opportunity to contest VA's findings before benefits are reduced or terminated would benefit both VA and eligible veterans and Family Caregivers. 85 FR 13394 (March 6, 2020)). By adding a requirement for advanced notice before stipend payment decreases and certain revocations and discharges, it is our hope that communication between VA and eligible veterans and their Family Caregivers would improve, and that PCAFC participants would have a better understanding of VA's decision-making process. Id.

To the extent that commenters recommended that the appeals process for PCAFC determinations be set forth in regulation and that PCAFC have its own unique appeals process, as we explained above, all decisions under PCAFC are considered medical determinations pursuant to 38 U.S.C. 1720G; and disputes of medical determinations (*i.e.,* clinical disputes) are subject to the VHA clinical appeals process per VHA Directive 1041, Appeal of VHA Clinical Decisions. We note that while we generally follow the VHA clinical appeals process outlined in VHA Directive 1041 for appeals of PCAFC decisions, there are some processes unique to PCAFC, which will be addressed in an appendix to VHA Directive 1041. The updated directive with that appendix will be published at a future date on VHA's publication website. Thus, because the clinical appeals process is already established in VHA Directive 1041, we do not find it necessary to establish an entirely separate appeals process for PCAFC decisions or set forth in regulation the appeals process for PCAFC decisions. For these reasons, at this time, we decline to establish an entirely separate appeals process for PCAFC decisions or set forth in regulation the appeals process for PCAFC decisions.

A commenter also encouraged VA to utilize mediation and online dispute resolutions for clinical appeals pursuant VHA Directive 1041, Appeal of VHA Clinical Decisions. Commenters also opined that the VHA clinical appeals process is not fair as there is no neutral party to impartially adjudicate appeals and inconsistent as clinical review could vary from provider to provider, VAMC to VAMC, and VISN to VISN. We do not address these as these comments are outside the scope of this rulemaking and apply to all of VHA clinical appeals, not just PCAFC. However, we will take these under consideration for future changes to VHA Directive 1041, or subsequent directive.

Electronic Communications

One commenter opined that it is necessary to include the ability of caregivers to electronically be in touch with the ones they are giving care to. The same commenter asserted that being unable to see or speak to the person you have been taking care of for years puts stress on the caregiver and the client. Further, the commenter stated that the recreation group in a nursing home can accommodate the use social media platforms. We do not understand the exact concerns of this commenter and

encourage anyone encountering these issues to contact their local CSC.

Contracting

One commenter stated they have not received any patients from VA despite having a contract for over three years and questioned what they should do. We consider this comment outside the scope of this rulemaking and would recommend this commenter reach out to the contracting officer for the contract.

Current Execution of PCAFC

Several commenters did not suggest specific changes to the proposed rule but rather expressed frustration with the current execution and management of PCAFC, to include inconsistent application of program requirements, problematic eligibility determinations, inappropriate discharges, and a general lack of knowledge and accountability by CSCs. Other commenters provided general information about their circumstances. We make no changes based on these comments; however, we note that we are implementing processes to standardize and improve PCAFC eligibility determinations to include a robust staff education and training plan, centralized eligibility, and enhanced oversight. Additionally, as we shift eligibility determinations to the CEATs, we will shift the role of the CSCs to providing care and advocacy for the eligible veteran and his or her caregiver. Also, eligible veterans and his or her caregivers who believe they have been inappropriately discharged from the program may contact their local facility patient advocate as well as appeal PCAFC determinations through the VHA clinical appeals process. Furthermore, individuals interested in applying to PCAFC may contact their local VA medical facility CSC or refer to *https://www.caregiver.va.gov/* for additional information about the program and the application process.

Denial of Aide and Attendance Benefit

One commenter stated that they have submitted VA Form 21–2680 three times and have been denied by VA. We note that PCAFC is a VHA clinical program that is separate from a VBA aide and attendance allowance. For questions regarding eligibility please contact your nearest VBA regional office.

Funding for PCAFC and Regulatory Impact Analysis

Multiple commenters questioned how VA will pay for the expansion of PCAFC. One commenter raised concerns that the program has too many holes it in and may likely be financially unsustainable. The 2020 President's Budget included estimated funding to meet the caregiver population expansion from the MISSION Act. The Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94) included sufficient funding to meet the Caregiver Program cost estimates. The 2021 President's Budget included a funding request for the Caregiver Program based on the same updated projection model as used to formulate the regulatory impact analysis budget impact. Future President's Budget requests will incorporate new data and updated cost projections as they become available. For a detailed analysis of the costs of this program, please refer to the regulatory impact analysis accompanying this rulemaking. We make no changes based on these comments.

Another comment requested VA explain the discrepancy between the economically significant description of the proposed rule and the regulatory impact analysis that states 2022 is not economically significant. The commenter further opined that after unloading all of the post-9/11 veterans, the costs of all previous era veterans equal out so that this rule is not economically significant. First, with regards to the commenter's statement that the regulatory impact analysis states that 2022 is not economically significant, we are unclear as to what this commenter is referring by ''2022.'' As the regulatory impact analysis states, we determined that this regulatory action is economically significant. Further, as previously discussed, we are not expanding to pre-9/11 eligible veterans at the expense of post-9/11 veterans and servicemembers, rather we are building one program to encompass veterans and servicemembers of all eras.

Intent of Program

One commenter requested VA ''get back'' to the original intent of the program, which the commenter stated is for home bound veterans from military service injury, and that most veterans with qualifying issues do not require a caregiver for 24/7 care and thus will not be eligible. This commenter also asserted that PCAFC may enable veterans and their caregivers, causing negative impacts on veteran/caregiver mental health.

First, we note that the intent of PCAFC has always been to provide comprehensive assistance to Family Caregivers of eligible veterans who have a serious injury incurred or aggravated in the line of duty on or after September 11, 2001. It was never intended to be solely for ''home bound veterans'' nor was it intended to require caregivers provide 24/7 care. PCAFC was intended to provide supportive services, and education and training to Family Caregivers of injured veterans. Services provided by Family Caregivers are meant to supplement or complement clinical services provided to eligible veterans. As part of PCAFC, we do not require Family Caregivers provide 24/7 care to eligible veterans. The changes we previously proposed and now make final do not alter that intent. However, we note that the changes we are making to PCAFC are necessary as a result of the VA MISSION Act of 2018 which requires PCAFC to be expanded to veterans of all eras. Thus, because veterans of different eras have different needs, we need to adapt PCAFC to meet the needs of these veterans and are doing so by making such changes as decoupling serious injury and the need for personal care services. We believe these changes are consistent with the original intent of PCAFC.

We respectfully disagree with the commenter's assertion that PCAFC will enable veterans and their caregivers, causing negative impacts on veteran and caregiver mental health. We reiterate that PCAFC is meant to provide certain assistance to Family Caregivers and recognize the sacrifices caregivers make to care for veterans. It is intended to help veterans and servicemembers achieve their highest level of health, quality of life, and independence. 85 FR 13360 (March 6, 2020). While we understand and recognize that being a Family Caregiver can be challenging, Family Caregivers can receive respite care and counseling, including individual and group therapy, and peer support groups, under PCAFC. Primary Family Caregivers may also receive health care and services through CHAMPVA. Additionally, eligible veterans would be enrolled in VA healthcare and would be able to seek mental health care through VA. We make no changes based on this comment.

Interaction With Other Programs

Multiple commenters requested clarification on how PCAFC interacts with other VA and federal programs (*e.g.,* VHA Homemaker and Home Health Aide, VHA Home Based Primary Care, VHA Veteran-Directed Care, VBA Aid and Attendance, programs administered by the Social Security Administration (SSA)). Additionally, one commenter requested information about services available to them to use now until they are eligible for PCAFC as a result of expansion. PCAFC is one of many in-home VA services that are complementary but not necessarily

exclusive to one another. As a result, an eligible veteran and his or her caregiver may participant in more than one in-home care program, as applicable. Furthermore, older veterans or servicemembers awaiting expansion for his or her service era, may be eligible for other VA programs and benefits (*e.g.,* PGCSS, Homemaker and Home Health Aide, Veteran-Directed Care, home based primary care, SMC). As we have noted throughout this rule, VA offers a menu of supports and services that supports caregivers caring for veterans such as PGCSS, homemaker and home health aides, home based primary care, Veteran-Directed care, and adult day care health care to name a few. We note that the definition of serious injury requires a single or combined service-connected disability rating of 70 percent, which is the minimum threshold we will use for determining eligibility for PCAFC. As explained previously, other criteria, including that the individual be in need of personal care services and that PCAFC be in the best interest of the veteran, must be further met to be eligible for PCAFC. Eligibility for SSA benefits does not impact eligibility for PCAFC. It is also important to note that stipend payments received under PCAFC do not earn credits toward Social Security retirement as stipend payments are non-taxable. We further note that all income counts against eligibility for Supplemental Security Income, but not against eligibility for Social Security Disability Income or Social Security retirements. Because we do not administer SSA benefits, we would further refer commenters to SSA's website (at *https://www.ssa.gov/*) for more information on eligibility for SSA benefits. We will also consider these comments in determining requirements in contracts for personal financial services. We are not making any changes to the regulation based on these comments.

Meeting Notes

One commenter requested VA provide the meetings notes from a current employee from February 25, 2019. If the commenter is referring to the February 25, 2019 meeting notes identified in the proposed rule, the meeting notes titled ''Meeting Notes 02.25.19'' is posted in the docket folder for this rulemaking (*i.e.,* AQ48—Proposed Rule—Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments under the VA MISSION Act of 2018) at *https://www.regulations.gov.* The commenter may need to select ''View All'' beside the Primary Documents heading in the docket. We make no changes based on this comment.

Electronic Medical Record and Health Insurance Portability and Accountability Act (HIPAA)

One commenter asserted that access to a patient's medical record, including the ability to insert a document into a patient's medical record should be limited to only the medical provider(s) who treat the veteran or servicemember. The same commenter further opined that introducing this security method to the Computerized Patient Record System (CPRS) would help eliminate HIPAA violations and cross provider communication that crowds up the medical record. The commenter also asserted that the medical records should only consist of the patient's medical information. We consider this comment outside the rulemaking, but note that VA has implemented security mechanisms, including access and audit controls, within VA's Veterans Health Information System Technology Architecture (VistA)/CPRS that comply with the HIPAA Security Rule. All staff with access to patient information are required, in the performance of their duties, to know their responsibilities in maintaining the confidentiality of VA sensitive information, especially patient information, by completing the annual Cyber Security and Privacy training. We note that the health record consists of the patient's medical information, including the individual's health history, examinations, tests, treatments, and outcomes. It also includes an administrative component that is an official record pertaining to the administrative aspects involved in the care of a patient, including: Demographics, eligibility, billing, correspondence, and other business-related aspects. Such information is necessary, particularly, as individuals other than a treating provider utilize the information contained in the VHA health record on a daily basis for eligibility determinations and other health care functions, such as coding and billing; thus, we cannot limit access to the medical record to only the treating providers. We make no changes based on this comment.

One commenter stated this is ludicrous and a clear HIPAA violation for said caregiver. As the commenter did not provide further information, we cannot address this comment. We make no changes based on this comment.

Move PCAFC to VBA

Several commenters asserted that PCAFC is a permanent benefits program and questioned whether the program should be administered by VBA. Commenters further expounded that VHA has shown it is unable to consistently administer the program and that VHA medical facility staff should not be involved with decisions that have financial implications to veterans and his or her caregiver. While we agree that PCAFC does provide benefits to the Family Caregivers of eligible veterans, PCAFC is a clinical program that provides assistance to Family Caregivers of eligible veterans who have a serious injury incurred or aggravated in the line of duty, and is designed to support the health and well-being of such veterans, enhance their ability to live safely in a home setting, and support their potential progress in rehabilitation, if such potential exists. See 85 FR 13356, at 13367 (March 6, 2020). Thus, PCAFC is intended to be a program under which assistance may shift depending on the changing needs of the eligible veteran. We do acknowledge that while some eligible veterans may improve over time, others may not, and PCAFC and other VHA services are available to ensure the needs of those veterans continue to be met. Given the placement of authority for the PCAFC program in Chapter 17 of title 38, U.S. Code—Hospital, Nursing Home, Domiciliary, and Medical Care, VHA has the exclusive authority to carry out the PCAFC program. See 38 U.S.C. 7301. Any relocation of the program to VBA would require statutory change. Further, section 1720G does not create any entitlement to any assistance or support provided under PCAFC and PGCSS. See 38 U.S.C. 1720G(c)(2)(B). In administering PCAFC pursuant to VHA's statutory authority in section 1720G, as explained in the proposed rule, we have recognized that improvements to PCAFC were needed to improve consistency and transparency within the PCAFC. See 85 FR 13356 (March 6, 2020). We believe the changes that we are making in this rule will improve PCAFC, especially with regards to eligibility determinations. We also note that we are implementing processes to standardize and improve PCAFC eligibility determinations to include a robust staff education and training plan, centralized eligibility, and enhanced oversight.

Most In Need

Several commenters expressed concern over the phrase ''most in need.'' In particular, one commenter asserted that the purpose and application of this phrase ''eliminates participation because the word 'most' [implies] not all who are eligible.'' We note that, although the comment used the word

''entitles,'' based on the content of the comment, we believe that the intended word was ''implies.'' This commenter further asserted that it is unlawful for VA to deny or revoke eligibility to focus on those who are most in need. We do not have unlimited resources to provide PCAFC to all caregivers of veterans, and note that the purpose and intent of PCAFC is to provide benefits to Family Caregivers who make sacrifices to care for veterans, who would otherwise not be able to manage without that caregiver's assistance. We note that the phrase ''most in need'' was only used in the proposed rule in reference to a **Federal Register** Notice published on January 5, 2018, requesting information and comments from the public on how to improve PCAFC. We note that the changes we are making through this rulemaking are intended to better address the needs of veterans of all eras and standardize the program to focus on eligible veterans with moderate and severe needs. 84 FR 13356 (March 6, 2020). We also further refer the commenter to the discussion directly above addressing that PCAFC is not an entitlement program.

We do not make any changes based on these comments.

Not Veteran-Centric

One commenter asserted that the proposed rule is VA-centric versus veteran centric. Specifically, this commenter asserted that the changes will lead to veterans not receiving the quality care they deserve, and deny eligibility to other veterans under expansion who would be previously eligible.

As we explained in the proposed rule, we are making changes to the current regulations in part 71 to improve the PCAFC to ensure consistency and transparency in decision making within the program, to update the regulations to comply with amendments made to 38 U.S.C. 1720G by the VA MISSION Act of 2018, and to allow PCAFC to better address the needs of veterans of all eras and standardize PCAFC to focus on eligible veterans with moderate and severe needs. These efforts to standardize PCAFC will ensure that eligible veterans and Family Caregivers will receive a high level of care through PCAFC. Thus, we disagree that the proposed rule is VA centric. We do not believe this will lead to veterans not receiving the quality of care they deserve, as veterans who are not eligible for PCAFC may be eligible for other VHA care and services, such as home based primary care, Veteran-Directed, and adult day health care. Similarly, we acknowledge there may be veterans who would be eligible for PCAFC under the previous eligibility criteria but will not be eligible under the new eligibility criteria. However, for the reasons described in this paragraph, we believe these changes are necessary.

We make no changes based on this comment.

Veteran Suicide

Commenters expressed concern that the proposed changes will result in an increase in veteran suicides. One commenter also requested that VA refrain from proposing another rule change before addressing why veterans are committing suicide on VA hospital property. While we consider these comments out of scope and make no changes based on these comments, it is important to note that PCAFC is focused on providing support and services to caregivers of veterans, and does not replace appropriate clinical services from which a veteran may benefit. We also note that suicide prevention is VA's top clinical priority. More information on VA's suicide prevention efforts can be found at: *https://www.mentalhealth.va.gov/MENTALHEALTH/suicide_prevention/index.asp.* If you are a veteran in crisis or you are concerned about one, free and confidential support is available 24/7 by calling the Veterans Crisis Line at 1–800–273–8255 and Press 1 or by sending a text message to 838255. We make no changes based on these comments.

Overhaul of Existing Program

Multiple commenters expressed frustration that this rulemaking is a complete overhaul rather than fixing issues with the current program. Specifically, commenters noted that the proposed rule does nothing to address non-compliance and inconsistency in the implementation and management of the current program and questioned the purpose of the moratorium on tier reductions and discharges based on clinical determinations. As indicated in the proposed rule, VA has recognized the need to improve consistency and transparency since the implementation of PCAFC in 2011 and the current moratorium was put in place to prevent discharges and tier reductions while PCAFC focused on education, guidance and conducted audits. We note that this moratorium is still in place, and will be lifted once this regulation is final and effective. Additionally, the current regulations are focused on post-9/11 veterans and servicemembers and as discussed above we believe the eligibility requirements must be revised to be inclusive of veterans and servicemembers of all eras. Furthermore, we will continue to provide robust training and education to our staff, implement an audit process to review assessments at medical centers as well as centralized eligibility determinations, and conduct vigorous oversight to ensure consistency across VA in implementing this regulation. We make no changes based on these comments.

PCAFC Is Not a VBA Nonmedical Benefit

One commenter urged VA to stop modeling PCAFC as though it is a VBA nonmedical benefit, and cited to *Tapia* v. *United States,* 146 Fed. Cl. 114 (2016), in which the United State Court of Federal Claims affirmed that PCAFC determinations are clinical and thus subject to VHA's clinical appeals process. We do not understand this comment, and to the extent that this commenter is asserting that PCAFC is a clinical program operated by VHA, we agree. To the extent that this commenter is asserting that PCAFC determinations are subject to the clinical appeals process and are not within BVA's jurisdiction, we also agree. We make no changes based on this comment.

PCAFC Staffing

Several commenters expressed concern that VA does not have the staff to handle the wave of applications that will come once expansion occurs. Specifically, commenters noted that VA staff are already overwhelmed serving current PCAFC participants. We thank the commenters for their concerns and note that we are actively increasing PCAFC staff nationwide in anticipation of expansion. We make no changes based on these comments.

Plain Writing Act and FAQs

Two commenters requested VA better explain PCAFC by using plain language consistent with the Plain Writing Act of 2010. A separate comment indicated VA should follow the plain language guidelines of Plain Writing. Two commenters indicated that the rule was difficult to understand and one of those commenter's requests FAQs. We are aware of the complexity of the proposed changes; however, we conformed the regulation to the Office of Federal Register guidelines which where were developed to help agencies produce clear, enforceable regulation documents. Additionally, we have and will continue to provide FAQs on various aspects of the program. We are not making any changes based on this comment.

Pilot Program

One commenter requested that VA pilot the proposed changes before implementing the changes. The same commenter asserted that veterans of all eras should join under the current regulations. As amended by section 163 of the VA MISSION Act of 2018, 38 U.S.C. 1720G requires VA expand eligibility for PCAFC to all veterans in two phases. We would not pilot the proposed changes before implementing them as that would not be appropriate in this instance. Pilot programs are conducted to determine whether an approach may work and whether such an approach is the correct one to use. However, the changes we have proposed and are making final as part of this rulemaking are based on challenges and issues we have seen and identified over the years since PCAFC was first implemented. We have conducted thorough analysis to determine what changes to make and to support those changes. In addition, running two separate and distinct programs for different groups of veterans will lead to confusion for caregivers, veterans, and staff. We do not make any changes based on this comment but will continue to review and analyze PCAFC and make any changes we deem necessary.

Requirement To Reapply After Moving

One commenter opposed the current practice and requirement for participants to reapply for the program because they have moved, as this has resulted in denial of PCAFC benefits. We wish to clarify that an eligible veteran and the Family Caregiver are not required to submit a new joint application if or when they relocate; that is, move to another address. However, we will require a wellness contact be conducted in the eligible veteran's home to determine if the new environment meets the care needs of the eligible veteran. During the wellness contact, the clinical staff member conducting such contact may identify a change in the eligible veteran's condition or other such change in circumstances whereby a need for a reassessment may be deemed necessary and arranged accordingly pursuant to § 71.30 if necessary. We note that wellness contacts and reassessments are distinct and separate processes.

Further, as explained above, we will provide robust training and education to our staff, implement an audit process to review eligibility determinations, and conduct vigorous oversight to ensure consistency across VA in implementing this regulation. We are not making any changes based on this comment.

Special Compensation for Assistance With Activities of Daily Living (SCAADL)

Several commenters asserted that DoD's SCAADL program was intended to be a part of a servicemembers' seamless transition to PCAFC. One commenter provided SCAADL performance metrics and stated that there has been little coordination with SCAADL by PCAFC or the Recovery Coordination Program despite a Memorandum of Understanding between VA and DoD for interagency complex care coordination requirements for servicemembers and veterans. The commenter further asserted that the Congressional intent of PCAFC was very clear following the passage of three crucial laws: Caregivers Act, section 603 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84), and the Veterans' Benefits Act of 2010 (Pub. L. 111–275).

While we consider these comments outside the scope of the proposed rule, we will briefly explain SCAADL and PCAFC, and the coordination between VA and DoD to meet the needs of servicemembers and veterans. Authorized by section 603 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84) and codified at 37 U.S.C. 439, SCAADL is taxable financial compensation that DoD provides to eligible permanent catastrophically injured or ill servicemembers who require caregiver support for assistance with activities of daily living or for constant supervision and protection, without which they would require hospitalization or residential institutional care. It is important to note that PCAFC and SCAADL are distinct programs, as the statutory authorities set forth different requirements and benefits for each program. For example, unlike PCAFC, SCAADL does not provide benefits directly to the Family Caregiver nor does it provide benefits other than financial compensation.

These commenters also refer to the Recovery Coordination Program, and we assume they are referring to the joint DoD/VA Federal Recovery Coordination Program, which is a joint effort between the Departments to coordinate the clinical and nonclinical services needed by severely wounded, ill, and injured servicemembers and veterans.

DoD and VA continue to take efforts to support a smooth transition as servicemembers leave active duty and become veterans. Through the Transition Assistance Program, every year approximately 200,000 servicemembers, who are preparing to transition to civilian life, receive information, resources, and tools to help prepare for this transition. VA's portion of this program includes an in-person course called VA Benefits and Services, which helps servicemembers understand how to navigate VA and the benefits and services they have earned through their military careers. This includes information on PCAFC. It is important to note that if a servicemember has been discharged from the military or has a date of medical discharge, he or she is eligible to apply for PCAFC. We note that CSP partners with VA's Transition and Care Management through their partnership with the Federal Recovery Program and DoD Medical Treatment Facilities. We make no changes based on these comments.

These same commenters also recommended that PCAFC be more aligned with SCAADL, including definitions, application timelines, and eligibility determinations. As explained in response to the comments directly above, there are differences between the two programs based on the authorizing statutes. Thus, the definitions and eligibility determinations for these programs are necessarily different. Additionally, the application timelines differ as a result of differences between the programs' processes. For example, initial eligibility for SCAADL is certified by a DoD- or VA-licensed physician, after which time, DoD recommends that all responsible parties complete the SCAADL application form within 30 days. In contrast, PCAFC does not provide a recommended a timeline for completing the PCAFC application form. Because we view these as distinct programs with different requirements, we make no changes based on these comments.

Staff Training on Eligibility Determinations

Several commenters asserted that current PCAFC staff are unable to make accurate eligibility determinations because they have been improperly trained. Specifically, one commenter asserted that training provided was not properly vetted by VA's Chief Education Officer to ensure the training meets the standards of the Caregiver Omnibus Act of 2010. We are preparing multi-day trainings to be provided to staff that will be making eligibility determinations. These trainings will be approved by VA's Employee Education Service (EES), and will be tailored to the various disciplines of the staff that will be determining eligibility for PCAFC.

These trainings will be accredited by EES as these will be considered continuing education credits for staff licenses, as applicable. We currently provide in VA's employee training system, the Talent Management System, standardized trainings on many portions of PCAFC, including caregiver support and eligibility. These standardized trainings have been approved by EES. We are also developing trainings on how to use assessment instruments. We will ensure that quality assurance and peer reviews are conducted to ensure that eligibility determinations are made appropriately and consistently. Where we determine improvement is needed, we will remediate and provide re-training of staff. We make no changes based on these comments.

VA Should Pay all Veterans Before Caregivers

One commenter asserted that there should be some type of compensation for all veterans who served regardless of whether they have a service-connected disability prior to providing a stipend and health care services to Family Caregivers. The same commenter further opined that veterans with a certain percentage of service-connected disability are free to schedule multiple VA medical appointments and questioned why able-bodied veterans are not compensated nor able to use VA for medical care. To the extent the commenter requests VA to revise how veterans are compensated and priority designation for access to VA medical care, this is beyond the scope of this rulemaking. We make no changes based on this comment.

Veteran Functional Assessment Instrument

One commenter specifically stated that after the proposed rule was published, they requested additional information from VA about how the proposed eligibility evaluation and reassessment process will work, including any assessment instruments that VA staff will use. This commenter recommended that because VA did not adequately explain how the process will work, VA should publish a supplemental notice of proposed rulemaking or an interim final rule to explain this process, upon which to provide the public the opportunity to comment. One commenter recommended VA use an interrater reliability measure to determine the level of standardization of the veteran functional assessment instrument that VA staff may use to inform eligibility determinations, recommended the current assessment instrument be revised to ensure standardization and yield consistency, and further suggested that the current assessment instrument be independently validated, subject to public scrutiny, which should prove the instrument's reliability, validity, responsiveness as an outcome measure, and interpretability. This commenter also asked VA to provide justification to prove the current assessment instrument was so fatally flawed and beyond repair such that any necessary improvements would cause greater burden than deploying a new assessment instrument or undue burden on the public and the government. This commenter also noted that VA has not provided the public with any valid and reliable data or research to prove that the new veteran functional assessment instrument has equivalent interrater reliability and validity as the three assessment instruments on which it is based. Another commenter opined that the current assessment tool used for evaluating the level of assistance required by a veteran to complete ADLs or to determine a veteran's need for supervision or protection is a good instrument and asked what assessment/evaluation guidelines will be put in place now. Additionally, one of the commenters referenced our current use of the Katz Basic Activities of Daily Living Scale; the UK Functional Independence Measure and Functional Assessment Measure; and the Neuropsychiatric Inventory for conducting assessments of veterans. One commenter raised concerns about using a new tool as VA staff is not using the current tool properly. Two commenters requested VA provide a detailed list of requirements and the scoring methodology to determine eligibility.

We consider these comments to be outside the scope of the rule and do not make any changes based on these comments nor will we publish a supplemental notice of proposed rulemaking or an interim final rule; however, we provide additional information as follows. The exact processes and instruments that will be used to assess eligible veterans and Family Caregivers for PCAFC would best be handled through policy. While we note that commenters specifically inquired, or raised concerns about the veteran functional assessment instrument, we note that it is one of several factors that may be used by staff to inform determinations for PCAFC eligibility. There will be no scoring methodology for determining eligibility. Because these determinations are clinical, the indicators and information used to make the determinations will vary on a case by case basis depending on the veteran's situation. After the regulation is published, we will publish related policies that will describe the assessment process, including any assessment instruments VA staff may use when PCAFC applicants are evaluated for the program. We will ensure VA staff utilizing the any assessment instruments are properly trained. We further note that we will continue to monitor to ensure that any instruments used to assist in assessing a veteran's needs for purposes of PCAFC are reliable and valid. We make no changes based on these comments.

Several comments copied and pasted SMAG committee minutes, with no further explanation or discussion. We concur that these are the minutes from the SMAG Committee meetings. However, because no further context to these comments were provided, we cannot address them further. We make no changes based on these comments.

Other

Several commenters posted comments that did not provide additional information beyond what appears to be a news release from Senator Patty Murray on March 9, 2019 regarding PCAFC and minutes from the 1999 Archives of the U.S. Senate Taskforce on Hispanic Affairs, Veteran Advisory Committee. Another commenter posted their interpretation of the major takeaways for the proposed rule. One commenter posted information on an herbal formula that can be used for ALS. One commenter posted what appears to be excerpts from VA OIG reports. As no further explanation or discussion was provided by the commenters, we cannot further address. We make no changes based on these comments.

Technical Edits

We would make a technical edit to §§ 71.10 through 71.40, and 71.50. We would remove the statutory authority citations at the end of each of these sections and amend the introductory ''Authority'' section of part 71 to include the statutory citations listed in these sections that are not already provided in the ''Authority'' section of part 71 to conform with publishing guidelines established by the Office of the Federal Register. We note that current §§ 71.20 and 71.30 include a citation to 38 U.S.C. 1720G(a)(2) and 1720G(b)(1), (2), respectively. However, we would reference 38 U.S.C. 1720G, not specific subsections and paragraphs. We would also add a reference to 31 U.S.C. 3711, which pertains to collections; 38 U.S.C. 5302, which

pertains to waiver of benefits overpayments; and 38 U.S.C. 5314, which pertains to the offset of benefits overpayments. These references would be added for purposes of proposed § 71.47, Collection of overpayment.

Paperwork Reduction Act

This final rule contains provisions that would constitute a revised collection of information under 38 CFR 71.25, which is currently approved under Office of Management and Budget (OMB) Control #2900–0768. This rule also contains provisions that constitute a new collection of information under 38 CFR 71.40, which will be added under OMB Control #2900–0768. As required by 44 U.S.C. 3507(d), VA will submit, under a separate document, the revised collection of information associated with §§ 71.25 and 71.40 to OMB for its review and approval. Notice of OMB approval for this revised collection of information will be published in a future **Federal Register** document.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. We note that caregivers are not small entities. However, this final rule may directly affect small entities that we would contract with to provide financial planning services and legal services to Primary Family Caregivers; however, matters relating to contracts are exempt from the RFA requirements. Any effects on small entities would be indirect. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Congressional Review Act

This regulatory action is a major rule under the Congressional Review Act, 5 U.S.C. 801–808, because it may result in an annual effect on the economy of $100 million or more. In accordance with 5 U.S.C. 801(a)(1), VA will submit to the Comptroller General and to Congress a copy of this regulatory action and VA's Regulatory Impact Analysis.

Executive Order 12866, 13563, and 13771

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is an economically significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at *http://www.regulations.gov,* usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's website at *http://www.va.gov/orpm/,* by following the link for ''VA Regulations Published.''

This rulemaking is considered an E.O. 13771 regulatory action. VA has determined that the net costs are $483.4 million over a five-year period and $70.5 million per year on an ongoing basis discounted at 7 percent relative to year 2016, over a perpetual time horizon. Details on the estimated costs of this final rule can be found in the rule's economic analysis.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.009, Veterans Medical Care Benefits.

List of Subjects in 38 CFR Part 71

Administrative practice and procedure, Caregivers program, Claims, Health care, Health facilities, Health professions, Mental health programs, Travel and transportation expenses, Veterans.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Brooks D. Tucker, Acting Chief of Staff, Department of Veterans Affairs, approved this document on July 17, 2020, for publication.

Consuela Benjamin,

Regulations Development Coordinator, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 71 as follows:

PART 71—CAREGIVERS BENEFITS AND CERTAIN MEDICAL BENEFITS OFFERED TO FAMILY MEMBERS OF VETERANS

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

Authority: 38 U.S.C. 501, 1720G, unless otherwise noted.
Section 71.40 also issued under 38 U.S.C. 111(e), 1720B, 1782.
Section 71.47 also issued under 31 U.S.C. 3711; 38 U.S.C. 5302, 5314.
Section 71.50 also issued under 38 U.S.C. 1782.

■ 2. Amend § 71.10 by revising paragraph (b) and removing the authority citation at the end of the section.

The revision reads as follows:

§ 71.10 Purpose and scope.

* * * * *

(b) *Scope.* This part regulates the provision of benefits under the Program of Comprehensive Assistance for Family Caregivers and the Program of General Caregiver Support Services authorized by 38 U.S.C. 1720G. Persons eligible for such benefits may be eligible for other VA benefits based on other laws or other parts of this title. These benefits are provided only to those individuals residing in a State as that term is defined in 38 U.S.C. 101(20).

■ 3. Amend § 71.15 by:
■ a. Removing the definition of ''Combined rate'';
■ b. Adding in alphabetical order definitions for ''Domestic violence (DV)'', ''Financial planning services'', and ''In need of personal care services'';
■ c. Redesignating in proper alphabetical order the definition of ''In the best interest'' and revising it;
■ d. Revising the definition of ''Inability to perform an activity of daily living (ADL)'';
■ e. Adding in alphabetical order definitions for ''Institutionalization'', ''Intimate partner violence (IPV)'', ''Joint application'', ''Legacy applicant'', ''Legacy participant'', ''Legal services'', and ''Monthly stipend rate'';

■ f. Removing the definition of ''Need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury'';
■ g. Adding in alphabetical order definitions for ''Need for supervision, protection, or instruction'' and ''Overpayment'';
■ h. Revising the definitions of ''Primary care team'' and ''Serious injury'';
■ i. Adding in alphabetical order a definition of ''Unable to self-sustain in the community''; and
■ j. Removing the authority citation at the end of the section.

The revisions and additions read as follows:

§ 71.15 Definitions.

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Domestic violence (DV) refers to any violence or abuse that occurs within the domestic sphere or at home, and may include child abuse, elder abuse, and other types of interpersonal violence.

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Financial planning services means services focused on increasing financial capability and assisting the Primary Family Caregiver in developing a plan to manage the personal finances of the Primary Family Caregiver and the eligible veteran, as applicable, to include household budget planning, debt management, retirement planning review and education, and insurance review and education.

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In need of personal care services means that the eligible veteran requires in-person personal care services from another person, and without such personal care services, alternative in-person caregiving arrangements (including respite care or assistance of an alternative caregiver) would be required to support the eligible veteran's safety.

In the best interest means, for the purpose of determining whether it is in the best interest of the veteran or servicemember to participate in the Program of Comprehensive Assistance for Family Caregivers under 38 U.S.C. 1720G(a), a clinical determination that participation in such program is likely to be beneficial to the veteran or servicemember. Such determination will include consideration, by a clinician, of whether participation in the program significantly enhances the veteran's or servicemember's ability to live safely in a home setting, supports the veteran's or servicemember's potential progress in rehabilitation, if such potential exists, increases the veteran's or servicemember's potential independence, if such potential exists, and creates an environment that supports the health and well-being of the veteran or servicemember.

Inability to perform an activity of daily living (ADL) means a veteran or servicemember requires personal care services each time he or she completes one or more of the following:

(1) Dressing or undressing oneself;

(2) Bathing;

(3) Grooming oneself in order to keep oneself clean and presentable;

(4) Adjusting any special prosthetic or orthopedic appliance, that by reason of the particular disability, cannot be done without assistance (this does not include the adjustment of appliances that nondisabled persons would be unable to adjust without aid, such as supports, belts, lacing at the back, etc.);

(5) Toileting or attending to toileting;

(6) Feeding oneself due to loss of coordination of upper extremities, extreme weakness, inability to swallow, or the need for a non-oral means of nutrition; or

(7) Mobility (walking, going up stairs, transferring from bed to chair, etc.).

Institutionalization refers to being institutionalized in a setting outside the home residence to include a hospital, rehabilitation facility, jail, prison, assisted living facility, medical foster home, nursing home, or other similar setting.

Intimate partner violence (IPV) refers to any violent behavior including, but not limited to, physical or sexual violence, stalking, or psychological aggression (including coercive acts or economic harm) by a current or former intimate partner that occurs on a continuum of frequency and severity which ranges from one episode that might or might not have lasting impact to chronic and severe episodes over a period of years. IPV can occur in heterosexual or same-sex relationships and does not require sexual intimacy or cohabitation.

Joint application means an application that has all fields within the application completed, including signature and date by all applicants, with the following exceptions: social security number or tax identification number, middle name, sex, email, alternate telephone number, and name of facility where the veteran last received medical treatment, or any other field specifically indicated as optional.

Legacy applicant means a veteran or servicemember who submits a joint application for the Program of Comprehensive Assistance for Family Caregivers that is received by VA before October 1, 2020 and for whom a Family Caregiver(s) is approved and designated on or after October 1, 2020 so long as the Primary Family Caregiver approved and designated for the veteran or servicemember on or after October 1, 2020 pursuant to such joint application (as applicable) continues to be approved and designated as such. If a new joint application is received by VA on or after October 1, 2020 that results in approval and designation of the same or a new Primary Family Caregiver, the veteran or servicemember would no longer be considered a legacy applicant.

Legacy participant means an eligible veteran whose Family Caregiver(s) was approved and designated by VA under this part as of the day before October 1, 2020 so long as the Primary Family Caregiver approved and designated for the eligible veteran as of the day before October 1, 2020 (as applicable) continues to be approved and designated as such. If a new joint application is received by VA on or after October 1, 2020 that results in approval and designation of the same or a new Primary Family Caregiver, the veteran or servicemember would no longer be considered a legacy participant.

Legal services means assistance with advanced directives, power of attorney, simple wills, and guardianship; educational opportunities on legal topics relevant to caregiving; and referrals to community resources and attorneys for legal assistance or representation in other legal matters. These services would be provided only in relation to the personal legal needs of the eligible veteran and the Primary Family Caregiver. This definition excludes assistance with matters in which the eligible veteran or Primary Family Caregiver is taking or has taken any adversarial legal action against the United States government, and disputes between the eligible veteran and Primary Family Caregiver.

Monthly stipend rate means the Office of Personnel Management (OPM) General Schedule (GS) Annual Rate for grade 4, step 1, based on the locality pay area in which the eligible veteran resides, divided by 12.

Need for supervision, protection, or instruction means an individual has a functional impairment that directly impacts the individual's ability to maintain his or her personal safety on a daily basis.

Overpayment means a payment made by VA pursuant to this part to an individual in excess of the amount due, to which the individual was not eligible, or otherwise made in error. An overpayment is subject to collection action.

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Primary care team means one or more medical professionals who care for a patient based on the clinical needs of the patient. Primary care teams must include a VA primary care provider who is a physician, advanced practice nurse, or a physician assistant.

* * * * *

Serious injury means any service-connected disability that:

(1) Is rated at 70 percent or more by VA; or

(2) Is combined with any other service-connected disability or disabilities, and a combined rating of 70 percent or more is assigned by VA.

Unable to self-sustain in the community means that an eligible veteran:

(1) Requires personal care services each time he or she completes three or more of the seven activities of daily living (ADL) listed in the definition of an inability to perform an activity of daily living in this section, and is fully dependent on a caregiver to complete such ADLs; or

(2) Has a need for supervision, protection, or instruction on a continuous basis.

* * * * *

■ 4. Revise § 71.20 to read as follows:

§ 71.20 Eligible veterans and servicemembers.

A veteran or servicemember is eligible for a Family Caregiver under this part if he or she meets the criteria in paragraph (a), (b), or (c) of this section, subject to the limitations set forth in such paragraphs.

(a) A veteran or servicemember is eligible for a Primary or Secondary Family Caregiver under this part if he or she meets all of the following requirements:

(1) The individual is either:

(i) A veteran; or

(ii) A member of the Armed Forces undergoing a medical discharge from the Armed Forces.

(2) The individual has a serious injury incurred or aggravated in the line of duty in the active military, naval, or air service:

(i) On or after September 11, 2001;

(ii) Effective on the date specified in a future **Federal Register** document, on or before May 7, 1975; or

(iii) Effective two years after the date specified in a future **Federal Register** document as described in paragraph (a)(2)(ii) of this section, after May 7, 1975 and before September 11, 2001.

(3) The individual is in need of personal care services for a minimum of six continuous months based on any one of the following:

(i) An inability to perform an activity of daily living; or

(ii) A need for supervision, protection, or instruction.

(4) It is in the best interest of the individual to participate in the program.

(5) Personal care services that would be provided by the Family Caregiver will not be simultaneously and regularly provided by or through another individual or entity.

(6) The individual receives care at home or will do so if VA designates a Family Caregiver.

(7) The individual receives ongoing care from a primary care team or will do so if VA designates a Family Caregiver.

(b) For one year beginning on October 1, 2020, a veteran or servicemember is eligible for a Primary or Secondary Family Caregiver under this part if he or she is a legacy participant.

(c) For one year beginning on October 1, 2020, a veteran or servicemember is eligible for a Primary or Secondary Family Caregiver under this part if he or she is a legacy applicant.

■ 5. Amend § 71.25:

■ a. By revising paragraph (a);

■ b. In paragraph (c)(1) introductory text, by removing the phrase ''a VA primary care team'' and adding in its place ''VA''; and

■ c. By revising paragraphs (c)(1)(i) and (ii), (c)(2), (e), and (f); and

■ d. By removing the authority citation at the end of the section.

The revisions read as follows:

§ 71.25 Approval and designation of Primary and Secondary Family Caregivers.

(a) *Application requirement.* (1) Individuals who wish to be considered for designation by VA as Primary or Secondary Family Caregivers must submit a joint application, along with the veteran or servicemember. Individuals interested in serving as Family Caregivers must be identified as such on the joint application, and no more than three individuals may serve as Family Caregivers at one time for an eligible veteran, with no more than one serving as the Primary Family Caregiver and no more than two serving as Secondary Family Caregivers.

(2)(i) Upon receiving such application, VA (in collaboration with the primary care team to the maximum extent practicable) will perform the evaluations required to determine the eligibility of the applicants under this part, and if eligible, determine the applicable monthly stipend amount under § 71.40(c)(4). Notwithstanding the first sentence, VA will not evaluate a veteran's or servicemember's eligibility under § 71.20 when a joint application is received to add a Secondary Family Caregiver for an eligible veteran who has a designated Primary Family Caregiver.

(ii) Individuals who apply to be Family Caregivers must complete all necessary eligibility evaluations (along with the veteran or servicemember), education and training, and the initial home-care assessment (along with the veteran or servicemember) so that VA may complete the designation process no later than 90 days after the date the joint application was received by VA. If such requirements are not complete within 90 days from the date the joint application is received by VA, the joint application will be denied, and a new joint application will be required. VA may extend the 90-day period based on VA's inability to complete the eligibility evaluations, provide necessary education and training, or conduct the initial home-care assessment, when such inability is solely due to VA's action.

(3)(i) Except as provided in this paragraph, joint applications received by VA before October 1, 2020 will be evaluated by VA based on 38 CFR 71.15, 71.20, and 71.25 (2019). Notwithstanding the previous sentence, the term ''joint application'' as defined in § 71.15 applies to applications described in this paragraph.

(ii) Joint applications received by VA on or after October 1, 2020 will be evaluated by VA based on the provisions of this part in effect on or after October 1, 2020.

(A) VA will deny any joint application of an individual described in § 71.20(a)(2)(ii), if such joint application is received by VA before the date published in a future **Federal Register** document that is specified in such section. A veteran or servicemember seeking to qualify for the Program of Comprehensive Assistance for Family Caregivers pursuant to § 71.20(a)(2)(ii) should submit a joint application that is received by VA on or after the date published in a future **Federal Register** document that is specified in § 71.20(a)(2)(ii).

(B) VA will deny any joint application of an individual described in § 71.20(a)(2)(iii), if such joint application is received by VA before the date that is two years after the date published in a future **Federal Register** document that is specified in § 71.20(a)(2)(ii). A veteran or servicemember seeking to qualify for the Program of Comprehensive Assistance for Family Caregivers pursuant to § 71.20(a)(2)(iii) should submit a joint application that is received by VA on or after the date that is two years after the date published in a future **Federal**

Register document that is specified in § 71.20(a)(2)(ii).

* * * * *

(c) * * *

(1) * * *

(i) Whether the applicant can communicate and understand the required personal care services and any specific instructions related to the care of the eligible veteran (accommodation for language or hearing impairment will be made to the extent possible and as appropriate); and

(ii) Whether the applicant will be capable of performing the required personal care services without supervision, in adherence with the eligible veteran's treatment plan in support of the needs of the eligible veteran.

(2) Complete caregiver training and demonstrate the ability to carry out the specific personal care services, core competencies, and additional care requirements.

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(e) *Initial home-care assessment.* VA will visit the eligible veteran's home to assess the eligible veteran's well-being and the well-being of the caregiver, as well as the caregiver's competence to provide personal care services at the eligible veteran's home.

(f) *Approval and designation.* VA will approve the joint application and designate Primary and/or Secondary Family Caregivers, as appropriate, if the applicable requirements of this part are met. Approval and designation is conditioned on the eligible veteran and designated Family Caregiver(s) remaining eligible for Family Caregiver benefits under this part, the Family Caregiver(s) providing the personal care services required by the eligible veteran, and the eligible veteran and designated Family Caregiver(s) complying with all applicable requirements of this part, including participating in reassessments pursuant to § 71.30 and wellness contacts pursuant to § 71.40(b)(2). Refusal to comply with any applicable requirements of this part will result in revocation from the program pursuant to § 71.45, Revocation and Discharge of Family Caregivers.

§ 71.30 [Redesignated as § 71.35]

■ 6. Redesignate § 71.30 as § 71.35.

■ 7. Add a new § 71.30 to read as follows:

§ 71.30 Reassessment of Eligible Veterans and Family Caregivers.

(a) Except as provided in paragraphs (b) and (c) of this section, the eligible veteran and Family Caregiver will be reassessed by VA (in collaboration with the primary care team to the maximum extent practicable) on an annual basis to determine their continued eligibility for participation in PCAFC under this part. Reassessments will include consideration of whether the eligible veteran is unable to self-sustain in the community for purposes of the monthly stipend rate under § 71.40(c)(4)(i)(A). Reassessment may include a visit to the eligible veteran's home.

(b) Reassessments may occur more frequently than annually if a determination is made and documented by VA that more frequent reassessment is appropriate.

(c) Reassessments may occur on a less than annual basis if a determination is made and documented by VA that an annual reassessment is unnecessary.

(d) Failure of the eligible veteran or Family Caregiver to participate in any reassessment pursuant to this section will result in revocation pursuant to § 71.45, Revocation and Discharge of Family Caregivers.

(e)(1) If the eligible veteran meets the requirements of § 71.20(b) or (c) (*i.e.,* is a legacy participant or a legacy applicant), the eligible veteran and Family Caregiver will be reassessed by VA (in collaboration with the primary care team to the maximum extent practicable) within the one-year period beginning on October 1, 2020 to determine whether the eligible veteran meets the requirements of § 71.20(a). This reassessment may include a visit to the eligible veteran's home. If the eligible veteran meets the requirements of § 71.20(a), the reassessment will consider whether the eligible veteran is unable to self-sustain in the community for purposes of the monthly stipend rate under § 71.40(c)(4)(i)(A).

(2) Notwithstanding paragraph (e)(1) of this section, a reassessment will not be completed under paragraph (e)(1) if at some point before a reassessment is completed during the one-year period beginning on October 1, 2020 the individual no longer meets the requirements of § 71.20(b) or (c).

§ 71.35 [Amended]

■ 8. In newly redesignated § 71.35, remove the authority citation at the end of the section.

■ 9. Amend § 71.40 by revising paragraphs (b)(2), (c) introductory text, and (c)(4), adding paragraphs (c)(5) and (6), revising paragraph (d), and removing the authority citation at the end of the section.

The revisions and additions read as follows:

§ 71.40 Caregiver benefits.

* * * * *

(b) * * *

(2) Wellness contacts to review the eligible veteran's well-being, adequacy of personal care services being provided by the Family Caregiver(s), and the well-being of the Family Caregiver(s). This wellness contact will occur, in general, at a minimum of once every 120 days, and at least one visit must occur in the eligible veteran's home on an annual basis. Failure of the eligible veteran and Family Caregiver to participate in any wellness contacts pursuant to this paragraph will result in revocation pursuant to § 71.45, Revocation and Discharge of Family Caregivers.

* * * * *

(c) *Primary Family Caregiver benefits.* VA will provide to Primary Family Caregivers all of the benefits listed in paragraphs (c)(1) through (6) of this section.

* * * * *

(4) Primary Family Caregivers will receive a monthly stipend for each month's participation as a Primary Family Caregiver.

(i) *Stipend amount.* (A) Except as provided in paragraph (c)(4)(i)(C) of this section, if the eligible veteran meets the requirements of § 71.20(a), the Primary Family Caregiver's monthly stipend is the amount set forth in paragraph (c)(4)(i)(A)(*1*) or (*2*) of this section.

(*1*) The Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate by 0.625.

(*2*) If VA determines that the eligible veteran is unable to self-sustain in the community, the Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate by 1.00.

(B) Except as provided in paragraph (c)(4)(i)(C) of this section, for one year beginning on October 1, 2020, if the eligible veteran meets the requirements of § 71.20(b) or (c), (*i.e.,* is a legacy participant or a legacy applicant), the Primary Family Caregiver's monthly stipend is calculated based on the clinical rating in 38 CFR 71.40(c)(4)(i) through (iii) (2019) and the definitions applicable to such paragraphs under 38 CFR 71.15 (2019). If the sum of all of the ratings assigned is:

(*1*) 21 or higher, then the Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate by 1.00.

(*2*) 13 to 20, then the Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate by 0.625.

(*3*) 1 to 12, then the Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate by 0.25.

(C) For one year beginning on October 1, 2020, if the eligible veteran meets the requirements of § 71.20(a) and (b) or (c), the Primary Family Caregiver's monthly stipend is the amount the Primary Family Caregiver is eligible to receive under paragraph (c)(4)(i)(A) or (B) of this section, whichever is higher. If the higher monthly stipend rate is the amount the Primary Family Caregiver is eligible to receive under paragraph (c)(4)(i)(A) of this section, the stipend rate will be adjusted and paid in accordance with paragraph (c)(4)(ii)(C)(*2*)(*i*) of this section.

(D) Notwithstanding paragraphs (c)(4)(i)(A) through (C) of this section, for one year beginning on October 1, 2020, if the eligible veteran meets the requirements of § 71.20(b), the Primary Family Caregiver's monthly stipend is not less than the amount the Primary Family Caregiver was eligible to receive as of the day before October 1, 2020 (based on the eligible veteran's address on record with the Program of Comprehensive Assistance for Family Caregivers on such date) so long as the eligible veteran resides at the same address on record with the Program of Comprehensive Assistance for Family Caregivers as of the day before October 1, 2020. If the eligible veteran relocates to a different address, the stipend amount thereafter is determined pursuant to paragraph (c)(4)(i)(A), (B), or (C) of this section and adjusted in accordance with paragraph (c)(4)(ii)(B) of this section.

(ii) *Adjustments to stipend payments.* (A) Adjustments to stipend payments that result from OPM's updates to the General Schedule (GS) Annual Rate for grade 4, step 1 for the locality pay area in which the eligible veteran resides take effect prospectively following the date the update to such rate is made effective by OPM.

(B) Adjustments to stipend payments that result from the eligible veteran relocating to a new address are effective the first of the month following the month in which VA is notified that the eligible veteran has relocated to a new address. VA must receive notification within 30 days from the date of relocation. If VA does not receive notification within 30 days from the date of relocation, VA will seek to recover overpayments of benefits under this paragraph (c)(4) back to the latest date on which the adjustment would have been effective if VA had been notified within 30 days from the date of relocation, as provided in § 71.47.

(C) The Primary Family Caregiver's monthly stipend may be adjusted pursuant to the reassessment conducted by VA under § 71.30.

(*1*) If the eligible veteran meets the requirements of § 71.20(a) only (and does not meet the requirements of § 71.20(b) or (c)), the Primary Family Caregiver's monthly stipend is adjusted as follows:

(*i*) In the case of a reassessment that results in an increase in the monthly stipend payment, the increase takes effect as of the date of the reassessment.

(*ii*) In the case of a reassessment that results in a decrease in the monthly stipend payment, the decrease takes effect as of the effective date provided in VA's final notice of such decrease to the eligible veteran and Primary Family Caregiver. The effective date of the decrease will be no earlier than 60 days after VA provides advanced notice of its findings to the eligible veteran and Primary Family Caregiver.

(*2*) If the eligible veteran meets the requirements of § 71.20(b) or (c), the Primary Family Caregiver's monthly stipend may be adjusted as follows:

(*i*) In the case of a reassessment that results in an increase in the monthly stipend payment, the increase takes effect as of the date of the reassessment. The Primary Family Caregiver will also be paid the difference between the amount under paragraph (c)(4)(i)(A) of this section that the Primary Family Caregiver is eligible to receive and the amount the Primary Family Caregiver was eligible to receive under paragraph (c)(4)(i)(B) or (D) of this section, whichever the Primary Family Caregiver received for the time period beginning on October 1, 2020 up to the date of the reassessment, based on the eligible veteran's address on record with the Program of Comprehensive Assistance for Family Caregivers on the date of the reassessment and the monthly stipend rate on such date. If there is more than one reassessment for an eligible veteran during the one-year period beginning on October 1, 2020, the retroactive payment described in the previous sentence applies only if the first reassessment during the one-year period beginning on October 1, 2020 results in an increase in the monthly stipend payment, and only as the result of the first reassessment during the one-year period.

(*ii*) In the case of a reassessment that results in a decrease in the monthly stipend payment and the eligible veteran meets the requirements of § 71.20(a), the new stipend amount under paragraph (c)(4)(i)(A) of this section takes effect as of the effective date provided in VA's final notice of such decrease to the eligible veteran and Primary Family Caregiver. The effective date of the decrease will be no earlier than 60 days after the date that is one year after October 1, 2020. On the date that is one year after October 1, 2020, VA will provide advanced notice of its findings to the eligible veteran and Primary Family Caregiver.

Note to paragraph (c)(4)(ii)(C)(2): If an eligible veteran who meets the requirements of § 71.20(b) or (c) is determined, pursuant to a reassessment conducted by VA under § 71.30, to not meet the requirements of § 71.20(a), the monthly stipend payment will not be increased under paragraph (c)(4)(ii)(C)(*2*)(*i*) of this section or decreased under paragraph (c)(4)(ii)(C)(*2*)(*ii*) of this section. Unless the Family Caregiver is revoked or discharged under § 71.45 before the date that is 60 days after the date that is one year after October 1, 2020, the effective date for discharge of the Family Caregiver of a legacy participant or legacy applicant under § 71.45(b)(1)(ii) will be no earlier than 60 days after the date that is one year after October 1, 2020. On the date that is one year after October 1, 2020, VA will provide advanced notice of its findings to the eligible veteran and Family Caregiver.

(D) Adjustments to stipend payments for the first month will take effect on the date specified in paragraph (d) of this section. Stipend payments for the last month will end on the date specified in § 71.45.

(iii) *No employment relationship.* Nothing in this section shall be construed to create an employment relationship between the Secretary and an individual in receipt of assistance or support under this part.

(iv) *Periodic assessment.* In consultation with other appropriate agencies of the Federal government, VA shall periodically assess whether the monthly stipend rate meets the requirements of 38 U.S.C. 1720G(a)(3)(C)(ii) and (iv). If VA determines that adjustments to the monthly stipend rate are necessary, VA shall make such adjustments through future rulemaking.

(5) Primary Family Caregivers are eligible for financial planning services as that term is defined in § 71.15. Such services will be provided by entities authorized pursuant to any contract entered into between VA and such entities.

(6) Primary Family Caregivers are eligible for legal services as that term is defined in § 71.15. Such services will be provided by entities authorized pursuant to any contract entered into between VA and such entities.

(d) *Effective date of benefits under the Program of Comprehensive Assistance for Family Caregivers.* Except for paragraphs (b)(6) and (c)(3) and (4) of this section, caregiver benefits under

paragraphs (b) and (c) of this section are effective upon approval and designation under § 71.25(f). Caregiver benefits under paragraphs (b)(6) and (c)(3) and (4) are effective on the latest of the following dates:

(1) The date the joint application that resulted in approval and designation of the Family Caregiver is received by VA.

(2) The date the eligible veteran begins receiving care at home.

(3) The date the Family Caregiver begins providing personal care services to the eligible veteran at home.

(4) In the case of a new Family Caregiver applying to be the Primary Family Caregiver for an eligible veteran, the day after the effective date of revocation or discharge of the previous Primary Family Caregiver for the eligible veteran (such that there is only one Primary Family Caregiver designated for an eligible veteran at one time).

(5) In the case of a new Family Caregiver applying to be a Secondary Family Caregiver for an eligible veteran who already has two Secondary Family Caregivers approved and designated by VA, the day after the effective date of revocation or discharge of a previous Secondary Family Caregiver for the eligible veteran (such that there are no more than two Secondary Family Caregivers designated for an eligible veteran at one time).

(6) In the case of a current or previous Family Caregiver reapplying with the same eligible veteran, the day after the date of revocation or discharge under § 71.45, or in the case of extended benefits under § 71.45(b)(1)(iii), (b)(2)(iii), (b)(3)(iii)(A) or (B), and (b)(4)(iv), the day after the last date on which such Family Caregiver received caregiver benefits.

(7) The day after the date a joint application is denied.

■ 10. Revise § 71.45 to read as follows:

§ 71.45 Revocation and discharge of Family Caregivers.

(a) *Revocation of the Family Caregiver*—(1) *Bases for revocation of the Family Caregiver*—(i) *For cause.* VA will revoke the designation of a Family Caregiver for cause when VA determines any of the following:

(A) The Family Caregiver or eligible veteran committed fraud under this part;

(B) The Family Caregiver neglected, abused, or exploited the eligible veteran;

(C) Personal safety issues exist for the eligible veteran that the Family Caregiver is unwilling to mitigate;

(D) The Family Caregiver is unwilling to provide personal care services to the eligible veteran or, in the case of the Family Caregiver's temporary absence or incapacitation, fails to ensure (if able to) the provision of personal care services to the eligible veteran.

(ii) *Noncompliance.* Except as provided in paragraph (f) of this section, VA will revoke the designation of a Family Caregiver when the Family Caregiver or eligible veteran is noncompliant with the requirements of this part. Noncompliance means:

(A) The eligible veteran does not meet the requirements of § 71.20(a)(5), (6), or (7);

(B) The Family Caregiver does not meet the requirements of § 71.25(b)(2);

(C) Failure of the eligible veteran or Family Caregiver to participate in any reassessment pursuant to § 71.30;

(D) Failure of the eligible veteran or Family Caregiver to participate in any wellness contact pursuant to § 71.40(b)(2); or

(E) Failure to meet any other requirement of this part except as provided in paragraph (b)(1) or (2) of this section.

(iii) *VA error.* Except as provided in § 71.45(f), VA will revoke the designation of a Family Caregiver if the Family Caregiver's approval and designation under this part was authorized as a result of an erroneous eligibility determination by VA.

(2) *Revocation date.* All caregiver benefits will continue to be provided to the Family Caregiver until the date of revocation.

(i) In the case of revocation based on fraud committed by the Family Caregiver or eligible veteran under paragraph (a)(1)(i)(A) of this section, the date of revocation will be the date the fraud began. If VA cannot identify when the fraud began, the date of revocation will be the earliest date that the fraud is known by VA to have been committed, and no later than the date on which VA identifies that fraud was committed.

(ii) In the case of revocation based on paragraphs (a)(1)(i)(B) through (D) of this section, the date of revocation will be the date VA determines the criteria in any such paragraph has been met.

(iii) In the case of revocation based on noncompliance under paragraph (a)(1)(ii) of this section, revocation takes effect as of the effective date provided in VA's final notice of such revocation to the eligible veteran and Family Caregiver. The effective date of revocation will be no earlier than 60 days after VA provides advanced notice of its findings to the eligible veteran and Family Caregiver.

(iv) In the case of revocation based on VA error under paragraph (a)(1)(iii) of this section, the date of revocation will be the date the error was made. If VA cannot identify when the error was made, the date of revocation will be the earliest date that the error is known by VA to have occurred, and no later than the date on which VA identifies that the error occurred.

(3) *Continuation of benefits.* In the case of revocation based on VA error under paragraph (a)(1)(iii) of this section, caregiver benefits will continue for 60 days after the date of revocation unless the Family Caregiver opts out of receiving such benefits. Continuation of benefits under this paragraph will be considered an overpayment and VA will seek to recover overpayment of such benefits as provided in § 71.47.

(b) *Discharge of the Family Caregiver*—(1) *Discharge due to the eligible veteran*—(i) *Bases for discharge.* Except as provided in paragraph (f) of this section, the Family Caregiver will be discharged from the Program of Comprehensive Assistance for Family Caregivers when VA determines any of the following:

(A) Except as provided in paragraphs (a)(1)(ii)(A) and (b)(1)(i)(B) of this section, the eligible veteran does not meet the requirements of § 71.20 because of improvement in the eligible veteran's condition or otherwise; or

(B) Death or institutionalization of the eligible veteran. Note: VA must receive notification of death or institutionalization of the eligible veteran as soon as possible but not later than 30 days from the date of death or institutionalization. Notification of institutionalization must indicate whether the eligible veteran is expected to be institutionalized for 90 or more days from the onset of institutionalization.

(ii) *Discharge date.* (A) In the case of discharge based on paragraph (b)(1)(i)(A) of this section, the discharge takes effect as of the effective date provided in VA's final notice of such discharge to the eligible veteran and Family Caregiver. The effective date of discharge will be no earlier than 60 days after VA provides advanced notice of its findings to the eligible veteran and Family Caregiver that the eligible veteran does not meet the requirements of § 71.20.

(B) For discharge based on paragraph (b)(1)(i)(B) of this section, the date of discharge will be the earliest of the following dates, as applicable:

(*1*) Date of death of the eligible veteran.

(*2*) Date that institutionalization begins, if it is determined that the eligible veteran is expected to be institutionalized for a period of 90 days or more.

(*3*) Date of the 90th day of institutionalization.

(iii) *Continuation of benefits.* Caregiver benefits will continue for 90 days after the date of discharge.

(2) *Discharge due to the Family Caregiver*—(i) *Bases for discharge.* Except as provided in paragraph (f) of this section, the Family Caregiver will be discharged from the Program of Comprehensive Assistance for Family Caregivers due to the death or institutionalization of the Family Caregiver. Note: VA must receive notification of death or institutionalization of the Family Caregiver as soon as possible but not later than 30 days from the date of death or institutionalization. Notification of institutionalization must indicate whether Family Caregiver is expected to be institutionalized for 90 or more days from the onset of institutionalization.

(ii) *Discharge date.* The date of discharge will be the earliest of the following dates, as applicable:

(A) Date of death of the Family Caregiver.

(B) Date that the institutionalization begins, if it is determined that the Family Caregiver is expected to be institutionalized for a period of 90 days or more.

(C) Date of the 90th day of institutionalization.

(iii) *Continuation of benefits.* Caregiver benefits will continue for 90 days after date of discharge in paragraph (b)(2)(ii)(B) or (C) of this section.

(3) *Discharge of the Family Caregiver by request of the Family Caregiver*—(i) *Request for discharge.* Except as provided in paragraph (f) of this section, the Family Caregiver will be discharged from the Program of Comprehensive Assistance for Family Caregivers if a Family Caregiver requests discharge of his or her caregiver designation. The request may be made verbally or in writing and must provide the present or future date of discharge. If the discharge request is received verbally, VA will provide the Family Caregiver written confirmation of receipt of the verbal discharge request and the effective date of discharge. VA will notify the eligible veteran verbally and in writing of the request for discharge and the effective date of discharge.

(ii) *Discharge date.* The date of discharge will be the present or future date provided by the Family Caregiver or the date of the Family Caregiver's request for discharge if the Family Caregiver does not provide a date. If the request does not include an identified date of discharge, VA will contact the Family Caregiver to request a date. If unable to successfully obtain this date, discharge will be effective as of the date of the request.

(iii) *Continuation of benefits.* (A) Except as provided in paragraph (b)(3)(iii)(B) of this section, caregiver benefits will continue for 30 days after the date of discharge.

(B) If the Family Caregiver requests discharge due to domestic violence (DV) or intimate partner violence (IPV) perpetrated by the eligible veteran against the Family Caregiver, caregiver benefits will continue for 90 days after the date of discharge when any of the following can be established:

(*1*) The issuance of a protective order, to include interim, temporary and/or final protective orders, to protect the Family Caregiver from DV or IPV perpetrated by the eligible veteran.

(*2*) A police report indicating DV or IPV perpetrated by the eligible veteran against the Family Caregiver or a record of an arrest related to DV or IPV perpetrated by the eligible veteran against the Family Caregiver; or

(*3*) Documentation of disclosure of DV or IPV perpetrated by the eligible veteran against the Family Caregiver to a treating provider (*e.g.,* physician, dentist, psychologist, rehabilitation therapist) of the eligible veteran or Family Caregiver, Intimate Partner Violence Assistance Program (IPVAP) Coordinator, therapist or counselor.

(4) *Discharge of the Family Caregiver by request of the eligible veteran or eligible veteran's surrogate*—(i) *Request for discharge.* Except as provided in paragraph (f) of this section, the Family Caregiver will be discharged from the Program of Comprehensive Assistance for Caregivers if an eligible veteran or the eligible veteran's surrogate requests discharge of the Family Caregiver. The discharge request may be made verbally or in writing and must express an intent to remove the Family Caregiver's approval and designation. If the discharge request is received verbally, VA will provide the eligible veteran written confirmation of receipt of the verbal discharge request and effective date of discharge. VA will notify the Family Caregiver verbally and in writing of the request for discharge and effective date of discharge.

(ii) *Discharge date.* The date of discharge will be the present or future date of discharge provided by the eligible veteran or eligible veteran's surrogate. If the request does not provide a present or future date of discharge, VA will ask the eligible veteran or eligible veteran's surrogate to provide one. If unable to successfully obtain this date, discharge will be effective as of the date of the request.

(iii) *Rescission.* VA will allow the eligible veteran or eligible veteran's surrogate to rescind the discharge request and have the Family Caregiver reinstated if the rescission is made within 30 days of the date of discharge. If the eligible veteran or eligible veteran's surrogate expresses a desire to reinstate the Family Caregiver more than 30 days from the date of discharge, a new joint application is required.

(iv) *Continuation of benefits.* Caregiver benefits will continue for 30 days after the date of discharge.

(c) *Safety and welfare.* If VA suspects that the safety of the eligible veteran is at risk, then VA may suspend the caregiver's responsibilities, and facilitate appropriate referrals to protective agencies or emergency services if needed, to ensure the welfare of the eligible veteran, prior to discharge or revocation.

(d) *Overpayments.* VA will seek to recover overpayments of benefits provided under this section as provided in § 71.47.

(e) *Transition and bereavement counseling.* VA will, if requested and applicable, assist the Family Caregiver in transitioning to alternative health care coverage and mental health services. In addition, in cases of death of the eligible veteran, bereavement counseling may be available under 38 U.S.C. 1783.

(f) *Multiple bases for revocation or discharge.* In the instance that a Family Caregiver may be both discharged pursuant to any of the criteria in paragraph (b) of this section and have his or her designation revoked pursuant to any of the criteria in paragraph (a) of this section, the Family Caregiver's designation will be revoked pursuant to paragraph (a). In the instance that the designation of a Family Caregiver may be revoked under paragraph (a)(1)(i) and paragraph (a)(1)(ii) or (iii) of this section, the designation of the Family Caregiver will be revoked pursuant to paragraph (a)(1)(i). In the instance that the designation of a Family Caregiver may be revoked under paragraphs (a)(1)(ii) and (iii) of this section, the designation of the Family Caregiver will be revoked pursuant to paragraph (a)(1)(iii). In the instance that a Family Caregiver may be discharged under paragraph (b)(1), (2), (3), or (4) of this section, the Family Caregiver will be discharged pursuant to the paragraph most favorable to the Family Caregiver.

■ 11. Add § 71.47 to read as follows:

§ 71.47 Collection of overpayment.

VA will collect overpayments as defined in § 71.15 pursuant to the Federal Claims Collection Standards.

§ 71.50 [Amended]

■ 12. Amend § 71.50 by removing the statutory authority citation at the end of the section.

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Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 218

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the U.S. Navy Training and Testing Activities in the Mariana Islands Training and Testing (MITT) Study Area; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 218

[Docket No. 200713–0188]

RIN 0648–BJ00

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the U.S. Navy Training and Testing Activities in the Mariana Islands Training and Testing (MITT) Study Area

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

ACTION: Final rule; notification of issuance of Letter of Authorization.

SUMMARY: NMFS, upon request from the U.S. Navy (Navy), issues these regulations pursuant to the Marine Mammal Protection Act (MMPA) to govern the taking of marine mammals incidental to the training and testing activities conducted in the Mariana Islands Training and Testing (MITT) Study Area. The Navy's activities qualify as military readiness activities pursuant to the MMPA, as amended by the National Defense Authorization Act for Fiscal Year 2004 (2004 NDAA). These regulations, which allow for the issuance of a Letter of Authorization (LOA) for the incidental take of marine mammals during the described activities and timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species and their habitat, and establish requirements pertaining to the monitoring and reporting of such taking.

DATES: Effective from July 31, 2020, to July 30, 2027.

ADDRESSES: A copy of the Navy's application, NMFS' proposed and final rules and subsequent LOA for the existing regulations, and other supporting documents and documents cited herein may be obtained online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities.* In case of problems accessing these documents, please use the contact listed here (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Stephanie Egger, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Purpose of Regulatory Action

These regulations, issued under the authority of the MMPA (16 U.S.C. 1361 *et seq.*), provide the framework for authorizing the take of marine mammals incidental to the Navy's training and testing activities (which qualify as military readiness activities) from the use of sonar and other transducers and in-water detonations throughout the MITT Study Area. The MITT Study Area includes the seas off the coasts of Guam and the Commonwealth of the Northern Mariana Islands (CNMI), the in-water areas around the Mariana Islands Range Complex (MIRC), the transit corridor between the MIRC and the Hawaii Range Complex (HRC), and select pierside and harbor locations. The transit corridor is outside the geographic boundaries of the MIRC and represents a great circle route across the high seas for Navy vessels transiting between the MIRC and the HRC. The planned activities also include various activities in Apra Harbor such as sonar maintenance alongside Navy piers located in Inner Apra Harbor.

NMFS received an application from the Navy requesting seven-year regulations and an authorization to incidentally take individuals of multiple species of marine mammals (''Navy's rulemaking/LOA application'' or ''Navy's application''). Take is anticipated to occur by Level A and Level B harassment incidental to the Navy's training and testing activities, with no serious injury or mortality expected or authorized.

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs 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, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity, as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I, provide the legal basis for issuing this final rule and the subsequent LOAs. As directed by this legal authority, this final rule contains mitigation, monitoring, and reporting requirements.

Summary of Major Provisions Within the Final Rule

The following is a summary of the major provisions of this final rule regarding the Navy's activities. Major provisions include, but are not limited to:

- The use of defined powerdown and shutdown zones (based on activity);
- Measures to eliminate the likelihood of ship strikes;
- Activity limitations in certain areas and times that are biologically important (*i.e.,* for foraging, migration, reproduction) for marine mammals; and
- Implementation of a Notification and Reporting Plan (for dead or live stranded marine mammals); and
- Implementation of a robust monitoring plan to improve our understanding of the environmental effects resulting from the Navy training and testing activities.

Additionally, the rule includes an adaptive management component that allows for timely modification of mitigation or monitoring measures based on new information, when appropriate.

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA 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 authorization is provided to the public for review and the opportunity to submit comments.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stocks and will not have an unmitigable adverse impact on the availability of the species or stocks for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in this rule as ''mitigation measures''); and requirements pertaining to the monitoring and reporting of such takings. The MMPA defines ''take'' to mean to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal. The *Analysis and Negligible*

Impact Determination section below discusses the definition of ''negligible impact.''

The NDAA for Fiscal Year 2004 (2004 NDAA) (Pub. L. 108–136) amended section 101(a)(5) of the MMPA to remove the ''small numbers'' and ''specified geographical region'' provisions indicated above and amended the definition of ''harassment'' as applied to a ''military readiness activity.'' The definition of harassment for military readiness activities (section 3(18)(B) of the MMPA) is (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A Harassment); or (ii) Any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered (Level B harassment). In addition, the 2004 NDAA amended the MMPA as it relates to military readiness activities such that the least practicable adverse impact analysis shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

More recently, section 316 of the NDAA for Fiscal Year 2019 (2019 NDAA) (Pub. L. 115–232), signed on August 13, 2018, amended the MMPA to allow incidental take rules for military readiness activities under section 101(a)(5)(A) to be issued for up to seven years. Prior to this amendment, all incidental take rules under section 101(a)(5)(A) were limited to five years.

Summary and Background of Request

On February 11, 2019, NMFS received an application from the Navy for authorization to take marine mammals by Level A and Level B harassment incidental to training and testing activities (categorized as military readiness activities) from the use of sonar and other transducers and in-water detonations in the MITT Study Area over a seven-year period beginning when the current authorization expires. On March 15, 2019, we published a notice of receipt of application (NOR) in the **Federal Register** (84 FR 9495), requesting comments and information related to the Navy's request for 30 days. On January 31, 2020, we published a notice of the proposed rulemaking (85 FR 5782) and requested comments and information related to the Navy's request for 45 days. All comments received during the NOR and the proposed rulemaking comment periods were considered in this final rule. Comments received on the proposed rule are addressed in this final rule in the *Comments and Responses* section. The following types of training and testing, which are classified as military readiness activities pursuant to the MMPA, as amended by the 2004 NDAA, will be covered under the regulations and LOA: Amphibious warfare (in-water detonations), anti-submarine warfare (sonar and other transducers, in-water detonations), surface warfare (in-water detonations), and other testing and training (sonar and other transducers). The activities will not include any pile driving/removal or use of air guns.

This will be the third time NMFS has promulgated incidental take regulations pursuant to the MMPA relating to similar military readiness activities in the MITT Study Area, following those effective from August 3, 2010, through August 3, 2015 (75 FR 45527; August 3, 2010) and from August 3, 2015 through August 3, 2020 (80 FR 46112; August 3, 2015). For this third rulemaking, the Navy is proposing to conduct similar activities as they have conducted over the past nine years under the previous rulemakings.

The Navy's mission is to organize, train, equip, and maintain combat-ready naval forces capable of winning wars, deterring aggression, and maintaining freedom of the seas. This mission is mandated by Federal law (10 U.S.C. 8062), which requires the readiness of the naval forces of the United States. The Navy executes this responsibility by training and testing at sea, often in designated operating areas (OPAREA) and testing and training ranges. The Navy must be able to access and utilize these areas and associated sea space and air space in order to develop and maintain skills for conducting naval operations. The Navy's testing activities ensure naval forces are equipped with well-maintained systems that take advantage of the latest technological advances. The Navy's research and acquisition community conducts military readiness activities that involve testing. The Navy tests ships, aircraft, weapons, combat systems, sensors, and related equipment, and conducts scientific research activities to achieve and maintain military readiness.

The tempo and types of training and testing activities fluctuate because of the introduction of new technologies, the evolving nature of international events, advances in warfighting doctrine and procedures, and changes in force structure (*e.g.,* organization of ships, submarines, aircraft, weapons, and personnel). Such developments influence the frequency, duration, intensity, and location of required training and testing activities, but the basic nature of sonar and explosive events conducted in the MITT Study Area has remained the same.

The Navy's rulemaking/LOA application reflects the most up-to-date compilation of training and testing activities deemed necessary to accomplish military readiness requirements. The types and numbers of activities included in the rule account for fluctuations in training and testing in order to meet evolving or emergent military readiness requirements. These regulations will cover training and testing activities that will occur for a seven-year period following the expiration of the current MMPA authorization for the MITT Study Area, which expires on August 3, 2020.

Description of the Specified Activity

Additional detail regarding the specified activity was provided in our **Federal Register** notice of proposed rulemaking (85 FR 5782; January 31, 2020); please see that notice of proposed rulemaking or the Navy's application for more information. In addition, since publication of the proposed rule, additional mitigation measures have been added, which are discussed in detail in the *Mitigation Measures* section of this rule. The Navy requested authorization to take marine mammals incidental to conducting training and testing activities. The Navy has determined that acoustic and explosive stressors are most likely to result in impacts on marine mammals that could rise to the level of harassment, and NMFS concurs with this determination. Descriptions of these activities are provided in section 2 of the 2020 MITT Final Supplemental Environmental Impact Statement (FSEIS)/Overseas EIS (OEIS) (2020 MITT FSEIS/OEIS) (U.S. Department of the Navy, 2020) and in the Navy's rule making/LOA application (*https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities*) and are summarized here.

Dates and Duration

The specified activities can occur at any time during the seven-year period of validity of the regulations, with the exception of the activity types and time periods for which limitations have explicitly been identified (see *Mitigation Measures* section). The planned number of training and testing activities are described in the *Detailed Description of the Specified Activities* section (Table 3).

Geographical Region

The MITT Study Area is comprised of three components: (1) The MIRC, (2) additional areas on the high seas, and (3) a transit corridor between the MIRC and the HRC. The MIRC includes the waters south of Guam to north of Pagan (CNMI), and from the Pacific Ocean east of the Mariana Islands to the Philippine Sea to the west, encompassing 501,873 square nautical miles (nmi^2) of open ocean. The additional areas of the high seas include the area to the north of the MIRC that is within the U.S. Exclusive Economic Zone (EEZ) of the CNMI and the areas to the west of the MIRC. The transit corridor is outside the geographic boundaries of the MIRC and represents a great circle route (*i.e.,* the shortest distance) across the high seas for Navy ships transiting between the MIRC and the HRC. Although not part of any defined range complex, the transit corridor is important to the Navy in that it provides available air, sea, and undersea space where vessels and aircraft conduct training and testing while in transit. While in transit and along the corridor, vessels and aircraft will, at times, conduct basic and routine unit-level activities such as gunnery and sonar training. Ships also conduct sonar maintenance, which includes active sonar transmissions.

Additionally, the MITT Study Area includes pierside locations in the Apra Harbor Naval Complex where surface ship and submarine sonar maintenance occur. Activities in Apra Harbor include channels and routes to and from the Navy port in the Apra Harbor Naval Complex, and associated wharves and facilities within the Navy port.

Primary Mission Areas

The Navy categorizes its at-sea activities into functional warfare areas called primary mission areas. These activities generally fall into the following eight primary mission areas: Air warfare; amphibious warfare; anti-submarine warfare (ASW); electronic warfare; expeditionary warfare; mine warfare (MIW); strike warfare; and surface warfare (SUW). Most activities addressed in the MITT Study Area are categorized under one of the primary mission areas. Activities that do not fall within one of these areas are listed as ''other activities.'' Each warfare community (surface, subsurface, aviation, and expeditionary warfare) may train in some or all of these primary mission areas. The testing community also categorizes most, but not all, of its testing activities under these primary mission areas. A description of the sonar, munitions, targets, systems, and other material used during training and testing activities within these primary mission areas is provided in the 2020 MITT FSEIS/OEIS Appendix A (*Training and Testing Activities Descriptions*).

The Navy describes and analyzes the effects of its activities within the 2020 MITT FSEIS/OEIS. In its assessment, the Navy concluded that sonar and other transducers and in-water detonations were the stressors that would result in impacts on marine mammals that could rise to the level of harassment as defined under the MMPA. Therefore, the Navy's rulemaking/LOA application provides the Navy's assessment of potential effects from these stressors in terms of the various warfare mission areas in which they will be conducted. Those mission areas include the following:

- Amphibious warfare (underwater detonations)
- ASW (sonar and other transducers, underwater detonations)
- MIW (sonar and other transducers, underwater detonations)
- SUW (underwater detonations)
- Other training and testing activities (sonar and other transducers)

The Navy's training and testing activities in air warfare, electronic warfare, and expeditionary warfare do not involve sonar and other transducers, underwater detonations, or any other stressors that could result in harassment, serious injury, or mortality of marine mammals. Therefore, the activities in air, electronic, and expeditionary warfare areas are not discussed further in this rule, but are analyzed fully in the 2020 MITT FSEIS/OEIS. Additional detail regarding the primary mission areas was provided in our **Federal Register** notice of proposed rulemaking (85 FR 5782; January 31, 2020); please see that notice of proposed rulemaking or the Navy's application for more information.

Overview of Major Training Activities and Exercises Within the MITT Study Area

A major training exercise (MTE) for purposes of this rulemaking is comprised of several unit-level activities conducted by several units operating together, commanded and controlled by a single Commander, and typically generating more than 100 hours of active sonar. These exercises typically employ an exercise scenario developed to train and evaluate the exercise participants in tactical and operational tasks. In an MTE, most of the activities being directed and coordinated by the Commander in charge of the exercise are identical in nature to the activities conducted during individual, crew, and smaller unit-level training events. In an MTE, however, these disparate training tasks are conducted in concert, rather than in isolation.

Exercises may also be categorized as integrated or coordinated ASW exercises. The distinction between integrated and coordinated ASW exercises is how the units are being controlled. Integrated ASW exercises are controlled by an existing command structure, and generally occur during the Integrated Phase of the training cycle. Coordinated exercises may have a command structure stood up solely for the event; for example, the commanding officer of a ship may be placed in tactical command of other ships for the duration of the exercise. Not all integrated ASW exercises are considered MTEs, due to their scale, number of participants, duration, and amount of active sonar. The distinction between large, medium, and small integrated or coordinated exercises is based on the scale of the exercise *(i.e.,* number of ASW units participating), the length of the exercise, and the total number of active sonar hours. NMFS considered the effects of all training exercises, not just these major, integrated, and coordinated training exercises in this rule.

Overview of Testing Activities Within the MITT Study Area

The Navy's research and acquisition community engages in a broad spectrum of testing activities in support of the Fleet. These activities include, but are not limited to, basic and applied scientific research and technology development; testing, evaluation, and maintenance of systems (missiles, radar, and sonar) and platforms (surface ships, submarines, and aircraft); and acquisition of systems and platforms. The individual commands within the research and acquisition community include Naval Air Systems Command, Naval Sea Systems Command, and Office of Naval Research.

Description of Stressors

The Navy uses a variety of sensors, platforms, weapons, and other devices, including ones used to ensure the safety of Sailors and Marines, to meet its mission. Training and testing with these systems may introduce acoustic (sound) energy or shock waves from explosives into the environment. The following subsections describe the acoustic and explosive stressors for marine mammals and their habitat (including prey species) within the MITT Study Area. Because of the complexity of analyzing

sound propagation in the ocean environment, the Navy relied on acoustic models in its environmental analyses and rulemaking/LOA application that considered sound source characteristics and varying ocean conditions across the MITT Study Area. Stressor/resource interactions that were determined to have de minimis or no impacts (*i.e.,* vessel, aircraft, or weapons noise, and explosions in air) were not carried forward for analysis in the Navy's rulemaking/LOA application. NMFS reviewed the Navy's analysis and conclusions on de minimis sources and finds them complete and supportable.

Acoustic stressors include acoustic signals emitted into the water for a specific purpose, such as sonar and other transducers (devices that convert energy from one form to another—in this case, into sound waves), as well as incidental sources of broadband sound produced as a byproduct of vessel movement and use of weapons or other deployed objects. Explosives also produce broadband sound but are characterized separately from other acoustic sources due to their unique hazardous characteristics. Characteristics of each of these sound sources are described in the following sections.

In order to better organize and facilitate the analysis of approximately 300 sources of underwater sound used for training and testing by the Navy, including sonar and other transducers and explosives, a series of source classifications, or source bins, was developed. The source classification bins do not include the broadband sounds produced incidental to vessel or aircraft transits, weapons firing, and bow shocks.

The use of source classification bins provides the following benefits:

- Provides the ability for new sensors or munitions to be covered under existing authorizations, as long as those sources fall within the parameters of a ''bin;''
- Improves efficiency of source utilization data collection and reporting requirements anticipated under the MMPA authorizations;
- Ensures a conservative approach to all impact estimates, as all sources within a given class are modeled as the most impactful source (highest source level, longest duty cycle, or largest net explosive weight) within that bin;
- Allows analyses to be conducted in a more efficient manner, without any compromise of analytical results; and
- Provides a framework to support the reallocation of source usage (hours/explosives) between different source bins, as long as the total numbers of takes remain within the overall analyzed and authorized limits. This flexibility is required to support evolving Navy training and testing requirements, which are linked to real world events.

Sonar and Other Transducers

Active sonar and other transducers emit non-impulsive sound waves into the water to detect objects, navigate safely, and communicate. Passive sonars differ from active sound sources in that they do not emit acoustic signals; rather, they only receive acoustic information about the environment, or listen. In this rule, the terms sonar and other transducers will be used to indicate active sound sources unless otherwise specified.

The Navy employs a variety of sonars and other transducers to obtain and transmit information about the undersea environment. Some examples are mid-frequency hull-mounted sonars used to find and track enemy submarines; high-frequency small object detection sonars used to detect mines; high-frequency underwater modems used to transfer data over short ranges; and extremely high-frequency (greater than 200 kilohertz (kHz)) doppler sonars used for navigation, like those used on commercial and private vessels. The characteristics of these sonars and other transducers, such as source level, beam width, directivity, and frequency, depend on the purpose of the source. Higher frequencies can carry more information or provide more information about objects off which they reflect, but attenuate more rapidly. Lower frequencies attenuate less rapidly, so may detect objects over a longer distance, but with less detail.

Additional detail regarding sound sources and platforms and categories of acoustic stressors was provided in our **Federal Register** notice of proposed rulemaking (85 FR 5782; January 31, 2020); please see that notice of proposed rulemaking or the Navy's application for more information.

Sonars and other transducers are grouped into classes that share an attribute, such as frequency range or purpose of use. As detailed below, classes are further sorted by bins based on the frequency or bandwidth; source level; and, when warranted, the application in which the source would be used. Unless stated otherwise, a reference distance of 1 meter (m) is used for sonar and other transducers.

- Frequency of the non-impulsive acoustic source;
  - Low-frequency sources operate below 1 kHz;
  - Mid-frequency sources operate at and above 1 kHz, up to and including 10 kHz;
  - High-frequency sources operate above 10 kHz, up to and including 100 kHz;
  - Very high-frequency sources operate above 100 kHz but below 200 kHz;
- Sound pressure level of the non-impulsive source;
  - Greater than 160 decibels (dB) re 1 micro Pascal (μPa), but less than 180 dB re 1 μPa;
  - Equal to 180 dB re 1 μPa and up to 200 dB re 1 μPa;
  - Greater than 200 dB re 1 μPa;
- Application in which the source would be used;
  - Sources with similar functions that have similar characteristics, such as pulse length (duration of each pulse), beam pattern, and duty cycle.

The bins used for classifying active sonars and transducers that are quantitatively analyzed in the MITT Study Area are shown in Table 1 below. While general parameters or source characteristics are shown in the table, actual source parameters are classified.

TABLE 1—SONAR AND TRANSDUCERS QUANTITATIVELY ANALYZED IN THE MITT STUDY AREA

Source class category	Bin	Description
Low-Frequency (LF): Sources that produce signals less than 1 kHz.	LF4	LF sources equal to 180 dB and up to 200 dB.
	LF5	LF sources less than 180 dB.
Mid-Frequency (MF): Tactical and non-tactical sources that produce signals between 1 and 10 kHz.	MF1	Hull-mounted surface ship sonars (*e.g.,* AN/SQS–53C and AN/SQS–60).
	MF1K	Kingfisher mode associated with MF1 sonars.
	MF3	Hull-mounted submarine sonars (*e.g.,* AN/BQQ–10).
	MF4	Helicopter-deployed dipping sonars (*e.g.,* AN/AQS–22).
	MF5	Active acoustic sonobuoys (*e.g.,* DICASS).
	MF6	Underwater sound signal devices (*e.g.,* MK 84 SUS).

TABLE 1—SONAR AND TRANSDUCERS QUANTITATIVELY ANALYZED IN THE MITT STUDY AREA—Continued

Source class category	Bin	Description
	MF9	Sources (equal to 180 dB and up to 200 dB) not otherwise binned.
	MF11	Hull-mounted surface ship sonars with an active duty cycle greater than 80 percent.
	MF12	Towed array surface ship sonars with an active duty cycle greater than 80 percent.
High-Frequency (HF): Tactical and non-tactical sources that produce signals between 10 and 100 kHz.	HF1	Hull-mounted submarine sonars (*e.g.,* AN/BQQ–10).
	HF3	Other hull-mounted submarine sonars (classified).
	HF4	Mine detection, classification, and neutralization sonar (*e.g.,* AN/SQS–20).
	HF6	Sources (equal to 180 dB and up to 200 dB) not otherwise binned.
Anti-Submarine Warfare (ASW): Tactical sources (*e.g.,* active sonobuoys and acoustic countermeasures systems) used during ASW training and testing activities.	ASW1	MF systems operating above 200 dB.
	ASW2	MF Multistatic Active Coherent sonobuoy (*e.g.,* AN/SSQ–125).
	ASW3	MF towed active acoustic countermeasure systems (*e.g.,* AN/SLQ–25).
	ASW4	MF expendable active acoustic device countermeasures (*e.g.,* MK 3).
	ASW5	MF sonobuoys with high duty cycles.
Torpedoes (TORP): Active acoustic signals produced by torpedoes.	TORP1	Lightweight torpedo (*e.g.,* MK 46, MK 54, or Anti-Torpedo Torpedo).
	TORP2	Heavyweight torpedo (*e.g.,* MK 48).
	TORP3	Heavyweight torpedo (*e.g.,* MK 48).
Forward Looking Sonar (FLS): Forward or upward looking object avoidance sonars used for ship navigation and safety.	FLS2	HF sources with short pulse lengths, narrow beam widths, and focused beam patterns.
Acoustic Modems (M): Sources used to transmit data	M3	MF acoustic modems (greater than 190 dB).
Synthetic Aperture Sonars (SAS): Sonars used to form high-resolution images of the seafloor.	SAS2	HF SAS systems.
	SAS4	MF to HF broadband mine countermeasure sonar.

Explosives

This section describes the characteristics of explosions during naval training and testing. The activities analyzed in the Navy's rulemaking/LOA application that use explosives are described in Appendix A (*Training and Testing Activities Descriptions*) of the 2020 MITT FSEIS/OEIS. Explanations of the terminology and metrics used when describing explosives in the Navy's rule making/LOA application are also in Appendix H (*Acoustic and Explosive Concepts*) of the 2020 MITT FSEIS/OEIS.

The near-instantaneous rise from ambient to an extremely high peak pressure is what makes an explosive shock wave potentially damaging. Farther from an explosive, the peak pressures decay and the explosive waves propagate as an impulsive, broadband sound. Several parameters influence the effect of an explosive: The weight of the explosive in the warhead, the type of explosive material, the boundaries and characteristics of the propagation medium, and, in water, the detonation depth and the depth of the receiver (*i.e.,* marine mammal). The net explosive weight, which is the explosive power of a charge expressed as the equivalent weight of trinitrotoluene (TNT), accounts for the first two parameters. The effects of these factors are explained in Appendix H (*Acoustic and Explosive Concepts*) of the 2020 MITT FSEIS/OEIS.

Explosive detonations during training and testing activities are associated with high-explosive munitions, including, but not limited to, bombs, missiles, rockets, naval gun shells, torpedoes, mines, demolition charges, and explosive sonobuoys. Explosive detonations during training and testing involving the use of high-explosive munitions (including bombs, missiles, and naval gun shells) could occur in the air or at the water's surface. Explosive detonations associated with torpedoes and explosive sonobuoys could occur in the water column; mines and demolition charges could be detonated in the water column or on the ocean bottom. Most detonations will occur in waters greater than 200 ft in depth, and greater than 3 nmi from shore, with the exception of three existing mine warfare areas (Outer Apra Harbor, Piti, and Agat Bay). Nearshore small explosive charges only occur at the three mine warfare areas. Piti and Agat Bay, while nearshore, are in very deep water and used for floating mine neutralization activities. In order to better organize and facilitate the analysis of explosives used by the Navy during training and testing that could detonate in water or at the water surface, explosive classification bins were developed. The use of explosive classification bins provides the same benefits as described for acoustic source classification bins discussed above and in Section 1.4.1 (Acoustic Stressors) of the Navy's rulemaking/LOA application.

Explosives detonated in water are binned by net explosive weight. The bins of explosives that are planned for use in the MITT Study Area are shown in Table 2 below.

TABLE 2—EXPLOSIVES ANALYZED IN THE MITT STUDY AREA

Bin	Net explosive weight (lb)	Example explosive source
E1	0.1–0.25	Medium-caliber projectiles.

TABLE 2—EXPLOSIVES ANALYZED IN THE MITT STUDY AREA—Continued

Bin	Net explosive weight (lb)	Example explosive source
E2	>0.25–0.5	Anti-swimmer grenade.
E3	>0.5–2.5	57 mm projectile.
E4	>2.5–5	Mine neutralization charge.
E5	>5–10	5 in projectiles.
E6	>10–20	Hellfire missile.
E8	>60–100	250 lb bomb; Lightweight torpedo.
E9	>100–250	500 lb bomb.
E10	>250–500	1,000 lb bomb.
E11	>500–650	Heavyweight torpedo.
E12	>650–1,000	2,000 lb bomb.

Notes: (1) Net Explosive Weight refers to the equivalent amount of TNT. The actual weight of a munition may be larger due to other components; (2) in = inch(es), lb = pound(s), ft = feet.

Propagation of explosive pressure waves in water is highly dependent on environmental characteristics such as bathymetry, bottom type, water depth, temperature, and salinity, which affect how the pressure waves are reflected, refracted, or scattered; the potential for reverberation; and interference due to multi-path propagation. In addition, absorption greatly affects the distance over which higher-frequency components of explosive broadband noise can propagate. Appendix H (*Acoustic and Explosive Concepts*) of the 2020 MITT FSEIS/OEIS explains the characteristics of explosive detonations and how the above factors affect the propagation of explosive energy in the water.

Marine mammals could be exposed to fragments from underwater explosions associated with the specified activities. When explosive ordnance *(e.g.,* bomb or missile) detonates, fragments of the weapon are thrown at high-velocity from the detonation point, which can injure or kill marine mammals if they are struck. These fragments may be of variable size and are ejected at supersonic speed from the detonation. The casing fragments will be ejected at velocities much greater than debris from any target due to the proximity of the casing to the explosive material. Risk of fragment injury reduces exponentially with distance as the fragment density is reduced. Fragments underwater tend to be larger than fragments produced by in-air explosions (Swisdak and Montaro, 1992). Underwater, the friction of the water would quickly slow these fragments to a point where they no longer pose a threat. Opposingly, the blast wave from an explosive detonation moves efficiently through the seawater. Because the ranges to mortality and injury due to exposure to the blast wave are likely to far exceed the zone where fragments could injure or kill an animal, the thresholds for assessing the likelihood of harassment from a blast, which are also used to inform mitigation zones, are assumed to encompass risk due to fragmentation.

Detailed Description of the Specified Activities

Planned Training and Testing Activities

The Navy's Operational Commands and various System Commands have identified activity levels that are needed in the MITT Study Area to ensure naval forces have sufficient training, maintenance, and new technology to meet Navy missions in the Pacific. Training prepares Navy personnel to be proficient in safely operating and maintaining equipment, weapons, and systems to conduct assigned missions. Navy research develops new science and technology followed by concept testing relevant to future Navy needs. Unlike other Navy range complexes, training and testing in the MITT Study Area is more episodic as transiting strike groups or individual units travel through on the way to and from the Western Pacific, or forward deployed assets temporarily travel to the MITT Study Area for individual or group activities. This section analyzes a maximum number of activities that could occur each year and then a maximum total of activities that could occur over seven years. One activity, Torpedo (Explosive) Testing, does not occur every year, but the maximum times it could occur over one year and seven years was analyzed.

The training and testing activities that the Navy proposes to conduct in the MITT Study Area are summarized in Table 3. The table is organized according to primary mission areas and includes the activity name, associated stressors, description of the activity, sound source bin, the locations of those activities in the MITT Study Area, and the number of activities. For further information regarding the primary platform used (*e.g.,* ship or aircraft type) see Appendix A (*Training and Testing Activities Descriptions*) of the 2020 MITT FSEIS/OEIS.

TABLE 3—TRAINING AND TESTING ACTIVITIES ANALYZED ANNUALLY AND FOR A SEVEN-YEAR PERIOD IN THE MITT STUDY AREA

Stressor category	Activity	Description	Typical duration of event	Source bin [1]	Location	Annual number of events	7-Year number of events
Major Training Event—Large Integrated Anti-Submarine Warfare Training (ASW)							
Acoustic	Joint Multi-Strike Group Exercise.	Typically a 10-day Joint exercise, in which up to three carrier strike groups would conduct training exercises simultaneously.	10 days	ASW2, ASW3, ASW4, ASW5, HF1, MF1, MF11, MF3, MF4, MF5, MF12, TORP1.	Study Area; MIRC	1	7

TABLE 3—TRAINING AND TESTING ACTIVITIES ANALYZED ANNUALLY AND FOR A SEVEN-YEAR PERIOD IN THE MITT STUDY AREA—Continued

Stressor category	Activity	Description	Typical duration of event	Source bin [1]	Location	Annual number of events	7-Year number of events
Major Training Event—Medium Integrated ASW							
Acoustic	Joint Expeditionary Exercise.	Typically a 10-day exercise that could include a Carrier Strike Group and Expeditionary Strike Group, Marine Expeditionary Units, Army Infantry Units, and Air Force aircraft together in a joint environment that includes planning and execution efforts as well as military training activities at sea, in the air, and ashore.	10 days	ASW2, ASW3, MF1, MF4, MF5, MF12.	Study Area; Apra Harbor.	1	7
Medium Coordinated ASW							
Acoustic	Marine Air Ground Task Force Exercise (Amphibious)—Battalion.	Typically a 10-day exercise that conducts over the horizon, ship to objective maneuver for the elements of the Expeditionary Strike Group and the Amphibious Marine Air Ground Task Force. The exercise utilizes all elements of the Marine Air Ground Task Force (Amphibious), conducting training activities ashore with logistic support of the Expeditionary Strike Group and conducting amphibious landings.	10 days	ASW3, MF1, MF4, MF12.	Study Area to nearshore; MIRC; Tinian; Guam; Rota; Saipan; Farallon De Medinilla.	4	28
ASW							
Acoustic	Tracking Exercise—Helicopter (TRACKEX—Helo).	Helicopter crews search for, detect, and track submarines.	2–4 hours	MF4, MF5	Study Area >3 NM from land; Transit Corridor.	10	70
Acoustic	Torpedo Exercise—Helicopter (TORPEX—Helo).	Helicopter crews search for, detect, and track submarines. Recoverable air launched torpedoes are employed against submarine targets.	2–5 hours	MF4, MF5, TORP1.	Study Area >3 NM from land.	6	42
Acoustic	Tracking Exercise—Maritime Patrol Aircraft (TRACKEX—Maritime Patrol Aircraft).	Maritime patrol aircraft crews search for, detect, and track submarines.	2–8 hours	MF5	Study Area >3 NM from land.	36	252
Acoustic	Torpedo Exercise—Maritime Patrol Aircraft (TORPEX—Maritime Patrol Aircraft).	Maritime patrol aircraft crews search for, detect, and track submarines. Recoverable air launched torpedoes are employed against submarine targets.	2–8 hours	MF5, TORP1	Study Area >3 NM from land.	6	42
Acoustic	Tracking Exercise –Surface (TRACKEX—Surface).	Surface ship crews search for, detect, and track submarines.	2–4 hours	ASW1, ASW3, MF1, MF11, MF12.	Study Area >3 NM from land*.	91	637
Acoustic	Torpedo Exercise—Surface (TORPEX—Surface).	Surface ship crews search for, detect, and track submarines. Exercise torpedoes are used during this event.	2–5 hours	ASW3, MF1, MF5, TORP1.	Study Area >3 NM from land.	6	42
Acoustic	Tracking Exercise—Submarine (TRACKEX—Sub).	Submarine crews search for, detect, and track submarines.	8 hours	ASW4, HF1, HF3, MF3.	Study Area >3 NM from land; Transit Corridor.	4	28
Acoustic	Torpedo Exercise—Submarine (TORPEX—Sub).	Submarine crews search for, detect, and track submarines. Recoverable exercise torpedoes are used during this event.	8 hours	ASW4, HF1, MF3, TORP2.	Study Area >3 NM from land.	9	63
Acoustic	Small Combined Coordinated ASW exercise (Multi-Sail/GUAMEX).	Typically, a 5-day exercise with multiple ships, aircraft and submarines integrating the use of their sensors, including sonobuoys, to search, detect, and track threat submarines.	5 days	ASW2, ASW3, ASW4, HF1, MF1, MF3, MF4, MF5, MF11, MF12.	Study Area >3 NM from land*.	38	56

TABLE 3—TRAINING AND TESTING ACTIVITIES ANALYZED ANNUALLY AND FOR A SEVEN-YEAR PERIOD IN THE MITT STUDY AREA—Continued

Stressor category	Activity	Description	Typical duration of event	Source bin [1]	Location	Annual number of events	7-Year number of events
Mine Warfare							
Acoustic	Civilian Port Defense.	Maritime security personnel train to protect civilian ports and harbors against enemy efforts to interfere with access to those ports.	Multiple days	HF4, SAS2	MIRC, Mariana littorals, Inner and Outer Apra Harbor.	1	7
Explosive	Mine Neutralization—Remotely Operated Vehicle Sonar (ASQ–235 [AQS–20], SLQ–48).	Ship, small boat, and helicopter crews locate and disable mines using remotely operated underwater vehicles.	1–4 hours	E4	Study Area, Mariana littorals, and Outer Apra Harbor.	4	28
Acoustic	Mine Countermeasure Exercise—Surface Ship Sonar (SQQ–32, MCM).	Ship crews detect, locate, identify, and avoid mines while navigating restricted areas or channels, such as while entering or leaving port.	1–4 hours	HF4	Study Area, Apra Harbor.	4	28
Acoustic	Mine Countermeasure Exercise—Towed Sonar (AQS–20).	Surface ship crews detect and avoid mines while navigating restricted areas or channels using towed active sonar systems.	1–4 hours	HF4	Study Area, Apra Harbor.	4	28
Explosive	Mine Neutralization—Explosive Ordnance Disposal.	Personnel disable threat mines using explosive charges.	Up to 4 hours	E5, E6	Agat Bay site, Piti, and Outer Apra Harbor.	20	140
Acoustic	Submarine Mine Exercise.	Submarine crews practice detecting mines in a designated area.	Varies	HF1	Study Area, Mariana Littorals, Inner/Outer Apra Harbor.	1	7
Acoustic	Surface Ship Object Detection.	Ship crews detect and avoid mines while navigating restricted areas or channels using active sonar.	1–4 hours	MF1K	Study Area	6	42
Explosive	Underwater Demolition Qualification/Certification.	Navy divers conduct various levels of training and certification in placing underwater demolition charges.	Varies	E5, E6	Agat Bay site, Piti, and Outer Apra Harbor.	45	315
Surface Warfare (SUW)							
Explosive	Bombing Exercise (Air-to-Surface).	Fixed-wing aircrews deliver bombs against stationary surface targets.	1 hour	E9, E10, E12	Study Area, Special Use Airspace.	37	259
Explosive	Gunnery Exercise (GUNEX) (Air-to-Surface)—Medium-caliber.	Fixed-wing and helicopter aircrews fire medium-caliber guns at surface targets.	1 hour	E1, E2	Study Area >12 NM from land, Special Use Airspace.	120	840
Explosive	GUNEX (Surface-to-Surface) Boat—Medium-caliber.	Small boat crews fire medium-caliber guns at surface targets.	1 hour	E2	Study Area >12 NM from land, Special Use Airspace.	20	140
Explosive	GUNEX (Surface-to-Surface) Ship—Large-caliber.	Surface ship crews fire large-caliber guns at surface targets.	Up to 3 hours	E5	Study Area >12 NM from land, Special Use Airspace.	255	1,785
Explosive	GUNEX (Surface-to-Surface) Ship—Small- and Medium-caliber.	Surface ship crews fire medium and small-caliber guns at surface targets.	2–3 hours	E1	Study Area >12 NM from land, Special Use Airspace.	234	1,638
Explosive	Maritime Security Operations.	Helicopter, surface ship, and small boat crews conduct a suite of maritime security operations at sea, to include visit, board, search and seizure, maritime interdiction operations, force protection, and anti-piracy operations.	Up to 3 hours	E2	Study Area; MIRC	40	280
Explosive	Missile Exercise (Air-to-Surface) (MISSILEX [A–S]).	Fixed-wing and helicopter aircrews fire air-to-surface missiles at surface targets.	2 hours	E6, E8, E10	Study Area >12 NM from land, Special Use Airspace.	10	70
Explosive	Missile Exercise (Air-to-Surface)—Rocket (MISSILEX [A–S]—Rocket).	Helicopter aircrews fire both precision-guided and unguided rockets at surface targets.	1 hour	E3	Study Area >12 NM from land, Special Use Airspace.	110	770

TABLE 3—TRAINING AND TESTING ACTIVITIES ANALYZED ANNUALLY AND FOR A SEVEN-YEAR PERIOD IN THE MITT STUDY AREA—Continued

Stressor category	Activity	Description	Typical duration of event	Source bin [1]	Location	Annual number of events	7-Year number of events
Explosive	Missile Exercise (Surface-to-Surface). (MISSILEX [S–S])	Surface ship crews defend against surface threats (ships or small boats) and engage them with missiles.	2–5 hours	E6, E10	Study Area >50 NM from land, Special Use Airspace.	28	196
Explosive	Sinking Exercise	Aircraft, ship, and submarine crews deliberately sink a seaborne target, usually a decommissioned ship made environmentally safe for sinking according to U.S. Environmental Protection Agency standards, with a variety of ordnance.	4–8 hours, possibly over 1–2 days.	E5, E8, E10, E11, E12, TORP2.	Study Area >50 NM from land and >1,000 fathoms depth.	1	7
Other Training Activities							
Acoustic	Submarine Navigation.	Submarine crews operate sonar for navigation and detection while transiting into and out of port during reduced visibility.	Up to 2 hours	HF1, MF3	Study Area, Apra Harbor, and Mariana littorals.	8	56
Acoustic	Submarine Sonar Maintenance.	Maintenance of submarine sonar and other system checks are conducted pierside or at sea.	Up to 1 hour	MF3	Study Area; Apra Harbor and Mariana littorals.	86	602
Acoustic	Surface Ship Sonar Maintenance.	Maintenance of surface ship sonar and other system checks are conducted pierside or at sea.	Up to 4 hours	MF1	Study Area; Apra Harbor and Mariana littorals.	44	308
Acoustic	Unmanned Underwater Vehicle Training.	Units conduct training with unmanned underwater vehicles from a variety of platforms, including surface ships, small boats, and submarines.	Up to 24 hours	FLS2, M3, SAS2, SAS4.	MIRC; Apra Harbor and Mariana littorals.	64	448
Testing Activities							
ASW Acoustic; Explosive.	Anti-Submarine Warfare Tracking Test—Maritime Patrol Aircraft (Sonobuoys).	The test evaluates the sensors and systems used by maritime patrol aircraft to detect and track submarines and to ensure that aircraft systems used to deploy the tracking systems perform to specifications and meet operational requirements.	8 hours	ASW2, ASW5, E1, E3, MF5, MF6.	Study Area >3 NM from land.	26	182
Acoustic	Anti-Submarine Warfare Torpedo Test.	This event is similar to the training event torpedo exercise. Test evaluates anti-submarine warfare systems onboard rotary-wing and fixed-wing aircraft and the ability to search for, detect, classify, localize, track, and attack a submarine or similar target.	2–6 flight hours	MF5, TORP1	Study Area >3 NM from land.	20	140
Acoustic	Anti-Submarine Warfare Mission Package Testing.	Ships and their supporting platforms (*e.g.,* helicopters and unmanned aerial systems) detect, localize, and prosecute submarines.	1–2 weeks, with 4–8 hours of active sonar use with intervals of non-activity in between.	ASW1, ASW2, ASW3, ASW5, MF12, MF4, MF5, TORP1.	Mariana Island Range Complex.	100	700
Acoustic	At-Sea Sonar Testing.	At-sea testing to ensure systems are fully functional in an open ocean environment.	From 4 hours to 11 days.	HF1, HF6, M3, MF3, MF9.	Study Area	7	49
Acoustic; Explosive.	Torpedo (Explosive) Testing.	Air, surface, or submarine crews employ explosive and non-explosive torpedoes against artificial targets.	1–2 days during daylight hours.	ASW3, HF1, HF6, MF1, MF3, MF4, MF5, MF6, TORP1, TORP2, E8, E11.	Mariana Island Range Complex.	3	9
Acoustic	Torpedo (Non-explosive) Testing.	Air, surface, or submarine crews employ non-explosive torpedoes against submarines or surface vessels.	Up to 2 weeks	ASW3, ASW4, HF1, HF6, LF4, MF1, MF3, MF4, MF5, MF6, TORP1, TORP2, TORP3.	Mariana Island Range Complex.	7	49

TABLE 3—TRAINING AND TESTING ACTIVITIES ANALYZED ANNUALLY AND FOR A SEVEN-YEAR PERIOD IN THE MITT STUDY AREA—Continued

Stressor category	Activity	Description	Typical duration of event	Source bin [1]	Location	Annual number of events	7-Year number of events
Mine Warfare							
Acoustic; Explosive.	Mine Countermeasure and Neutralization Testing.	Air, surface, and subsurface vessels neutralize threat mines and mine-like objects.	1–10 days, with intermittent use of countermeasure/neutralization systems during this period.	HF4, E4	MIRC; nearshore and littorals.	3	21
Surface Warfare							
Explosive	Air to Surface Missile Test.	Fixed-wing and helicopter aircrews fire air-to-surface missiles at surface targets.	2 hours	E10	Study Area >50 NM from land.	4	28
Vessel Evaluation							
Acoustic	Undersea Warfare Testing.	Ships demonstrate capability of countermeasure systems and underwater surveillance, weapons engagement, and communications systems. This tests ships' ability to detect, track, and engage undersea targets.	Up to 10 days	HF4, MF1, MF4, MF5, TORP1.	MIRC	1	7

[1] Additional activities utilizing sources not listed in the Major Training Event and coordinated exercise bins above may occur during these exercises. All acoustic sources which may be used during training and testing activities have been accounted for in the modeling and analysis presented in this application and in the 2020 MITT FSEIS/OEIS.

* Includes limited occurrence within the Marpi Reef Geographic Mitigation Area and a portion of Chalan Kanoa Reef Geographic Mitigation Area outside of 3 nmi from land (see Figures 1 and 2).

Summary of Acoustic and Explosive Sources Analyzed for Training and Testing

Tables 4 and 5 show the acoustic and explosive source classes, bins, and quantities used in either hours or counts associated with the Navy's training and testing activities over a seven-year period in the MITT Study Area that were analyzed in the Navy's rulemaking/LOA application. Table 4 describes the acoustic source classes (*i.e.,* low-frequency (LF), mid-frequency (MF), and high-frequency (HF)) that could occur over seven years under the planned training and testing activities. Acoustic source bin use in the planned activities will vary annually. The seven-year totals for the planned training and testing activities take into account that annual variability.

TABLE 4—ACOUSTIC SOURCE CLASSES ANALYZED AND NUMBER USED FOR A SEVEN-YEAR PERIOD FOR TRAINING AND TESTING ACTIVITIES IN THE MITT STUDY AREA

Source class category	Bin	Description	Unit	Annual	7-year total
Low-Frequency (LF): Sources that produce signals less than 1 kHz.	LF4	LF sources equal to 180 dB and up to 200 dB	H	1	7
	LF5	LF sources less than 180 dB	H	10	65
Mid-Frequency (MF): Tactical and non-tactical sources that produce signals between 1 and 10 kHz.	MF1	Hull-mounted surface ship sonars (*e.g.,* AN/SQS–53C and AN/SQS–60).	H	1,818	12,725
	MF1K	Kingfisher mode associated with MF1 sonars	H	3	21
	MF3	Hull-mounted submarine sonars (*e.g.,* AN/BQQ–10).	H	227	1,586
	MF4	Helicopter-deployed dipping sonars (*e.g.,* AN/AQS–22).	H	185	1,289
	MF5	Active acoustic sonobuoys (*e.g.,* DICASS)	C	2,094	14,623
	MF6	Active underwater sound signal devices (*e.g.,* MK 84 SUS).	C	74	458
	MF9	Active sources (equal to 180 dB and up to ..... 200 dB) not otherwise binned	H	29	202
	MF11	Hull-mounted surface ship sonars with an active duty cycle greater than 80%.	H	304	2.128
	MF12	Towed array surface ship sonars with an active duty cycle greater than 80%.	H	616	4,320
High-Frequency (HF): Tactical and non-tactical sources that produce signals between 10 and 100 kHz.	HF1	Hull-mounted submarine sonars (*e.g.,* AN/BQQ–10).	H	73	497
	HF3	Other hull-mounted submarine sonars (classified).	H	4	28

TABLE 4—ACOUSTIC SOURCE CLASSES ANALYZED AND NUMBER USED FOR A SEVEN-YEAR PERIOD FOR TRAINING AND TESTING ACTIVITIES IN THE MITT STUDY AREA—Continued

Source class category	Bin	Description	Unit	Annual	7-year total
	HF4	Mine detection, classification, and neutralization sonar (*e.g.,* AN/SQS–20).	H	1,472	10,304
	HF6	Active sources (equal to 180 dB and up to 200 dB) not otherwise binned.	H	309	2,128
Anti-Submarine Warfare (ASW): Tactical sources (*e.g.,* active sonobuoys and acoustic countermeasures systems) used during ASW training and testing activities.	ASW1	MF systems operating above 200 dB	H	192	1,360
	ASW2	MF Multistatic Active Coherent sonobuoy (*e.g.,* AN/SSQ–125).	C	554	3,878
	ASW3	MF towed active acoustic countermeasure systems (*e.g.,* AN/SLQ–25).	H	3,124	21,863
	ASW4	MF expendable active acoustic device countermeasures (*e.g.,* MK 3).	C	332	2,324
	ASW5	MF sonobuoys with high duty cycles	H	50	350
Torpedoes (TORP): Source classes associated with the active acoustic signals produced by torpedoes.	TORP1	Lightweight torpedo (*e.g.,* MK 46, MK 54, or Anti-Torpedo Torpedo).	C	71	485
	TORP2	Heavyweight torpedo (*e.g.,* MK 48)	C	62	398
	TORP3	Heavyweight torpedo test (*e.g.,* MK 48)	C	6	42
Forward Looking Sonar (FLS): Forward or upward looking object avoidance sonars used for ship navigation and safety.	FLS2	HF sources with short pulse lengths, narrow beam widths, and focused beam patterns.	H	4	28
Acoustic Modems (M): Systems used to transmit data through the water.	M3	MF acoustic modems (greater than 190 dB)	H	31	216
Synthetic Aperture Sonars (SAS): Sonars in which active acoustic signals are post-processed to form high-resolution images of the seafloor.	SAS2	HF SAS systems	H	449	3,140
	SAS4	MF to HF broadband mine countermeasure sonar.	H	6	42

Notes: H= hours; C = count.

Table 5 describes the number of in-water explosives that could be used in any year under the planned training and testing activities. Under the planned activities, bin use will vary annually, and the seven-year totals for the planned training and testing activities take into account that annual variability.

TABLE 5—EXPLOSIVE SOURCE BINS ANALYZED AND NUMBER USED ANNUALLY AND FOR A SEVEN-YEAR PERIOD FOR TRAINING AND TESTING ACTIVITIES WITHIN THE MITT STUDY AREA

Bin	Net explosive weight (lb)	Example Explosive Source	Annual	7-year total
E1	0.1–0.25	Medium-caliber projectiles	768	5,376
E2	>0.25–0.5	Anti-swimmer grenade	400	2,800
E3	>0.5–2.5	57 mm projectile	683	4,591
E4	>2.5–5	Mine neutralization charge	44	308
E5	>5–10	5 in projectiles	1,221	8,547
E6	>10–20	15 lb shaped charge	29	203
E8	>60–100	250 lb bomb; Light weight torpedo	134	932
E9	>100–250	500 lb bomb	110	770
E10	>250–500	1,000 lb bomb	78	546
E11	>500–650	Heavy weight torpedo	5	17
E12	>650–1,000	2,000 lb bomb	48	336

Notes: (1) net explosive weight refers to the equivalent amount of TNT. The actual weight of a munition may be larger due to other components. (2) in = inch(es), lb = pound(s), ft = feet.

Vessel Movement

The only areas with projected high concentrations of Navy vessel movement will be within Apra Harbor Guam and the coastal approaches to and from Apra Harbor. Some amphibious training events use Tinian as a landing area so amphibious ships could occur in the offshore waters off that island. Most other activities are spread throughout the greater MITT Study Area with a high degree of spatial and temporal separation between activities. Additional detail on vessel movement was provided in our **Federal Register** notice of proposed rulemaking (85 FR 5782; January 31, 2020); please see that notice of proposed rulemaking or the

Navy's application for more information.

The Navy tabulated annual at-sea vessel steaming days for training and testing activities projected for the MITT Study Area. Across all warfare areas and activities, 493 days of Navy at-sea time will occur annually for training and testing activities in the MITT Study Area (Table 6). Amphibious Warfare activities account for 48 percent of total surface ship days, MTEs account for 38 percent, ASW activities account for 8 percent, and Air Warfare, ASW, and Other activities (sonar maintenance, anchoring) account for 2 percent each (Table 6). In comparison to the Hawaii-Southern California Training and Testing (HSTT) Study Area, the estimated number of at-sea annual days for training and testing activities in the MITT Study Area is approximately ten times less than in the HSTT Study Area over the same time period.

TABLE 6—ANNUAL NAVY SURFACE SHIP DAYS WITHIN THE MITT STUDY AREA

MITT events	Annual days	Percent by event	Annual days by warfare area	Percent by warfare area
Air Warfare	.....	.....	9	1.9
GUNNEX (Lg)	2	0.3		
GUNNEX (Sm)	3	0.6		
MISSILEX	5	0.9		
Amphibious Warfare	.....	.....	299	60.7
Fire Support (Land Target)	5	1.0		
Amphibious Rehearsal	144	29.2		
Amphibious Assault	14	2.8		
Amphibious Raid	3	0.6		
Marine Air Ground Task Force Exercise	40	8.1		
Non-Combatant Evacuation Op	67	13.5		
Humanitarian Assist/Disaster Relief Op	7	1.4		
Special Purpose				
Marine Air Ground Task Force Exercise	20	4.1		
Surface Warfare	.....	.....	41	8.4
MISSILEX	2	0.4		
GUNNEX (Lg)	14	2.8		
GUNNEX (Med)	10	2.0		
GUNNEX (Sm)	6	1.3		
SINKEX	7	1.4		
Maritime Security Op	3	0.5		
Anti–Submarine Warfare	.....	.....	8	1.6
Tracking Exercise	8	1.5		
Torpedo Exercise	1	0.1		
Major Training Exercises	.....	.....	125	24.5
Joint Expeditionary Exercise	63	12.9		
Joint Multi-Strike Group Exercise	62	12.5		
Other	.....	.....	10	2.1
Surface Ship Sonar Maintenance	7	1.5%		
Precision Anchoring	3	0.6%		
Total	493			

Additional details on Navy at-sea vessel movement are provided in the 2020 MITT FSEIS/OEIS.

Standard Operating Procedures

For training and testing to be effective, personnel must be able to safely use their sensors and weapon systems as they are intended to be used in military missions and combat operations and to their optimum capabilities. While standard operating procedures are designed for the safety of personnel and equipment and to ensure the success of training and testing activities, their implementation often yields additional benefits on environmental, socioeconomic, public health and safety, and cultural resources.

Because standard operating procedures are essential to safety and mission success, the Navy considers them to be part of the planned Specified Activities, and has included them in the environmental analysis. Additional details on standard operating procedures were provided in our **Federal Register** notice of proposed rulemaking (85 FR 5782; January 31, 2020); please see that notice of proposed rulemaking or the Navy's application for more information.

Comments and Responses

We published the proposed rule in the **Federal Register** on January 31, 2020 (85 FR 5782), with a 45-day comment period. With that proposed rule, we requested public input on our analyses, our preliminary findings, and the proposed regulations, and requested that interested persons submit relevant information and comments. During the 45-day comment period, we received 16 comment letters in total. Of this total, one submission was from another Federal agency, one was from the Marine Mammal Commission, three letters were from organizations or individuals acting in an official capacity (*e.g.,* non-governmental organizations (NGOs), and 11 submissions were from private citizens. NMFS has reviewed and considered all public comments received on the proposed rule and issuance of the LOA. General comments that did not provide information pertinent to NMFS' decisions have been noted, but are not addressed further. All substantive comments and our responses are described below. We provide no response to specific comments that addressed species or statutes not relevant to the rulemaking under section 101(a)(5)(A) of the MMPA (*e.g.,* comments related to sea turtles). We organize our comment responses by major categories.

General Comments

Comment 1: The Navy must be required to submit a Habitat Conservation Plan that will ensure the well being of those mammals to the best extent possible.

Response: A Habitat Conservation Plan (HCP) is a planning document for non-Federal agencies and persons to obtain an ESA incidental take permit under section 10(a)(1)(B) of the Endangered Species Act (ESA). The Navy is a Federal agency that consulted with NMFS under section 7 of the ESA, and therefore obtaining a separate ESA incidental take permit is not required. The Navy will comply with the Reasonable and Prudent Measures and Terms and Conditions that are part of their Incidental Take Statement, which was issued as part of the consultation process under section 7 of the ESA.

Impact Analysis and Thresholds

Comment 2: A commenter recommended that NMFS clarify whether and how the Navy incorporated uncertainty in its density estimates for its animat modeling specific to MITT and if uncertainty was not incorporated, re-estimate the numbers of marine mammal takes based on the uncertainty inherent in the density estimates provided in Department of the Navy (2018b).

Response: Uncertainty was incorporated into the density estimates used for modeling and estimating take for NMFS' rule. The commenter is referred to the technical report titled ''Quantifying Acoustic Impacts on Marine Mammals and Sea Turtles: Methods and Analytical Approach for Phase III Training and Testing'' (U.S. Department of the Navy, 2018) for clarification on the consideration of uncertainty in density estimates. See specifically Section 4.2 (Marine Species Distribution Builder) of the 2020 MITT FSEIS/OEIS where details are provided on how statistical uncertainty surrounding density estimates was incorporated into the modeling for the MITT Study Area, as has been done for all other recent NMFS and Navy analyses of training and testing at sea. To the Commenters more specific question, as with the 2018 HSTT final rule, a lognormal distribution was used in the density regression model. Uncertainty was incorporated into the take estimation through the density estimates and it is not necessary to re-estimate the take numbers for marine mammals.

Comment 3: A Commenter stated that NMFS has largely followed the Navy in revising its hearing loss thresholds to reflect certain new data and modeling approaches. The Commenter suggested they have previously advised that the criteria that NMFS produced to estimate temporary and permanent threshold shift in marine mammals are erroneous and non-conservative. According to the Commenter, Wright (2015) has identified several statistical and numerical faults in NMFS' approach, such as pseudo-replication and inconsistent treatment of data, that tend to bias the criteria towards an underestimation of effects. The Commenter stated that similar and additional issues were raised by a dozen scientists during the public comment period on the draft criteria held by NMFS. The Commenter asserts that the issue is NMFS' broad extrapolation from a small number of individual animals, mostly bottlenose dolphins, without taking account of what Racca *et al.* (2015b) have succinctly characterized as a ''non-linear accumulation of uncertainty.'' The Commenter asserts that NMFS failed to address the basic errors identified by these and other experts, nor did it perform a sensitivity analysis to understand the potential magnitude of those errors. The Commenter suggests that NMFS should not rely exclusively on its auditory guidance in determining ''Level A'' take, but should, at minimum, produce a conservative upper bound such as by retaining the 180 dB threshold, or by performing a sensitivity analysis.

Response: The Acoustic Technical Guidance updates the historical 180 dB rms injury threshold, which was based on professional judgement (*i.e.,* no data were available on the effects of noise on marine mammal hearing at the time this original threshold was derived). NMFS disagrees with any suggestion that the use of the Acoustic Technical Guidance provides erroneous results. The 180 dB rms threshold is plainly outdated, as the best available science indicates that rms SPL is not even an appropriate metric by which to gauge potential auditory injury. Further, NMFS disagrees with the suggestion that NMFS should not rely exclusively on its Technical Guidance in determining take by Level A harassment and should instead also produce an upper bound (either by retaining the 180-dB threshold or performing a sensitivity analysis). The Acoustic Technical Guidance represents the best available science and provides thresholds and weighting functions that allow us to predict when marine mammals are likely to incur permanent threshold shift (PTS). As described in the *Estimated Take of Marine Mammals* section, when the acoustic thresholds, the Navy model, and other inputs into the take calculation are considered, the authorized incidental takes represent the maximum number of instances in which marine mammals are reasonably expected to be taken, which is appropriate under the statute and there is no need or requirement for NMFS to authorize a larger number.

Multiple studies from humans, terrestrial mammals, and marine mammals have demonstrated less temporary threshold shift (TTS) from intermittent exposures compared to continuous exposures with the same total energy because hearing is known to experience some recovery in between noise exposures, which means that the effects of intermittent noise sources such as tactical sonars are likely overestimated. Marine mammal TTS data have also shown that, for two exposures with equal energy, the longer duration exposure tends to produce a larger amount of TTS. Most marine mammal TTS data have been obtained using exposure durations of tens of seconds up to an hour, much longer than the durations of many tactical sources (much less the continuous time that a marine mammal in the field would be exposed consecutively to those levels), further suggesting that the use of these TTS data are likely to overestimate the effects of sonars with shorter duration signals.

Regarding the suggestion of pseudoreplication and erroneous models, since marine mammal hearing and noise-induced hearing loss data are limited, both in the number of species and in the number of individuals available, attempts to minimize pseudoreplication would further reduce these already limited data sets. Specifically, with marine mammal behaviorally derived temporary threshold shift studies, behaviorally derived data are only available for two mid-frequency cetacean species (bottlenose dolphin, beluga) and two phocids (in-water) pinniped species (harbor seal and northern elephant seal), with otariid (in-water) pinnipeds and high-frequency cetaceans only having behaviorally-derived data from one species. Arguments from Wright (2015) regarding pseudoreplication within the TTS data are therefore largely irrelevant in a practical sense because there are so few data. Multiple data points were not included for the same individual at a single frequency. If multiple data existed at one frequency, the lowest TTS onset was always used. There is only a single frequency where TTS onset data exist for two individuals of the same species: 3 kHz for bottlenose dolphins. Their TTS (unweighted) onset values

were 193 and 194 dB re 1 µPa2s. Thus, NMFS believes that the current approach makes the best use of the given data. Appropriate means of reducing pseudoreplication may be considered in the future, if more data become available. Many other comments from Wright (2015) and the comments from Racca *et al.* (2015b) appear to be erroneously based on the idea that the shapes of the auditory weighting functions and TTS/PTS exposure thresholds are directly related to the audiograms; *i.e.,* that changes to the composite audiograms would directly influence the TTS/PTS exposure functions (*e.g.,* Wright (2015) describes weighting functions as ''effectively the mirror image of an audiogram'' (p. 2) and states, ''The underlying goal was to estimate how much a sound level needs to be above hearing threshold to induce TTS.'' (p. 3)). Both statements are incorrect and suggest a fundamental misunderstanding of the criteria/threshold derivation. This would require a constant (frequency-independent) relationship between hearing threshold and TTS onset that is not reflected in the actual marine mammal TTS data. Attempts to create a ''cautionary'' outcome by artificially lowering the composite audiogram thresholds would not necessarily result in lower TTS/PTS exposure levels, since the exposure functions are to a large extent based on applying mathematical functions to fit the existing TTS data.

Comment 4: A Commenter recommended that NMFS specify in the preamble to the final rule whether the data regarding behavioral audiograms (Branstetter *et al.* 2017, Kastelein *et al.* 2017b) and TTS (Kastelein *et al.* 2017a and c, Popov *et al.* 2017, Kastelein *et al.* 2018a and 2019a and b) support the continued use of the current weighting functions and PTS and TTS thresholds.

Response: Thus far, no new information has been published or otherwise conveyed that would fundamentally change the assessment of impacts or conclusions of this rule regarding current weighting functions and PTS and TTS thresholds. Furthermore, the recent peer-reviewed updated marine mammal noise exposure criteria by Southall *et al.* (2019a) provide identical PTS and TTS thresholds to those provided in NMFS' Acoustic Technical Guidance. NMFS' Revised Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (NMFS 2018) (Acoustic Technical Guidance), which was used in the assessment of effects for this rulemaking, compiled, interpreted, and synthesized the best available scientific information for noise-induced hearing effects for marine mammals to derive updated thresholds for assessing the impacts of noise on marine mammal hearing, including the articles that the Commenter referenced that were published subsequent to the publication of the first version of the Acoustic Technical Guidance in 2016. The new data included in those articles are consistent with the thresholds and weighting functions included in the current version of the Acoustic Technical Guidance (NMFS, 2018). NMFS will continue to review and evaluate new relevant data as it becomes available and consider the impacts of those studies on the Acoustic Technical Guidance to determine what revisions/updates may be appropriate.

Comment 5: Commenters recommended that NMFS refrain from using cut-off distances in conjunction with the Bayesian Behavioral Response Functions (BRFs) and re-estimate the numbers of marine mammal takes based solely on the Bayesian BRFs as the use of cut-off distances could be perceived as an attempt to reduce the numbers of takes.

Response: The consideration of proximity (cut-off distances) was part of the criteria developed in consultation between the Navy and NMFS, and is appropriate based on the best available science which shows that marine mammal responses to sound vary based on both sound level and distance. Therefore these cut-off distances were applied within the Navy's acoustic effects model. The derivation of the behavioral response functions and associated cut-off distances is provided in the 2017 technical report titled ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)''. To account for non-applicable contextual factors, all available data on marine mammal reactions to actual Navy activities and other sound sources (or other large scale activities such as seismic surveys when information on proximity to sonar sources was not available for a given species group) were reviewed to find the farthest distance to which significant behavioral reactions were observed. These distances were rounded up to the nearest 5 or 10 km interval, and for moderate to large scale activities using multiple or louder sonar sources, these distances were greatly increased—doubled in most cases. The Navy's BRFs applied within these distances provide technically sound methods reflective of the best available science to estimate the impact and potential take for the actions analyzed within the 2020 MITT FSEIS/OEIS and included in these regulations. NMFS has independently assessed the Navy's behavioral harassment thresholds (*i.e.,* their BRFs) and finds that they appropriately apply the best available science and it is not necessary to recalculate take estimates.

The Commenters also specifically expressed concern that distance ''cut-offs'' alleviate some of the exposures that would otherwise have been counted if the received level alone were considered. It is unclear why the Commenters find this inherently inappropriate, as this is what the data show. As noted previously, there are multiple studies illustrating that in situations where one would expect behavioral disturbance of a certain degree because of the received levels at which previous responses were observed, it has not occurred when the distance from the source was larger than the distance of the first observed response.

Comment 6: Regarding the behavioral harassment thresholds for explosives, Commenters recommended that NMFS estimate and ultimately authorize takes of marine mammals by Level B harassment in the form of behavioral disturbance, as well as TTS, during all explosive activities, including those that involve single detonations.

Response: The derivation of the explosive injury criteria is provided in the 2017 technical report titled ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III),'' and NMFS has applied the general rule a commenter referenced to single explosives for years, *i.e.,* that marine mammals are unlikely to respond to a single instantaneous detonation *at received levels below the TTS threshold* in a manner that would rise to the level of a take. Neither NMFS nor the Navy are aware of evidence to support the assertion that animals will have significant behavioral reactions *(i.e.,* those that would rise to the level of a take) to temporally and spatially isolated explosions at received levels below the TTS threshold.

Marine mammals may be exposed to isolated impulses in their natural environment (*e.g.,* lightning). There is no evidence to support that animals have significant behavioral responses to temporally and spatially isolated impulses (such as military explosions) that may rise to the level of ''harassment'' under the MMPA for military readiness activities. Still, the analysis conservatively assumes that any modeled instance of temporally or spatially separated detonations occurring in a single 24-hour period would result in harassment under the

MMPA for military readiness activities. The Navy has been monitoring detonations since the 1990s and has not observed these types of reactions. To be clear, this monitoring has occurred under the monitoring plans developed specifically for shock trials, the detonations with the largest net explosive weight conducted by the Navy, and no shock trials are proposed in this study area.

Further, to clarify, the current take estimate framework does not preclude the consideration of animals being behaviorally disturbed during single explosions as they are counted as ''taken by Level B harassment'' if they are exposed above the TTS threshold, which is only 5 dB higher than the behavioral harassment threshold. We acknowledge in our analysis that individuals exposed above the TTS threshold may also be behaviorally disturbed and those potential impacts are considered in the negligible impact determination.

Comment 7: A Commenter stated that the behavioral response functions rely on captive animal studies and the risk functions do not incorporate a number of relevant studies on wild marine mammals (specifically referencing a passive acoustic study on blue whales). The Commenter asserts it is not clear from the proposed rule, or from the Navy's recent technical report on acoustic ''criteria and thresholds,'' on which NMFS' approach here is based, exactly how each of the studies that NMFS employed was applied in the analysis, or how the functions were fitted to the data, but the available evidence on behavioral response raises serious concerns that the functions are not conservative for some species. For this reason and others, and given the obvious importance of this analysis for future acoustic impact analyses, the Commenter requests that NMFS make additional technical information available, including from any expert elicitation and peer review, and to re-open public comment on this issue.

Response: We refer the Commenter to the Criteria and Thresholds for the U.S. Navy Acoustic and Explosive Effects Analysis (Phase III) Technical Report (U.S. Department of the Navy, 2017) for details on how the Navy accounted for the differences in captive and wild animals in the development of the behavioral response risk functions, which NMFS has evaluated and deemed appropriate to incorporate into the analysis in the rule. The appendices to this report detail the specific data points used to generate the behavioral response functions. Data points come from published data that is readily available and cited within the technical report, and NMFS disagrees that it is necessary to re-open public comment on this issue.

The Navy uses the best available science in the analysis, which has been reviewed by external scientists and approved by NMFS. The Navy considered all data available at the time for the development of updated criteria and thresholds, and limiting the data to the small number of field studies would not provide enough data with which to develop the new risk functions. In addition, the Navy accounts for the fact that captive animals may be less sensitive, and the scale at which a moderate-to-severe response was considered to have occurred is different for captive animals than for wild animals, as the Navy understands those responses will be different. The new risk functions were developed in 2016, before several recent papers were published or the data were available. The Navy and NMFS continue to evaluate the information as new science is made available. The criteria have been rigorously vetted within the Navy community, among scientists during expert elicitation, and then reviewed by the public before being applied. It is unreasonable to revise and update the criteria and risk functions every time a new paper is published. NMFS concurs with the Navy's evaluation and conclusion that there is no new information that necessitates changing the acoustic thresholds at this time.

These new papers provide additional information, and the Navy is considering them for updates to the criteria in the future, when the next round of updated criteria will be developed. Regarding consideration of research findings involving a passive acoustic study on blue whale vocalizations and behavior, the Navy considered multiple recent references, including but not limited to: Paniagua-Mendoza, 2017; Lesage, 2017; DeRuiter, 2017; Mate, 2016; Lomac-MacNair, 2016; Friedlaender, 2016; Mate, 2015. Thus far, no new information has been published or otherwise conveyed that would fundamentally change the assessment of impacts or conclusions of this Supplemental EIS/OEIS. To be included in the BRF, data sets needed to relate known or estimable received levels to observations of individual or group behavior. Melcon *et al.* (2012) does not relate observations of individual/group behavior to known or estimable received levels at that individual/group. In Melcon *et al.* (2012), received levels at the HARP buoy averaged over many hours are related to probabilities of D-calls, but the received level at the blue whale individuals/group are unknown.

Comment 8: A Commenter commented that dipping sonar, like hull-mounted sonar, appears to be a significant predictor of deep-dive rates in beaked whales, with the dive rate falling significantly (*e.g.,* to 35 percent of that individual's control rate) during sonar exposure, and likewise appears associated with habitat abandonment. According to the Commenter, the data sources used to produce the Navy's behavioral response functions (BRF) concern hull-mounted sonar, an R/V-deployed sonar playback, or an in-pool source. The Navy's generic behavioral response function for beaked whales does not incorporate their heightened response to these sources, although such a response would be presumed to shift its risk function ''leftward.'' Nor do the response functions for other species account for this difference, although unpredictability is known to exacerbate stress response in a diversity of mammalian species and should conservatively be assumed, in this case, to lead to a heightened response in marine mammal species other than beaked whales.

Response: In consultation with NMFS, the Navy relied upon the best science that was available to develop the behavioral response functions. The current beaked whale BRF acknowledges and incorporates the increased sensitivity observed in beaked whales during both behavioral response studies and during actual Navy training events, as well as the fact that dipping sonar can have greater effects than some other sources with the same source level. Specifically, the distance cut-off for beaked whales is 50 km, larger than any other group. Moreover, although dipping sonar has a significantly lower source level than hull-mounted sonar, it is included in the category of sources with larger distance cut-offs, specifically in acknowledgement of its unpredictability and association with observed effects. This means that ''takes'' are reflected at lower received levels that would have been excluded because of the distance for other source types.

An article referenced by the Commenter (Associating patterns in movement and diving behavior with sonar use during military training exercises: A case study using satellite tag data from Cuvier's beaked whales at the Southern California Anti-submarine Warfare Range (Falcone *et al.,* 2017)) was not available at the time the BRFs were developed. However, NMFS and the Navy have reviewed the article and concur that neither this article nor any

other new information that has been published or otherwise conveyed since the proposed rule was published changes the assessment of impacts or conclusions in the 2020 MITT FSEIS/OEIS or in this rulemaking. Additionally, the Navy's current beaked whale BRF covers the responses observed in this study since the beaked whale risk function is more sensitive than the other risk functions at lower received levels. The researchers involved with the study are still refining their analytical approach and integrating additional statistical parameters for future reporting. Nonetheless, the new information and data presented in the article were thoroughly reviewed by the Navy and will be quantitatively incorporated into future behavioral response functions, as appropriate, when and if other new data that would meaningfully change the functions would necessitate their revision.

Furthermore, ongoing Navy funded beaked whale monitoring at the same site where the dipping sonar tests were conducted has not documented habitat abandonment by beaked whales. Passive acoustic detections of beaked whales have not significantly changed over ten years of monitoring (DiMarzio *et al.,* 2018, updated in 2020). From visual surveys in the area since 2006 there have been repeated sightings of: The same individual beaked whales, beaked whale mother-calf pairs, and beaked whale mother-calf pairs with mothers on their second calf (Schorr *et al.,* 2018, 2020). Satellite tracking studies of beaked whales documented high site fidelity to this area (Schorr *et al.,* 2018, updated in 2020).

Comment 9: A Commenter recommends that NMFS (1) explain why, if the constants and exponents for onset mortality and onset slight lung injury thresholds for the current phase of incidental take rulemaking for the Navy (Phase III) have been amended to account for lung compression with depth, they result in lower rather than higher absolute thresholds when animals occur at depths greater than 8 m and (2) specify what additional assumptions were made to explain this counterintuitive result.

Response: The derivation of the explosive injury equations, including any assumptions, is provided in the 2017 technical report titled ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III).'' Specifically, the equations were modified in Phase III to fully incorporate the injury model in Goertner (1982), specifically to include lung compression with depth. NMFS independently reviewed and concurred with this approach.

The impulse mortality/injury equations are depth dependent, with thresholds increasing with depth due to increasing hydrostatic pressure in the model for both the previous 2015–2020 phase of rulemaking (Phase II) and Phase III. The underlying experimental data used in Phase II and Phase III remain the same, and two aspects of the Phase III revisions explain the relationships the Commenter notes:

(1) The numeric coefficients in the equations are computed by inserting the Richmond et al. (1973) experimental data into the model equations. Because the Phase III model equation accounts for lung compression, the plugging of experimental exposure values into a different model results in different coefficients. The numeric coefficients are slightly larger in Phase III versus Phase II, resulting in a slightly greater threshold near the surface.

(2) The rate of increase for the Phase II thresholds with depth is greater than the rate of increase for Phase III thresholds with depth because the Phase III equations take into account the corresponding reduction in lung size with depth (making an animal more vulnerable to injury per the Goertner model), as the Commenter notes.

Ranges to effect are based on these injury thresholds, in addition to geometry of exposure (location of an animal relative to the explosive charge, horizontally and vertically), propagation environment, and the impulse integration duration.

Comment 10: A Commenter recommends that NMFS use onset mortality, onset slight lung injury, and onset GI tract injury thresholds rather than the 50-percent thresholds to estimate both the numbers of marine mammal takes and the respective ranges to effect. If NMFS does not implement the recommendation, the Commenter further recommends that NMFS (1) specify why it is inconsistently basing its explosive thresholds for Level A harassment on onset of PTS and Level B harassment on onset of TTS and onset of behavioral response, while the explosive thresholds for mortality and Level A harassment are based on the 50-percent criteria for mortality, slight lung injury, and GI tract injury, (2) provide scientific justification supporting that slight lung and GI tract injuries are less severe than PTS and thus the 50-percent rather than onset criteria are more appropriate for estimating Level A harassment for those types of injuries, and (3) justify why the number of estimated mortalities should be predicated on at least 50 percent rather than 1 percent of the animals dying.

Response: As appropriate, NMFS and the Navy have used a combination of exposure thresholds and consideration of mitigation to inform the take estimates. The Navy used the range to one percent risk of mortality and injury (referred to as ''onset'' in the 2020 MITT FSEIS/OEIS) to inform the development of mitigation zones for explosives. Ranges to effect based on one percent risk criteria were examined to ensure that explosive mitigation zones would encompass the range to any potential mortality or non-auditory injury, affording actual protection against these effects. In all cases, the mitigation zones for explosives extend beyond the range to one percent risk of non-auditory injury, even for a small animal (representative mass = 5 kg).

Given the implementation and expected effectiveness of this mitigation, the application of the indicated threshold is appropriate for the purposes of estimating take. Using the 1 percent non-auditory injury risk criteria to estimate take would result in an over-estimate of take, and would not afford extra protection to any animal. Specifically, calculating take based on marine mammal density within the area that an animal might be exposed above the 1 percent risk criteria would over-predict effects because many of those exposures will not happen because of the effective mitigation. The Navy, in coordination with NMFS, has determined that the 50 percent incidence of occurrence is a reasonable representation of a potential effect and appropriate for take estimation, given the mitigation requirements at the 1 percent threshold, and the area ensonified above this threshold would capture the appropriate reduced number of likely injuries.

Although the commenter implies that the Navy did not use extensive lung hemorrhage as indicative of mortality, that statement is incorrect. Extensive lung hemorrhage is assumed to result in mortality, and the explosive mortality criteria are based on extensive lung injury data. See the 2017 technical report titled ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III).''

Comment 11: A Commenter stated that NMFS, following the Navy, has applied a post-modeling adjustment to its estimate of lethal take that substantially reduces the total number. That adjustment, in the case of serious injury and mortality, purports to account for the effectiveness of visual observers in detecting marine mammals within the blast zone of an underwater

explosion (or within the radius of permanent acoustic injury), but NMFS' borrowed methods here are non-transparent and misconceived. The Navy's DSEIS/OEIS for the MITT Study Area starts with the species-specific g(0) factors applied in professional marine mammal abundance surveys (the probability that an object that is on the line is detected using standard line-transect methods), then multiplies them by simple factors to reflect the relative effectiveness of its Lookouts in routine operating conditions. Yet the Navy's sighting effectiveness is likely to be much poorer than that of experienced biologists dedicated exclusively to marine mammal detection, operating under conditions that maximize sightings. In any case, the public has no meaningful way to further evaluate the agencies' adjustment since the proposed rule does not provide the scores used to generate the effectiveness factor or the agencies' pre-adjustment take numbers, nor does the Navy in the ancillary report NMFS references. The Commenter suggests that ''[s]ince the Navy has yet to determine the effectiveness of its mitigation measures, it is premature to include any related assumptions to reduce the numbers of marine mammal takes.'' Another Commenter recommends that NMFS (1) specify the total numbers of model estimated Level A harassment (PTS) and mortality takes rather than reduce the estimated numbers of takes based on the Navy's post-model analyses and (2) include the model-estimated Level A harassment and mortality takes in its negligible impact determination analyses.

Response: The consideration of marine mammal avoidance and mitigation effectiveness is integral to NMFS' and the Navy's overall analysis of impacts from sonar and explosive sources. NMFS has independently evaluated the method and agrees that it is appropriately applied to augment the model in the prediction and authorization of injury and mortality as described in the rule. Details of this analysis are provided in the Navy's 2018 technical report titled ''Quantifying Acoustic Impacts on Marine Mammals and Sea Turtles: Methods and Analytical Approach for Phase III Training and Testing.'' Additional information on the mitigation analysis also was included in the proposed rule and NMFS disagrees with the Commenter's suggestion that there was not enough information by which to evaluate the Navy's post-modeling calculations. Also, it should be noted that even before consideration of mitigation effectiveness, there were no modeled mortalities to any marine mammals.

Sound levels diminish quickly below levels that could cause PTS. Specifically, behavioral response literature, including the recent 3S and SOCAL BRS studies, indicate that multiple species from different cetacean suborders do in fact avoid approaching sound sources by a few hundred meters or more, which would reduce received sound levels for individual marine mammals to levels below those that could cause PTS (see Appendix B of the ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Impacts to Marine Mammals and Sea Turtles Technical Report'' (U.S. Department of the Navy, 2017) and Southall *et al.* (2019a)). The ranges to PTS for most marine mammal groups are within a few tens of meters and the ranges for the most sensitive group, the HF cetaceans, average about 200 m, to a maximum of 270 m in limited cases. For blue whales and other LF cetaceans, the range to PTS is 65 m for MF1 30 sec duration exposure, which is well within the mitigation zones for hull-mounted MFAS. Therefore, the anticipated avoidance to the distances discussed would greatly reduce the likelihood of impacts to hearing such as TTS and PTS. As discussed in the Navy's report, animats in the Navy's acoustic effects model do not move horizontally or ''react'' to sound in any way. Accordingly, NMFS and the Navy's analysis appropriately applies a quantitative adjustment to the exposure results calculated by the model (which does not consider avoidance or mitigation).

As discussed in the Navy's report, the Navy's acoustic effects model does not consider procedural mitigations (*i.e.,* power-down or shut-down of sonars, or pausing explosive activities when animals are detected in specific zones adjacent to the source), which necessitates consideration of these factors in the Navy's overall acoustic analysis. Credit taken for mitigation effectiveness is extremely conservative. For example, if Lookouts can see the whole area, they get credit for it in the calculation; if they can see more than half the area, they get half credit; if they can see less than half the area, they get no credit. Not considering animal avoidance and mitigation effectiveness would lead to a great overestimate of injurious impacts. NMFS concurs with the analytical approach used, *i.e.,* we believe the estimated take by Level A harassment numbers represent the maximum number of these takes that are likely to occur and it would not be appropriate to authorize a higher number or consider a higher number in the negligible impact analysis.

The Navy assumes that Lookouts will not be 100 percent effective at detecting all individual marine mammals within the mitigation zones for each activity. This is due to the inherent limitations of observing marine species and because the likelihood of sighting individual animals is largely dependent on observation conditions (*e.g.,* time of day, sea state, mitigation zone size, observation platform) and animal behavior (*e.g.,* the amount of time an animal spends at the surface of the water). The Navy quantitatively assessed the effectiveness of its mitigation measures on a per-scenario basis for four factors: (1) Species sightability, (2) a Lookout's ability to observe the range to permanent threshold shift (for sonar and other transducers) and range to mortality (for explosives), (3) the portion of time when mitigation could potentially be conducted during periods of reduced daytime visibility (to include inclement weather and high sea-state) and the portion of time when mitigation could potentially be conducted at night, and (4) the ability for sound sources to be positively controlled (*e.g.,* powered down). The Navy's report clearly describes how these factors were considered, and it is not necessary to view the many tables of numbers generated in the assessment to evaluate the method.

The g(0) values used by the Navy for their mitigation effectiveness adjustments take into account the differences in sightability with sea state, and utilize averaged g(0) values for sea states of 1–4 and weighted as suggested by Barlow (2015). Using g(0) values is an appropriate and conservative approach (*i.e.,* underestimates the protection afforded by the Navy's mitigation measures) for the reasons detailed in the technical report. For example, during line-transect surveys, there are typically two primary observers searching for animals. Each primary observer looks for marine species in the forward 90-degree quadrant on their side of the survey platform and scans the water from the vessel out to the limit of the available optics (*i.e.,* the horizon). Because Navy Lookouts focus their observations on established mitigation zones, their area of observation is typically much smaller than that observed during line-transect surveys. The mitigation zone size and distance to the observation platform varies by Navy activity. For example, during hull-mounted mid-frequency active sonar activities, the mitigation zone extends 1,000 yd from the ship

hull. During the conduct of training and testing activities, there is typically at least one, if not numerous, support personnel involved in the activity (*e.g.,* range support personnel aboard a torpedo retrieval boat or support aircraft). In addition to the Lookout posted for the purpose of mitigation, these additional personnel observe for and disseminate marine species sighting information amongst the units participating in the activity whenever possible as they conduct their primary mission responsibilities. However, as a conservative approach to assigning mitigation effectiveness factors, the Navy elected to account only for the minimum number of required Lookouts used for each activity; therefore, the mitigation effectiveness factors may underestimate the likelihood that some marine mammals may be detected during activities that are supported by additional personnel who may also be observing the mitigation zone.

Although NAEMO predicted PTS, no mortality or non-auditory injury were predicted by NAEMO. Of these two non-auditory effects (mortality and non-auditory injury), only mortality would have been subject to mitigation consideration in the quantitative analysis, if there had been any. Also, as discussed in *Comment 43,* the Navy will be providing NMFS with a report summarizing the status of and/or providing its final assessment on the Navy's Lookout Effectiveness Study following the end of CY 2021.

Comment 12: One Commenter asserted that NMFS and the Navy make certain post-modeling adjustments to their estimates of non-lethal injury, on flawed assumptions about animal avoidance and mitigation effectiveness. A Commenter stated in regards to the method by which the Navy's post-model calculation considers avoidance specifically *(i.e.,* assuming animals present beyond the range of PTS for the first few pings will be able to avoid it and incur only TTS, which results in a 95 percent reduction in the number of estimated PTS takes predicted by the model), given that sound sources are moving, it may not be until later in an exercise that the animal is close enough to experience PTS, and it is those few close pings that contribute to the potential to experience PTS. Marine mammals may remain in important habitat, and the most vulnerable individuals may linger in an area, notwithstanding the risk of harm; marine mammals cannot necessarily predict where an exercise will travel. In addition, Navy vessels may move faster than the ability of the animals to evacuate the area. The Commenter expressed concern that this method underestimates the number of PTS takes and that NMFS should not create an under-supported, nonconservative adjustment for avoidance. The Commenter further suggested that the Navy could query the dosimeters on the animats in its model to test its assumption.

Response: The consideration of marine mammals avoiding the area immediately around the sound source is provided in the Navy's 2018 technical report titled ''*Quantitative Analysis for Estimating Acoustic and Explosive Impacts to Marine Mammals and Sea Turtles.*'' As the Commenter correctly articulates: ''For avoidance, the Navy assumed that animals present beyond the range to onset PTS for the first three to four pings are assumed to avoid any additional exposures at levels that could cause PTS. That equated to approximately 5 percent of the total pings or 5 percent of the overall time active; therefore, 95 percent of marine mammals predicted to experience PTS due to sonar and other transducers were instead assumed to experience TTS.''

In regard to the comment about vessels moving faster than animals' ability to get out of the way, as discussed in the Navy's 2018 technical report titled ''*Quantitative Analysis for Estimating Acoustic and Explosive Impacts to Marine Mammals and Sea Turtles,*'' animats in the Navy's acoustic effects model do not move horizontally or ''react'' to sound in any way, necessitating the additional step of considering animal avoidance of close-in PTS zones. NMFS independently reviewed these assumptions and this approach and concurs that they are fully supported by the best available science. Based on a growing body of behavioral response research, animals do in fact avoid the immediate area around sound sources to a distance of a few hundred meters or more depending upon the species. Avoidance to this distance greatly reduces the likelihood of impacts to hearing such as TTS and PTS, respectively. Specifically, the ranges to PTS for most marine mammal groups are within a few tens of meters and the ranges for the most sensitive group, the HF cetaceans, average about 200 m, to a maximum of 270 m in limited cases. The Commenter's point about speed is not applicable to the initially distant animals that are discounted by this method, most of which would be able to avoid the source as there is more time (because they are farther from the source) to do so. Further, the Commenter ignores the corollary to their point, which is that given the speed the Navy vessels operating sonar are typically traveling relative to the speed and direction of marine mammals, the likelihood of individuals remaining in close enough proximity to the source for a duration that would result in TTS or PTS is lessened.

Querying the dosimeters of the animats would not produce useful information since, as discussed previously, the animats do not move in the horizontal and are not programmed to ''react'' to sound or any other stimulus.

Humpback Whales

Comment 13: Commenters assert that the proposed reporting requirement for MF1 MFAS (with the lack of any restriction on actual sonar use) in the Chalan Kanoa Reef and Marpi Reef Geographic Mitigation Areas would not protect humpback whales, and particularly calves during this sensitive life stage. Further, the Commenters note that because these areas have not been a high-use area for the Navy and ASW training events and are ''considered generally unsuitable for training needs,'' (85 FR 48388), there is no justification for failing to prohibit sonar use in this sensitive humpback whale habitat off Saipan. One Commenter recommended that NMFS prohibit use of MF1 sonar in the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas during the months that humpbacks are present in the Marianas while another suggested a year-round prohibition.

Response: Following extensive discussions with the Navy during which more specific granular information about the Navy's likely activity was provided and the practicability of additional restrictions were considered, new information about humpback whale occurrence in the mitigation areas emerged, and new analyses were conducted (see the *Estimated Take of Marine Mammals* section), NMFS established a 20-hr annual cap from December 1–April 30 on the use of hull-mounted MF1 MFAS for these two Geographic Mitigation Areas (20 hrs total for both areas combined) to minimize sonar exposure and reduce the amount and/or severity of take by Level B harassment (behavioral disturbance and/or TTS) of humpback whales in these important reproductive areas. It is important to note that in the Navy's rulemaking/LOA application and NMFS' associated analysis for the proposed rule, while high amounts of sonar training may not have been expected, the amount of sonar use in these areas had not been limited.

Our evaluation of potential mitigation measures includes consideration of both

(1) the manner in which, and the degree to which, implementation of the potential measure(s) is expected to reduce adverse impacts to marine mammal species or stocks and their habitat and (2) the practicability of the measures for applicant implementation, which in this case includes the impact on the Navy's military readiness activities. While we did consider completely restricting MF1 MFAS in the two Geographic Mitigation Areas, we also considered the Navy's broader need for flexibility as well as the specific need not to restrict these shallow-water training areas entirely in the MITT Study Area given the proximity to forward deployed operations and the higher likelihood of a need to have the option to conduct training quickly to respond to emergent national security threats. The Navy expects current and future use of the two Geographic Mitigation Areas to remain low, but the 20-hr cap will allow the Navy flexibility to engage in a small amount of necessary training, most likely such as a Small Coordinated ASW Exercise or TRACKEX event(s), which could occur up to five days, but no more than four hours per day (or similar configuration totalling no more than 20 hrs). Areas of shallow depths are limited in the Mariana Archipelago, and NMFS determined (with the Navy's input) that it would be impracticable to completely limit the use of sonar at the Chalan Kanoa Reef and Marpi Reef due to the requirement to have access to such bathymetry for training purposes in order to support mission requirements as established by operational Commanders. The reduction in potential exposure of humpback whales to sonar in these areas and at this time (*i.e.,* the short overall and daily exposure) would reduce the likelihood of impacts that could affect reproduction or survival, by minimizing impacts on calves during this sensitive life stage, avoiding the additional energetic costs to mothers of avoiding the area and minimizing the chances that important behaviors (*e.g.,* cow-calf communication, breeding behaviors) are interrupted to the point that survivorship or reproduction are impacted. Therefore, we have determined that the 20-hr cap on MF1 MFAS sonar in the two Geographic Mitigation Areas will meaningfully reduce impacts on the affected humpback whales and, further, be practicable for Navy implementation. As an additional measure, the Navy will also now report all active sonar use (all bins, by bin) in these areas between December 1 and April 30 to NMFS in their annual reports. This will allow NMFS to evaluate the sonar use in the two Geographic Mitigation Areas over the seven-year period and to determine if further mitigation is warranted.

Comment 14: A Commenter recommended a prohibition on mid-frequency air deployed dipping sonar, year-round in the Geographic Mitigation Areas. The Commenter also commented that dipping sonar has been shown to have disproportionate impacts on beaked whales and may impact other species such as humpback whales in a similar manner, due to the unpredictability of the signal.

Response: Regarding the applicability of the data the Commenter cites to humpback whale responses, the research was focused exclusively on beaked whales and, further, in regard to the data cited, certain limitations are still under investigation such as the proximity of the source and other factors. Behavioral responses of beaked whales from dipping and other sonars cannot be universally applied to other marine mammal species, especially since beaked whales are known to be more sensitive to lower level sounds, which is reflected in our analysis through a lower behavioral harassment threshold. For example, Navy-funded behavioral response studies of blue whales to simulated surface ship sonar have demonstrated there are distinct individual variations as well as strong behavioral state considerations that influence any response or lack of response. The majority of take by Level B harassment results from MF1 sonar, which is practicable to limit in the Chalan Kanoa Reef and Marpi Reef Geographic Mitigation Areas. Sonar activities in this area have been limited historically, there is insufficient evidence to suggest that MF4 sonar would have disproportionately adverse effects, and further limitation of MF4 dipping sonar use in these areas would not be expected to meaningfully reduce impacts to humpback whales.

With regards to beaked whales, water depths in the Chalan Kanoa Reef and Marpi Reef Geographic Mitigation Areas are not suitable habitats for beaked whales. There is no evidence to suggest that prohibiting the use of mid-frequency dipping sonar in the Geographic Mitigation Areas would have any benefit to beaked whales.

Comment 15: A Commenter recommended prohibiting use of low-frequency active sonar from December through April in the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas, because they assert that baleen whales are vulnerable to the impacts of low-frequency active sonar, particularly in calving areas where low-amplitude communication calls between mothers and calves can be easily masked.

Response: Low-frequency sonar use in this rule has been significantly scaled down from previous authorizations. The Navy is only seeking authorization for 11 hrs or less per year of low-frequency sonar use in the MITT Study Area, with most of these systems used further offshore. Furthermore, the most used source at approximately 10 hrs (LF5) has source levels less than 180 dB and one hour of LF4 with source levels greater than 180 dB and less than or equal to 200 dB, with the associated harassment zones significantly smaller than for MF1. Based on historical sonar use in the MITT Study Area, it is highly unlikely that the few planned low-frequency sonar hours would occur in the Geographic Mitigation Areas from December through April. Given that, and the smaller impact zones, a prohibition would have very limited or no potential benefit to humpback whales and other baleen whales and would unnecessarily impose a restriction on training and testing in the MITT Study Area.

Comment 16: A Commenter recommended extending the Marpi Reef Geographic Mitigation Area boundaries to include a buffer that encompasses the humpback whale sightings data beyond the 400-m depth contour and the southernmost point of the proposed Marpi Reef Geographic Mitigation Area.

Response: NMFS extended the boundary out to the 400-m isobath for both Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas prior to the publication of the proposed rule. NMFS and the Navy considered using bathymetry to define the Marpi Reef Geographic Mitigation Area when initially evaluating potential mitigation areas, but instead relied on confirmed sightings of humpback whales to define the area. After reviewing the detailed bathymetry of the reef coupled with marine mammal sightings, NMFS and the Navy reevaluated how the Marpi Reef Geographic Mitigation Area was bounded and redefined the area based on the extent of the 400-m isobath. Given most sightings of humpback whales were in waters less than 200 m in depth, this provides an additional buffer between most sighting locations and the boundary for the area. Seafloor areas extending beyond the reef are not necessarily areas of potential biological importance (*i.e.,* whales may have been transiting to or from the reef when sighted). Scientists from NMFS' Pacific Islands Fisheries Science Center, who have conducted numerous humpback

whale surveys in Hawaii and the Mariana Islands, have observed that the majority of humpback whale breeding activity (mother-calf pairs, competitive behavior) happens in water depths of 200 m or less, with more mother-calf pairs in water depths 50 m or less (Hill *et al.,* 2020). In addition, during a review of the Marpi Reef sightings and bathymetry, the Navy found that the mitigation graphics in Appendix I (Geographic Mitigation Assessment) of the 2020 MITT FSEIS/OEIS had errors where bathymetric lines plotted were incorrectly shifted. This issue was fixed using a more accurate small-scale bathymetric dataset. Revised figures for the 2020 MITT FSEIS/OEIS show that all humpback whale sightings near Marpi Reef where suspected reproductive behaviors were observed (mother-calf pairs, competitive behavior) were shallower than the 200-m isobath.

Comment 17: A Commenter recommends implementing vessel speed restrictions from December through April in the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas as they argue that ship strike and vessel noise pose a serious risk to humpback whales, particularly in calving and breeding areas. They say it is important that NMFS prescribe vessel speed limits in this important breeding habitat and that mandatory speed limits, such as those that NMFS has put in place to protect North Atlantic right whales, have proven effective. NMFS has no basis on which to determine that its ''notification message'' measure—which would depend on non-specialist, non-dedicated Navy observers operating effectively in unfavorable sea states—would be as effective, or effective at all. The Commenter states there is no reason why NMFS cannot reasonably accommodate national security needs to create exceptions to the rule if needed.

Response: To avoid physical disturbance and strike from vessel movements, the Navy maneuvers to maintain a 500 yd mitigation zone from whales and other marine mammals (except bow-riding dolphins). As further described in Section 5.3.4.1 (Vessel Movement) of the 2020 MITT FSEIS/OEIS implementing mitigation to limit vessel speeds in the MITT Study Area would be incompatible with the Navy's criteria for safety, sustainability, and mission requirements. For example, Navy vessel operators need to train to proficiently operate vessels as they would during military missions and combat operations, including being able to react to changing tactical situations and evaluate system capabilities. Navy studies from other range complexes demonstrated that median speeds near coasts are already low, varying from 5 to 12 knots. Furthermore, given that there have been no vessel strikes involving humpback whales or other marine mammals while Navy vessels conducted training and testing activities in the MITT Study Area, implementing vessel speed restrictions in the Geographic Mitigation Areas or other locations in the Study Area would not be an effective mitigation measure because it would not result in discernible avoidance or reduction of impacts. Given the lack of meaningful reduction in impacts combined with the impracticability of ship speed restrictions, NMFS has found that this measure is not warranted and it is not required in this rule.

Serious Injury and Mortality, Beaked Whales

Comment 18: Commenters stated that NMFS underestimated serious injury and mortality for beaked whales around the Mariana Islands, ignored the best available scientific information, and failed to make any meaningful assessment and negligible impact determination of the likelihood that Navy training and testing activities triggered strandings in the MITT Study Area. A Commenter stated that NMFS has failed to demonstrate a rational basis for its assumption that ''[n]o mortality or Level A harassment [of beaked whales] is expected'' from MITT activities, rendering NMFS's preliminary determination of negligible impact arbitrary and capricious. Another Commenter noted that in the Guam press, at least six beaked whale stranding events, each involving as many as three animals, have been reported in the archipelago since 2006, as compared with only a single stranding in the previous 35 years. That number of recent stranding events was subsequently corrected to eight, in a paper that appeared earlier this year in a major, peer-reviewed journal. The Simonis *et al.* (2020) paper, whose co-authors include several NMFS biologists, correlated four of these events with Navy operations, a correlation that it describes as ''highly significant.'' The Commenter argued that the best available science shows that serious injuries and mortalities are likely to far exceed the number of reported strandings. Numerous studies along multiple lines of evidence, including post-stranding pathology, laboratory study of organ tissue, and theoretical work on dive physiology, in addition to expert reviews, indicate that behaviorally-mediated injury and mortality is occurring through maladaptive alteration of the dive pattern in response to Navy sonar exposure—impacts that occur at sea, independent of a whale's stranding. The Commenter argues that in light of the available scientific evidence, this position is both arbitrary and irresponsible. They state that NMFS' method in the proposed rule is to cast doubt on an undefined subset of previous stranding events on the grounds that the precise mechanism of harm could not be established, even while describing in detail the abundance of pathological and forensic evidence.

In a related comment, another Commenter asserted that although NMFS does not expect injury or mortality of any of beaked whales to occur as a result of the Navy's active sonar training exercises, NMFS's justification for authorizing beaked whale mortalities under Phase I and the previous Phase II regulations is still valid. The Commenter argues that NMFS cannot ignore that there remains the potential for the operation of MFAS to contribute to the mortality of beaked whales. Given that the potential for beaked whale mortalities cannot be obviated, the Commenter recommends that NMFS authorize at least 10 mortality takes of beaked whales associated with MFA sonar use in the MITT Study Area in the final rule.

Response: In the final rule, NMFS has included additional information and analysis and expanded the explanation of why the best available science does not indicate that the Navy's activities are likely to result in mortality of beaked whales through stranding. Please see the *Stranding* subsection of the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat* section, which addresses the issues raised by the Commenters; comments not addressed in that section are addressed below. To specifically correct an inaccuracy in the Comment, it should be noted, that of the eight events the Commenter refers to, only three had Navy sonar use before. Four events cited in the paper was an error the authors acknowledged.

In regard to the authorization of mortality in MMPA regulations for Phase I and II of MITT training and testing activities, the Commenter is in error. Mortality was authorized in the Phase I MITT final rule, in an abundance of caution given the events, worldwide, in which there was a causal link between naval sonar and strandings, and noting that there could be a stranding that co-occurred with Navy sonar that was not caused by it. However, the rule explicitly stated that

''Neither NMFS nor the Navy anticipates that marine mammal strandings or mortality will result from the use of mid- or high-frequency sonar during Navy exercises within the MIRC Study Area.'' However, no mortality was authorized in the Phase II final rule for the MITT Study Area. The Navy initially requested mortality takes of beaked whales, however, after further discussion of the lack of incidents in which strandings were causally associated with sonar in the Marianas, or a perceived reasonable likelihood that they would be at the time, NMFS and the Navy determined that authorization of mortality was not appropriate. NMFS does not argue that there is no possibility for mortality to occur as a result of Navy activities, rather, we reason that consideration of all applicable information (the best available science) does not indicate that such mortality is reasonably likely to result from the Navy's activities within the seven-year span of the rule.

Comment 19: A Commenter stated that in addition to documenting the substantial risk of injury and mortality to beaked whales from MITT activities, Simonis *et al.* (2020) confirmed the existence of biologically important areas for beaked whales near Saipan and Tinian. The study found that at least three species of beaked whales—Cuvier's, Blainville's, and a third unidentified species that may be the ginkgo-toothed beaked whale—occur in the Mariana Archipelago throughout the year, similar to other island-associated populations around the world. The Commenter argues that before finalizing its MMPA take regulations and issuing an LOA, NMFS must fully evaluate this new scientific information, which supports the establishment of a geographic mitigation area in the waters around Saipan and Tinian to protect vulnerable beaked whales from Navy sonar.

Response: NMFS has evaluated the new scientific information from Simonis *et al.* (2020) as well as years of field surveys conducted under interagency agreements between the Navy and NMFS Pacific Islands Fisheries Science Center and Navy-funded beaked whale monitoring, and there remains a lack of scientific information available on beaked whale distribution in the Marianas Islands. Simonis *et al.* (2020) confirm that the acoustic record from their HARPs indicates that the habitats near the recording locations are used by Blainville's, Cuvier's and an unidentified beaked whale, however, they only suggest that the locations ''may be considered as potentially important beaked whale habitat,'' given that beaked whales were present a large portion of the time at each recording site. Specifically, they note that the presence of beaked whale signals in a recording can be indicative of relative occurrence and seasonal fluctuations, however, given there are only two recorders, the relative occurrence may only be compared between the two locations, and the authors do not compare the recordings to any other locations, making it impossible to draw conclusions regarding how any inferred occurrence rates might compare to other parts of the MITT Study Area or the species' range. The information presented in Simonis *et al.* (2020), while informative, does not provide sufficient information to warrant the addition of geographic mitigation measures beyond the procedural mitigation measures put in place through this final rule to reduce the number and severity of takes for all marine mammals.

Without sufficient scientific data on beaked whale habitat use, bathymetry, and seasonality, NMFS is unable to develop mitigation measures that will meaningfully further reduce impacts to beaked whales and not be impracticable for the Navy. That said, NMFS and the Navy are committed to further actions (see the *Changes from the Proposed Rule to the Final Rule* section) to expand the science and inform future management actions related to beaked whales in the MITT Study Area. For example, the Navy will co-fund the Pacific Marine Assessment Program for Protected Species (PACMAPPS) survey in spring-summer 2021 to help document beaked whale occurrence, abundance, and distribution in the Mariana Islands. This effort will include deployments of a towed array as well as floating passive acoustic buoys. The Navy will monitor future beaked whale occurrence within select portions of the MITT Study Area starting in 2022. Additionally, the Navy will include Cuvier's beaked whales as a priority species for analysis under a 2020–2023 Navy-funded research program entitled Marine Species Monitoring for Potential Consequences of Disturbance (MSM4PCOD). Finally, the Navy will fund and co-organize with NMFS an expert panel to provide recommendations on scientific data gaps and uncertainties for further protective measure consideration to minimize the impact of Navy training and testing activities on beaked whales in the Mariana Islands.

Comment 20: One Commenter made several recommendations related to NMFS' assessment and mitigation of beaked whale impacts. The Commenter recommended that given beaked whales infrequent exposure to active sonar in the MITT Study Area, more conservative behavioral response curves be used to predict behavioral disturbance. The Commenter also challenged NMFS' assertion that suitable alternative foraging habitat is available for beaked whales in the MITT Study Area. Noting the scarcity of beaked whale data, the Commenter recommended that acoustic monitoring be implemented as the preferred method for estimating density of beaked whales, instead of using Hawaii data and, further, recommended more broadly that acoustic monitoring of beaked whales be conducted to better understand the impacts of Navy activities on beaked whales. The Commenter recommended that the Navy be more transparent in their monitoring in sharing data indicating the timing of Navy activities in relation to strandings. The Commenter noted that additional personnel and support for local stranding response and records is needed in order to better investigate causes of strandings that coincide with Navy activities in the MITT Study Area. Last, the Commenter notes that in order to detect any trend in the population, there is a strong need to conduct consistent surveys, with adequate methods for the species under consideration, over multiple years.

Response: Regarding the recommendation to modify the behavioral harassment thresholds (specifically, lower the received levels at which they would be considered taken) based on the infrequent exposures of beaked whales to sonar in the Marianas, we first note that although the amount of activities in the MITT Study Area is below the amount in the AFTT or HSTT study areas, active sonar has been in regular use in the MITT Study Area since the 1960s, and it is unlikely that marine mammals in the area are naive to sonar exposure. Further, while NMFS acknowledges the importance of context and considers it in evaluating behavioral responses, there is not sufficient data upon which to base a quantitative modification of the behavioral harassment thresholds. Further, the behavioral thresholds for beaked whales are already lower than for other taxa to address their sensitivity and, as with other taxa, take the form of a dose response curve, allowing for variation in individual responses given different contexts.

Regarding the comment that NMFS claims that suitable alternative habitat options exist if beaked whales are disturbed during feeding is not credible, we first direct the Commenter to the discussion of the impacts of noise

exposure during feeding behaviors described in the *Odontocete* subsection of the *Analysis and Negligible Impact Determination* section, which discusses the energetic impacts that interruption of feeding bouts can have on feeding odontocetes if interruptions occur over repeated sequential days. However, in the context of the MITT Study Area, as predicted and discussed, the magnitude and severity of takes is such that disturbance of low-moderate levels is expected to occur on no more than a few non-sequential days for any individual beaked whales, which would not result in the sort of energetic concerns that the Commenter is raising. Further, the Commenter repeatedly references concerns for small resident populations of beaked whales with high site fidelity, but there are no data to confirm the population structure of beaked whales in this area and, again, the magnitude and severity is low such that, regardless, adverse energetic impacts would be unlikely to result from Navy activities.

Regarding the recommendation that acoustic monitoring be implemented in order to provide better density information for beaked whales, and to better understand behavioral responses, as noted in the *Changes from the Proposed Rule* section, the Navy will be co-funding the Pacific Marine Assessment Program for Protected Species (PACMAPPS) survey in spring-summer 2021 to help document beaked whale occurrence, abundance, and distribution in the Mariana Islands. This effort will include deployments of a towed acoustic array as well as floating passive acoustic buoys. The Navy has further committed to monitoring future beaked whale occurrence within select portions of the MITT Study Area starting in 2022 (so as to not duplicate PACMAPPS efforts).

Regarding the recommendation that the Navy be more transparent in their monitoring and sharing data indicating the timing of Navy activities in relation to strandings, there is certain information that the Navy is unable to share freely because it is classified. Specific classified information is shared in the Navy's classified monitoring reports, and the Navy has always cooperated to provide additional detail in an unclassified format when needed. Further, though, the Navy has specifically targeted, for monitoring pursuant to this rule, increased analysis for any future beaked whale stranding in the Mariana Islands to include detailed Navy review of available records of sonar use.

Regarding the comment that additional personnel and support for local stranding response and records is needed in order to better investigate causes of strandings that coincide with Navy activities in the MITT Study Area, as discussed in the rule the Navy has committed to continuing to fund additional stranding response/necropsy analyses for the Pacific Islands region. Further, the Navy is submitting a proposal through the annual Federally Funded Research and Development Center (FFRDC) call to fund the Center for Naval Analysis (CNA) to develop a framework to improve the analysis of single and mass stranding events, including the development of more advanced statistical methods to better characterize the uncertainty associated with data parameters.

Last, the Commenter notes that in order to detect any trend in the population, there is a strong need to conduct consistent surveys, with adequate methods for the species under consideration, over multiple years. NMFS and the Navy do not disagree with this recommendation and, as noted, the Navy and NMFS are co-funding the PACMAPPS survey and the Navy has committed to additional beaked whale surveys. However, the ability to conduct consistent surveys is dependent upon the availability of resources at both NMFS and the Navy, and surveys may not always be conducted with the ideal regularity.

Comment 21: A Commenter recommends that the Navy conduct more visual monitoring efforts, at sea and along coastlines, for stranded cetaceans before, during, and after naval exercises.

Response: It is not practicable for the Navy to conduct additional visual monitoring at sea and along the coastlines for stranded cetaceans before, during, and after training and testing activities beyond what will occur through the procedural mitigation requirements under this rule. Pursuant to the mitigation, the Navy will be required to conduct monitoring for marine mammals before, during, and after in-water explosive exercises as described in the *Mitigation Measures* section of this rule. During operations of hull-mounted mid-frequency sonar and low frequency sonar above 200 dB, monitoring will be conducted in support of mitigation requirements, and during all operations of any sort the Navy will be required to report if any injured or dead marine mammals are observed and follow established incident reporting procedures. In addition, the Navy has been providing funding to augment stranding response and necropsy examinations in Hawaii and the Mariana Islands since 2018. Additional funding to continue this support has been programmed and is pending issuance in FY20.

Comment 22: A Commenter recommends that NMFS consider the full range of options in determining the mitigation measures needed to meet its responsibility under both the ''negligible impact'' and ''least practicable adverse impact'' provisions of the MMPA for beaked whales. Given the expertise needed to produce an optimal mitigation plan, the Commenter strongly advises NMFS to assemble a group of subject-matter experts, including experts on beaked whale distribution, monitoring, and conservation from the Southwest Fisheries Science Center, researchers from the Pacific Islands Fisheries Science Center who have led the work on beaked whales in the archipelago, and outside experts on the conservation biology of beaked whales.

Response: The procedural mitigation measures required by the final rule provide protection for all species of marine mammals by reducing the probability and severity of impacts from active sonar and explosives. As noted, there is limited data available addressing the distribution of marine mammals in the Marianas, and there is no information supporting the existence of any known biologically important areas that would warrant the development of a geographic mitigation area for beaked whales. NMFS had thorough discussions with the Navy about the possibility of crafting a mitigation measure to minimize any potential risk that Navy activities could contribute in any way to the potential stranding of beaked whales. These discussions included consideration of all public comments that recommended beaked whale mitigation measures. However, despite years of field surveys conducted under interagency agreements between the Navy and NMFS' PIFSC along with Navy funded beaked whale monitoring, there remains a lack of scientific information available on beaked whale distribution and other essential species information in the Mariana Islands. Without sufficient scientific data on beaked whale habitat use, bathymetry, and seasonality, and from that a better understanding of the circumstances that could affect the likelihood of a stranding in the MITT Study Area, NMFS is unable to develop mitigation measures that would meaningfully reduce the likelihood of stranding and/or will not result in unreasonable operational/practicability concerns.

Consequently, NMFS recommended to the Navy that the two agencies convene a panel of experts, both from

the region, as well as beaked whale behavioral response experts from other geographic areas, and Navy experts on biology, operations, and mitigation to review the status of the science, identify data gaps, and identify information applicable for consideration for future mitigation through the Adaptive Management process. The Navy has agreed to fund and co-organize this effort. Additional measures that the Navy has agreed to conduct to increase understanding and decrease uncertainty around beaked whales in the MITT Study Area are discussed in the *Monitoring* section.

Comment 23: A Commenter recommends that the impact assessment consider whether beaked whales would be startled by explosions or active sonar causing them to rush from great depths to the surface at dangerous speed causing injury from gas expansion in their blood and whether repeated impacts causing TTS could lead to PTS.

Response: The proposed rule addressed the impacts the commenter raises in the *Potential Effects of Specified activities on Marine Mammals and Their Habitat* section (*Acoustically Mediated Bubble Growth and other Pressure-related Injury).* Further, NMFS has expanded the discussion and rationale describing why the Navy's activities are not expected to result in the mortality of beaked whales in the *Stranding* section of this final rule.

As described in the proposed rule, very prolonged or repeated exposure to sound strong enough to elicit TTS, or shorter-term exposure to sound levels well above the TTS threshold, can cause PTS, however, circumstances that would be expected to lead to this are not present for Navy activities in the MITT Study Area. For this rulemaking, the Navy's modeling has considered the proximity of marine mammals to Navy activities and the likelihood of exposure to levels above which TTS or PTS might be incurred, throughout a full day (*i.e.,* considering potential repeated exposures within a day), and very few PTS takes are expected (see the *Estimated Take of Marine Mammals* section). Further, as discussed in the *Analysis and Negligible Impact Determination* section, there is no information suggesting that any marine mammals will be exposed to levels resulting in TTS across more than a few non-sequential days, much less at a level or duration that is expected to accrue to PTS across those days.

Also of note, ongoing research on beaked whale response to sonar does not indicate a panic response and rush to the surface. Instead, beaked whales move away from the source underwater and increase the slope of their ascent glide to bring them further from the source (Falcone et al. 2017).

Comment 24: A Commenter stated that similar to beaked whales, NMFS has failed to analyze seriously whether melon-headed whales and other marine mammal species known to be vulnerable to harm from Navy sonar and explosives are likely to suffer injury and/or death from MITT activities.

Response: There have not been significant instances of stranding of melon-headed whales or other blackfish species in the Mariana Islands. Effects analyses concluding that strandings of these species are unlikely to result from the Navy's activities are contained in the 2020 MITT FSEIS/OEIS. In review of NMFS' and Guam Department of Agriculture's Division of Aquatic and Wildlife Resources stranding data from 1962 through February 2019, only two instances of melon-headed whale strandings were reported (1980 and 2015). Stranding data for other species over the same time period include: false killer whale 3 (2000, 2003, 2007), dwarf sperm whale 4 (1970, 1974, 1993, 2002), pygmy killer whale 1 (1974), pygmy sperm whale 3 (1989 (2), 1997), sperm whale 6 (1962, 1993 (2), 2011, 2012, 2013), and short-finned pilot whale 1 (1980). Given the low numbers of strandings of these species in the Marianas and the absence of any evidence of association with active sonar operation, the likelihood that Navy activities would result in serious injury or mortality of these species is considered discountable.

Comment 25: A Commenter stated that NMFS assumes, counter to the available evidence, that beaked whales around the Mariana Archipelago have no population structure and are part of large, cosmopolitan populations. While limited information on population structure is available, the best available science shows differences in the echolocation signal frequency of Blainville's beaked whales between the Northern Marianas Islands and other locations in the Pacific, Western Atlantic, and Gulf of Mexico, indicative of a population specific to the Northern Marianas Islands. This finding is consistent with studies in other parts of the world, which have demonstrated remarkable site-fidelity in beaked whale populations. Range-limited populations have been found on the shelf break approximately 50 km east of Cape Hatteras, as well as off Canada, in the Mediterranean, off Southern California, in the Bahamas, and around the Hawaiian Islands.

Response: There is no satellite tag or photographic identification data supporting the assertion that the populations around the Marianas are resident populations, much less identifying what the size or shape of those resident populations might be within the Mariana Islands (*i.e.,* abundance and range size). The Commenter points to data differentiating vocalizations of Blainville's beaked whales in the Mariana Islands versus other parts of the Pacific, and to the presence of known resident populations of beaked whales in Hawaii and other islands of the world. These points support the potential for resident populations to exist in the Marianas, but do not provide any information that would support analyzing impacts in a manner differently than was done by the Navy and NMFS. Specifically, for example, even if the beaked whales within the Marianas comprise a separate population from those elsewhere in the Pacific, it would not suggest that beaked whales should be analyzed differently than they were within the MITT Study Area.

While NMFS cannot explicitly define the beaked whale population structure at this time, the magnitude and severity of the estimated take and the negligible impact analyses remain valid and applicable based on the best available science regardless of whether the beaked whales in the MITT Study Area are from a larger global population or a Marianas Islands associated population. NMFS and the Navy are committed to actions that will expand our understanding of beaked whales, including their distribution in the MITT Study Area (see the *Monitoring* and *Adaptive Management* sections below for detailed descriptions). For example, the Navy will co-fund the Pacific Marine Assessment Program for Protected Species (PACMAPPS) survey in spring-summer 2021 to help document beaked whale occurrence, abundance, and distribution in the Mariana Islands. This effort will include deployments of a towed array as well as floating passive acoustic buoys. The Navy will monitor future beaked whale occurrence within select portions of the MITT Study Area starting in 2022. Additionally, the Navy will include Cuvier's beaked whales as a priority species for analysis under a 2020–2023 Navy research-funded program entitled Marine Species Monitoring for Potential Consequences of Disturbance (MSM4PCOD). Finally, the Navy will fund and co-organize with NMFS an expert panel to provide recommendations on scientific data gaps and uncertainties.

Mitigation and Monitoring

Least Practicable Adverse Impact Determination

Comment 26: A Commenter cited two judicial decisions and commented that the ''least practicable adverse impact'' standard has not been met. The Commenter stated that contrary to the *Pritzker* Court decision, NMFS, while clarifying that population-level impacts are mitigated ''through the application of mitigation measures that limit impacts to individual animals,'' has again set population-level impact as the basis for mitigation in the proposed rule. Because NMFS' mitigation analysis is opaque, it is not clear what practical effect this position may have on its rulemaking. The Commenter stated that the proposed rule is also unclear in its application of the ''habitat'' emphasis in the MMPA's mitigation standard, and that while NMFS' analysis is opaque, its failure to incorporate or even, apparently, to consider viable time-area measures suggests that the agency has not addressed this aspect of the *Pritzker* decision. The Commenter argued that the MMPA sets forth a ''stringent standard'' for mitigation that requires the agency to minimize impacts to the lowest practicable level, and that the agency must conduct its own analysis and clearly articulate it and not just parrot what the Navy says. The baselessness of this approach can be seen from the outcome of the *Conservation Council* decision, where the parties were able to reach a settlement agreement establishing time-area management measures, among other things, on the Navy's Southern California and Hawaii Range Complexes notwithstanding NMFS' finding, following the Navy, that all such management measures would substantially affect military readiness and were not practicable. Unfortunately, there is no indication in the proposed rule that NMFS has, as yet, done anything different here.

Response: First, the Commenter's reference to mitigation measures implemented pursuant to a prior settlement agreement is entirely inapplicable to a discussion of NMFS' responsibility to ensure the least practicable adverse impact under the MMPA. Specifically, for those areas that were previously covered under the 2015 settlement agreement for the HSTT Study Area, it is essential to understand that: (1) The measures were developed pursuant to negotiations with the plaintiffs and were specifically not selected and never evaluated based on an examination of the best available science that NMFS otherwise applies to a mitigation assessment and (2) the Navy's agreement to restrictions on its activities as part of a relatively short-term settlement (which did not extend beyond the expiration of the 2013 regulations) did not mean that those restrictions were practicable to implement over the longer term.

Regarding the remainder of the comment, NMFS disagrees with much of what the Commenter asserts. First, we have carefully explained our interpretation of the least practicable adverse impact standard and how it applies to both stocks and individuals, including in the context of the *Pritzker* decision, in the *Mitigation Measures* section. Further, we have applied the standard correctly in this rule in requiring measures that reduce impacts to individual marine mammals in a manner that reduces the probability and/or severity of population-level impacts.

When a suggested or recommended mitigation measure that would reduce impacts is not practicable, NMFS has explored variations of that mitigation to determine if a practicable form of related mitigation exists. This is clearly illustrated in NMFS' independent mitigation analysis process explained in the *Mitigation Measures* section of the final rule. First, some types of mitigation required under this rule are area-specific and vary by mitigation area, demonstrating that NMFS has engaged in a site-specific analysis to ensure mitigation is tailored when practicability demands, *i.e.,* some forms of mitigation were practicable in some areas but not others. For instance, while it was not practicable for the Navy to restrict all use of the Chalan Kanoa Reef and Marpi Reef Geographic Mitigation Areas, NMFS did expand the seaward extent of the areas out to the 400-m isobath. Additionally, while it was not practicable for the Navy to eliminate all training in those two Geographic Mitigation Areas, restrictions in those areas have been expanded such that the Navy will not use explosives year-round and MF1 MFAS will be limited to 20 hours between December 1 and April 30 annually to minimize impacts from sonar on humpback whales during the time when they are engaged in important reproductive behaviors.

Regarding the comment about mitigation of habitat impacts, marine mammal habitat value is informed by marine mammal presence and use and, in some cases, there may be overlap in measures for the species or stock directly and for use of habitat. In this rule, we have required time-area mitigations based on a combination of factors that include higher densities and observations of specific important behaviors of marine mammals themselves, but also that clearly reflect preferred habitat (*e.g.,* reproductive areas of Marpi and Chalan Kanoa Reefs, resting habitat for spinner dolphins in Agat Bay). In addition to being delineated based on physical features that drive habitat function (*e.g.,* bathymetric features), the high densities and concentration of certain important behaviors (*e.g.,* breeding, resting) in these particular areas clearly indicate the presence of preferred habitat. The Commenter seems to suggest that NMFS must always consider separate measures aimed at marine mammal habitat; however, the MMPA does not specify that effects to habitat must be mitigated in separate measures, and NMFS has clearly identified measures that provide significant reduction of impacts to both ''marine mammal species and stocks and their habitat,'' as required by the statute.

NMFS agrees, however, that the agency must conduct its own analysis, which it has done here, and not just accept what is provided by the Navy. That does not mean, however, that NMFS cannot review the Navy's analysis of effectiveness and practicability of its proposed mitigation measures, which by regulation the Navy was required to submit with its application, and concur with those aspects of the Navy's analysis with which NMFS agrees. The Commenter seems to suggest that NMFS must describe in the rule in detail the rationale for not adopting every conceivable permutation of mitigation, which is neither reasonable nor required by the MMPA. NMFS has described our well-reasoned process for identifying the measures needed to meet the least practicable adverse impact standard in the *Mitigation Measures* section in this rule, and we have followed the approach described there when analyzing potential mitigation for the Navy's activities in the MITT Study Area. Responses to specific recommendations for mitigation measures provided by the Commenter on the proposed rule are discussed separately.

Comment 27: A Commenter noted that they have previously indicated that, under the least practicable adverse impact requirement, and more generally under the purposes and policies of the MMPA, Congress embraced a policy that minimizes, whenever it is practicable, the risk of killing or seriously injuring a marine mammal incidental to an activity subject to section 101(a)(5)(A), including taking measures in an authorization to eliminate or reduce the

likelihood of lethal taking. Accordingly, the Commenter had recommended that NMFS address this point explicitly in its least practicable adverse impact analysis and clarify whether it agrees that the incidental serious injury or death of a marine mammal always should be considered an adverse impact for purposes of applying the least practicable adverse impact standard. In the preamble to the Atlantic Fleet Training and Testing (AFTT) final rule, NMFS indicated that it was unnecessary or unhelpful to address explicitly the point made by the Commenter that an incidental death or serious injury of a marine mammal should always be considered an adverse impact on the species or stock (83 FR 57117). The Commenter disagrees. The Commenter does not see how NMFS can meet the mandate of the MMPA to reduce adverse impacts to the lowest level practicable if it does not first identify clearly which impacts are adverse and may require mitigation under section 101(a)(5)(A)(i)(II)(aa). The Commenter appreciates NMFS' statement that it has adopted a practice to mitigate mortality to the greatest degree possible, but disagrees with the agency's conclusions that one mortality does not affect the population in a quantifiable or meaningful way. However, the MMPA requires NMFS to go beyond that and reduce any adverse impacts to the greatest extent practicable, even though population-level impacts are not significant.

Response: NMFS continues to disagree that it is necessary or helpful to explicitly address the point the Commenter raises specifically in the discussion on the least practicable adverse impact standard. It is always NMFS' practice to mitigate serious injury and mortality to the greatest degree possible, as death is the impact that is most easily linked to reducing the probability of adverse impacts to populations. However, we cannot agree that one mortality will always decrease any population in a quantifiable or meaningful way. For example, for very large populations, one mortality may fall well within typical known annual variation and not have any effect on population rates. Mortality is not anticipated or authorized in this rule.

Comment 28: A Commenter continues to recommend that NMFS clearly separate its application of the least practicable adverse impact requirement from its negligible impact determination. Once NMFS determines that an applicant's proposed activities would have a negligible impact, it still has a responsibility to determine whether the activities would nevertheless have adverse impacts on marine mammal species and stocks and their habitat. If so, NMFS must condition the authorization to eliminate or reduce those impacts whenever, and to the greatest extent, practicable. As the statute is written, it is inappropriate to conflate the two standards, as NMFS seems to be doing.

Response: NMFS has made clear in this and other rules that the agency separates its application of the least practicable adverse impact requirement in the *Mitigation Measures* section from its negligible impact analyses and determinations for each species or stock in a separate section. Further, NMFS has made this separation clear in practice for years by requiring mitigation measures to reduce impacts to marine mammal species and stocks and their habitat for all projects, even those for which the anticipated take would clearly not approach the negligible impact threshold, even in the absence of mitigation.

Comment 29: A Commenter recommended that NMFS follow an analysis consisting of three elements to (1) determine whether the impacts of the proposed activities are negligible at the species/stock level, (2) if so, determine whether some of those impacts nevertheless are adverse either to marine mammal species or stocks or key marine mammal habitat, and (3) if so, whether it is practicable for the applicant to reduce or eliminate those impacts through modifying those activities or by other means (*e.g.,* requiring additional mitigation measures to be implemented).

Response: In the *Mitigation Measures* section of the rule, NMFS has explained in detail our interpretation of the least practicable adverse impact standard, the rationale for our interpretation, and then how we implement the standard. The method the agency is using addresses all of the necessary components of the standard and produces effective mitigation measures that result in the least practicable adverse impact on both the species or stocks and their habitat. The Commenter has failed to illustrate why NMFS' approach is inadequate or why the Commenter's proposed approach would be better, and we therefore decline to accept the recommendation.

Comment 30: Regarding the habitat component of the least practicable adverse impact standard, a Commenter recommends that NMFS (1) adopt a clear decision-making framework that recognizes the species and stock component *and* the marine mammal habitat component of the least practicable adverse impact provision and (2) always consider whether there are potentially adverse impacts on marine mammal habitat and whether it is practicable to minimize them. The MMPA requires that NMFS address both types of impacts, not that there be no overlap between the mitigation measures designed to reduce those impacts.

Response: NMFS' decision-making framework for applying the least practicable adverse impact standard clearly recognizes the habitat component of the provision (see *Mitigation Measures* section of the rule). NMFS does always consider whether there are adverse impacts on habitat and how they can be mitigated. Marine mammal habitat value is informed by marine mammal presence and use and, in some cases, there may be overlap in measures for the species or stock directly and for use of habitat. In this rule, we have required time-area mitigation measures based on a combination of factors that include higher densities and observations of specific important behaviors of marine mammal species themselves, but also that clearly reflect preferred habitat (*e.g.,* reproductive habitat off Marpi and Chalan Kanoa Reefs and resting habitat in Agat Bay). In addition to being delineated based on physical features that drive habitat function (*e.g.,* bathymetric features), the high densities and concentration of certain important behaviors (*e.g.,* reproduction, feeding, resting) in these particular areas clearly indicate the presence of preferred habitat. The Commenter seems to suggest that NMFS must include mitigation measures aimed at marine mammal habitat that are wholly separate from addressing adverse impacts directly on the species or stocks. However, the MMPA does not specify that effects to habitat must be mitigated in separate measures, and NMFS has clearly included measures that provide significant reduction of impacts to both marine mammal species or stocks and their habitat, as required by the statute.

Comment 31: A Commenter recommended that NMFS rework its evaluation criteria for applying the least practicable adverse impact standard to separate the factors used to determine whether a potential impact on marine mammals or their habitat is adverse and whether possible mitigation measures would be effective.

Response: In the *Mitigation Measures* section, NMFS has explained in detail our interpretation and application of the least practicable adverse impact standard. The Commenter has recommended an alternate way of

interpreting and implementing the least practicable adverse impact standard, in which NMFS would consider the effectiveness of a measure in our evaluation of its practicability. The Commenter erroneously asserts that NMFS currently considers the effectiveness of a measure in a determination of whether the potential effects of an activity are adverse, but the Commenter has misunderstood NMFS' practice—rather, NMFS appropriately considers the effectiveness of a measure in the evaluation of the degree to which a measure will reduce adverse impacts on marine mammal species or stocks and their habitat, as a less effective measure will less successfully reduce these impacts on marine mammals. Further, the Commenter has not provided information that shows that their proposed approach would more successfully evaluate mitigation against the LAPI standard, and we decline to accept it.

Comment 32: A Commenter stated that although NMFS has written extensively on the least practicable adverse impact standard, it remains unclear exactly how each authorization's proposed ''mitigation measures are sufficient to meet the statutory legal standard,'' or even what standard NMFS is using. As such, the Commenter again recommends that NMFS address these shortcomings by adopting a simple, two-step analysis that more closely tracks the statutory provisions being implemented. As the Commenter has stated previously, the first step should be to identify impacts on marine mammal species or stocks or their habitat that, although negligible, are nevertheless adverse. If such impacts are identified, then NMFS must identify and require the applicant to adopt measures to reduce those impacts to the lowest level practicable. If NMFS is using some other legal standard to implement the least practicable adverse impact requirements, the Commenter further recommends that NMFS provide a clear and concise description of that standard and explain why it believes it to be ''sufficient'' to meet the statutory legal requirements.

Response: NMFS disagrees with the Commenter's assertion that analysis of the rule's mitigation measures under the least practicable adverse impact standard remains unclear or that the suggested shortcomings exist. Further, the Commenter provides no rationale as to why the two-step process they describe is better than the process that NMFS uses to evaluate the least practicable adverse impact and, therefore, we decline to accept the recommendation.

Comment 33: A Commenter stated that since NMFS has expounded on the least practicable adverse impact standard at some length in a series of proposed authorizations, it has been an evolutionary process that varies depending on each specific situation. The Commenter continues to recommend that NMFS adopt general regulations to govern the process and set forth the basic steps and criteria that apply across least practicable adverse impact determinations. Those standards should not be shifting on a case by-case basis, as now appears to be the case. Rather, the analytical framework and decision-making standards should be consistent across authorizations. Variations between authorizations should be based on the facts underlying each application, not the criteria that underpin the least practicable adverse impact standard.

Response: The commenter misunderstands the agency's process. Neither the least practicable adverse impact standard nor NMFS' process for evaluating it shifts on a case-by-case basis. Rather, as the Commenter suggests should be the case, the evaluation itself is case-specific to the proposed activity, the predicted impacts, and the mitigation under consideration.

Regarding the recommendation to adopt general regulations, we appreciate the recommendation and may consider the recommended approach in the future. However, providing directly relevant explanations of programmatic approaches or interpretations related to the incidental take provisions of the MMPA in a proposed incidental take authorization is an effective and efficient way to provide information to and solicit focused input from the public. Further, this approach affords the same opportunities for public comment as a stand-alone rulemaking would.

Geographic Mitigation Measures

Comment 34: A Commenter cites the judicial decision in *Pritzker,* and suggests that NMFS should adjust its approach to geographic mitigation as follows: First, NMFS must not dismiss the existence of persistent areas of primary productivity. Second, NMFS must not conflate the lack of survey effort with an absence of biologically important habitat. Third, NMFS, in following the Navy, overlooks evidence of island-associated small or resident populations, and relative risk to those populations. It is entirely remiss for NMFS to ignore evidence of small and resident populations within the MITT Study Area and afford them no additional protections.

Response: To support its argument that NMFS must not dismiss the existence of persistent areas of primary productivity, the Commenter cites to the 2019 MITT DSEIS/OEIS and its general discussion of the West Marianas Ridge area and areas of productivity, and references some general information about how certain features may be tied to biodiversity hotspots. The West Marianas Trench is a huge area hundreds of miles long. The commenter does not provide any information about particular features or areas that are specifically known to be important to marine mammals in the West Marianas Trench, much less provide any specific recommendations about how geographic mitigation might potentially provide a reduction in impacts that the Navy's activities might be having on marine mammal species or stocks and their habitat. As described in section I.4.1 of the 2020 MITT FSEIS/OEIS, which NMFS reviewed and concurs with, the available data do not indicate that the West Mariana Ridge or surrounding area is an area of key biological importance for marine mammals or other marine species, nor is it clear that limiting the use of sonar and explosives in the area would result in an avoidance or reduction of impacts. Therefore, the West Mariana Ridge area does not warrant geographic mitigation. NMFS does not dismiss the existence of persistent areas of primary productivity, however, NMFS is unaware of, and the Commenter has failed to demonstrate the existence of, data supporting areas or habitat of specific importance to marine mammals, nor has the Commenter recommended any particular geographic mitigation measure. Additional discussion of areas of primary productivity is included below in the response to Comment 35.

Second, the commenter asserts that NMFS must not conflate the lack of survey effort with an absence of biologically important habitat. NMFS has not done this. In the final rule, we have clarified that there are no *known* biologically important areas for most of the species in the MITT Study Area. In addition, while both the Navy and NMFS have discussed the paucity of survey data and habitat information in and around the Marianas, and the limited amount of information indicating specific important habitat for marine mammals, we have not suggested that this lack of data indicates that no biologically important areas exist. However, in the absence of data supporting a specific area in which biologically important behaviors are known to be concentrated, or important

habitat is otherwise located, and in which a reasonable argument can be made that limitation of Navy activities would meaningfully reduce impacts to marine mammal species or stocks and their habitat, it is not reasonable to require geographic mitigation beyond the procedural mitigation that is already in place to reduce impacts to all marine mammals in all locations.

Third, the Commenter asserts that NMFS overlooks evidence of island-associated small or resident populations, and relative risk to those populations. NMFS and the Navy acknowledge the potential for island-associated odontocete populations in the Marianas and, in fact, the species that the Commenter focuses on in their comment (spinner dolphins) is the driver for the Agat Bay Mitigation Area, which will minimize impacts to spinner dolphins resting in a Bay on the west side of Guam where they are known to concentrate. However, as discussed in more detail in section I.4.2 of the 2020 MITT FSEIS/OEIS, which NMFS reviewed and concurs with, while some of the species that have been identified as island-associated residents in Hawaii have been detected from nearshore small boat surveys in the Marianas, these same species have been detected using offshore areas beyond the 3,500-m isobath in offshore surveys or by satellite tags. There is no satellite tag or photographic identification data supporting the assertion that the populations around the Marianas are resident populations, much less that their ranges are spatially limited in a manner that would support the consideration of geographic mitigation measures.

Comment 35: A Commenter recommended that NMFS should consider the guidelines for capturing biologically important marine mammal habitat in data-poor areas, provided by NMFS' subject-matter experts and addressed by the Ninth Circuit Court of Appeals in *NRDC* v. *Pritzker* 828 F.3d 1125 (9th Cir. 2016), as those guidelines are relevant to the broader MITT Study Area, much of which is comprised of data-poor, offshore areas. These ''White Paper'' guidelines call for: (1) Designation as Offshore Biologically Important Areas (OBIAs) of all continental shelf waters and waters 100 km seaward of the continental slope as biologically important for marine mammals; (2) establishment of OBIAs within 100 km of all islands and seamounts that rise within 500 m of the surface; and (3) nomination as OBIAs of high-productivity regions that are not included in the continental shelf, continental slope, seamount, and island ecosystems above as biologically important.

Response: In discussing OBIAs, the commenter references a process and set of recommendations that were specifically developed in the context of the Navy's SURTASS LFA sonar activities, in which five vessels operated primarily in the Pacific Ocean use low frequency active sonar only in deep offshore waters to train and search for enemy submarines. The geographic area of the SURTASS LFA regulations includes the western and central North Pacific Ocean and eastern Indian Ocean outside of the territorial seas of foreign nations (generally 12 nmi (22 km) from most foreign nations). By referencing designation as OBIAs, we assume the Commenter is suggesting restricting active sonar (at a minimum) in the areas identified. Below we discuss the consideration of these areas for mitigation in the MITT Study Area.

Regarding recommendations (1) and (2), restricting the Navy's MITT activities in these areas is impracticable, as many of the Navy's activities specifically necessitate use of the varied bathymetry that occurs between the continental slope and 100 km seaward or around seamounts, and many can occur only within designated training or testing areas that fall within this area.

The Navy has communicated to NMFS that the MITT Study Area includes dedicated range assets, special use airspace, and other infrastructure to support training and testing activities that would not be available to the Navy should it have to conduct activities beyond the continental shelf waters (including a 100 km buffer). Mid-frequency and high-frequency sonar sources, which are the primary sources used in the MITT training and testing activities, have a much smaller propagation range than LF sources. Therefore, moving further and further offshore, from seamounts, from islands, etc. would result in completely ineffective training/testing because the sonar system would not be able to perform in locations of the bathymetries required to meet proficiency with standoff/buffer distances proposed. Shelf, slope, sea mount, and shallow island associated waters are the type of complex training environments required by the Navy since those are the types of bathymetric conditions that deployed units to the Navy's 7th Fleet will be most presented with when operating in the Philippine Sea, South China Sea, etc. Therefore, it is impracticable to limit activities in the locations recommended by the white paper.

Also, regarding the 100 km offshore of the slope limitation, density data from other regions where more granular survey data is available generally indicate that while some species may typically be more concentrated in shelf and slope waters, certain mysticete species and sperm whales often have higher densities outside of the mitigation area the Commenter suggests (100 km beyond the Continental Slope), and focusing activities in those areas would shift impacts from more coastal species to more pelagic species, making any overall reduction in impacts uncertain. Regarding seamounts, while data have shown higher species diversity or aggregations of some species at some seamounts during certain periods of time (Morato *et al.,* 2008), they also suggest that these aggregations are often specific to a seamount or time period (*i.e.,* not all seamounts exhibit these aggregations at all times) and, further, that marine mammal species are more loosely associated with seamounts than other taxa (Pitcher *et al.,* 2007). When this information is considered in combination with the fact that no more than a few takes of any individual marine mammal are expected throughout the MITT Study Area annually, any potential reduction in impacts would be limited. For additional information regarding marine mammal use of seamounts, see the *White Paper Specific Recommendations* section of NMFS' Final Rule for SURTASS LFA Sonar (84 FR 40132, 40192, August 13, 2019). Given the lack of evidence supporting the likelihood that this approach would provide meaningful reduction of impacts to marine mammal species and their habitat in the MITT Study Area, combined with the impracticability for Navy implementation, NMFS finds that these measures are not warranted beyond the procedural mitigation measures that reduce the likelihood of injury or more severe behavioral impacts for all species in all areas.

Regarding restricting Navy activities in areas of high productivity, we first refer the reader to our response immediately above, which addresses the West Marianas Trench, and further note that the Commenter does not identify, and nor is NMFS aware of, any other known areas of high productivity within the MITT Study Area. More generally, areas of the highest productivity tend to be found in areas of high latitude (not found in the MITT Study Area) or near river mouths (small boat surveys in the MITT Study Area have already allowed for the identification of specifically important nearshore areas for marine mammals, which have been designated as geographic mitigation areas)

(Wolverton, 2009). More moderate areas of productivity tend to occupy large, and often ephemeral, offshore areas that are difficult to consistently define because of interannual spatial and temporal variability. Regions of high productivity have the potential to provide good foraging habitat for some species of marine mammals, however, there is not sufficient data to support the designation of any specific area. Further, the fact that no more than a few takes of any individual marine mammal are expected throughout the MITT Study Area annually suggests that any potential reduction in impacts would be limited. When this limited benefit is balanced against the general impracticability of restricting Navy training and testing in large portions of the MITT Study Area, and given the lack of information to identify an appropriate area, NMFS finds that this measure is not warranted beyond the procedural mitigation measures that reduce the likelihood of injury or more severe behavioral impacts for all species in all areas.

Comment 36: A Commenter recommends that NMFS determine whether the Navy's implementation of geographic mitigation measures at the North Guam, Ritidian Point, and Tumon Bay Offshore Areas would be practicable and if so, include them as mitigation areas in the final rule. In either case, all of the relevant information for North Guam, Ritidian Point, and Tumon Bay Offshore Areas must be included in the preamble to the final rule.

Response: NMFS has considered the best available information (which for mitigation measures discussed here and below includes both best available science and information on practicability) for these suggested mitigation areas. The areas of North Guam, Ritidian Point, and Tumon Bay Offshore Areas were reviewed as potential mitigation areas. While sightings and transits of the area by some species were noted in review of available scientific research, there is currently no information on specific uses for biologically important life processes beyond normal species broad-area occurrence (*e.g.,* the areas are not exclusive feeding areas, migration routes, or breeding locations). Given this, there is no evidence that limiting operations in these areas would reduce impacts on marine mammals, and accordingly, no geographic mitigation is warranted, regardless of whether it would be practicable.

Comment 37: A Commenter recommends that NMFS should establish mitigation areas for spinner dolphin resting habitat at Bile Bay, Tumon Bay, and Double Reef, Guam, and Tanapaq Bay, Saipan.

Response: NMFS has considered the best available information for these suggested mitigation areas. Previously reported spinner dolphin high-use areas nearshore at Guam include Bile Bay, Tumon Bay, Double Reef, as well as north Agat Bay, and off Merizo (Cocos Lagoon area), where these animals congregate during the day to rest (Amesbury *et al.,* 2001; Eldredge, 1991). More recently, high-use areas have included Agat Bay; the Merizo channel, tucked into the several small remote bays between Merizo and Facpi Point; Piti Bay; Hagatna; Tumon Bay; and Pugua Point (Ligon *et al.,* 2011). During the 2010–2018 small boat surveys in the Mariana Islands, there were 157 encounters with pods of spinner dolphins (Hill *et al.,* 2019). The approximate distance from shore for these encounters was 1 km, indicative of their preference for nearshore habitat and prevalence in the MITT Study Area (Hill *et al.,* 2017a; Hill *et al.,* 2018b; Hill *et al.,* 2019). As described in Section I.3.3 (Agat Bay Nearshore Geographic Mitigation Area) of the 2020 MITT FSEIS/OEIS, the nearshore area of Agat Bay represents an area of biological importance and is practicable for implementation, and has been included in the final rule as a geographic mitigation area for spinner dolphin resting behavior. The data suggesting numerous other locations around Guam and other islands where resting behavior has been observed or has the potential to occur (*i.e.,* the habitat is suitable) indicates that no single area is of particular concentration or biological importance. See Section 3.4.1.32.2 (Geographic Range and Distribution) of the 2020 MITT FSEIS/OEIS for more information. Accordingly, specific geographic mitigation for these areas, beyond the procedural mitigation measures that reduce the likelihood of injury or more severe behavioral impacts for spinner dolphins and all other species during all activities, is not warranted.

Comment 38: A Commenter recommends extending the southern boundary of the Agat Bay Nearshore Geographic Mitigation Area seaward to the 100 m depth contour and including a buffer area sufficient to accomplish the goal of avoiding mass disruption of spinner dolphins, and expanding the same restriction, at minimum, to dipping sonar.

Response: NMFS has considered the best available information for this suggested mitigation area. The current western boundary of the Agat Bay Nearshore Geographic Mitigation Area essentially follows the 100-m isobath except at the southern extent of the area. At its northern extent, the area includes deeper waters beyond the 100-m isobath to include an area with a cluster of sea turtle sightings. The greater number of spinner dolphin sightings may indicate that the northern or middle portion of the Agat Bay Nearshore Mitigation Area may be of greater importance than the southern portion due to some physical or biological features. The point of land at the southern end of the Agat Bay Nearshore Mitigation Area is a convenient physical feature for defining the area, and as with other sightings data, it is reasonable to assume that animals just outside of the boundary of the area may be transiting to (or from) the northern portion of the area and that areas beyond the boundary do not constitute areas of any particular biological significance. The expansion of the area to include a buffer at the southern end would not be likely to meaningfully further reduce impacts to spinner dolphins and is, therefore, not warranted. Dipping sonar, as described in the *Detailed Description of the Specified Activities* section, is used during ASW exercises, which occur primarily more than 3 nmi from shore, and would especially not occur in areas as shallow as Agat Bay and with a high number of small tour boats. As also indicated previously, the vast majority of the takes from sonar exposure are related to MF1 sonar, and dipping sonar has a significantly lower source level and has not been associated with any particular impacts of concern to dolphins. Given this, there is no additional protective value to be gained by adding a restriction on dipping sonar in this area and it is, therefore, not warranted.

Comment 39: A Commenter recommends that NMFS should establish a mitigation area for offshore Agat Bay encompassing the continental shelf break and slope and extending out to the 2,000 m depth contour to protect this potentially important calving and nursing area for endangered sperm whales. Additionally the Commenter also recommends the NMFS should establish a second mitigation area for sperm whale calving and nursery habitat offshore of Apra Harbor, encompassing the continental shelf break and slope and extending out to the 2,000 m depth contour.

Response: NMFS has considered the best available information for these suggested mitigation areas. While there were multiple sightings of sperm whale calves (not in Agat Bay or concentrated in a particular area) during the course of

the large boat surveys conducted around the Marianas in 2007, the recommendation that NMFS should consider an area off Agat Bay as a breeding and nursery area for sperm whales seems to be largely based on two Associated Press File photographs, taken opportunistically by a local photographer, showing a group of three adult sperm whales and a calf during an encounter from a commercial dive boat on June 15, 2001, ''. . . about four miles off the coast of the Agat Marina in Guam'' (Bangs, 2001). During the 2010–2018 small boat surveys in the Mariana Islands, a total of seven sperm whales were detected over four encounters (in 2010, 2013, 2016, and 2018) in a median depth of approximately 1,200 m and median distance from shore of approximately 12 km (Hill e*t al.,* 2017a; Hill *et al.,* 2018c; Hill *et al.,* 2018d; Hill *et al.,* 2019). Sightings and acoustic monitoring detections recorded both before and since 2007 indicate that sperm whales range widely in the MITT Study Area with no known areas of concentration in the Mariana Islands. Sperm whales are highly nomadic, mobile predators, and the available data do not support areas offshore of Agat Bay or Apra Harbor as important reproductive areas for sperm whales in the MITT Study Area. For instance, a sperm whale with a satellite tracking tag attached traveled in deep offshore waters from west of Guam to west of Saipan in less than 10 days (Hill et al. 2019). Accordingly, specific geographic mitigation in these areas, beyond the procedural mitigation measures that reduce the likelihood of injury or more severe behavioral impacts for sperm whales and all other species during all activities, is not warranted.

Comment 40: A Commenter recommended that NMFS should protect Cocos Lagoon and the continental shelf and slope waters west of Cocos Island seaward to the 2,000 m depth contour as an important habitat area for multiple species, particularly breeding habitat for a possibly resident pygmy killer whale population and resting habitat for spinner dolphin at Cocos Island and Lagoon, Guam.

Response: NMFS has considered the best available information for this suggested mitigation area. Like similar deep-water and deep-diving species, pygmy killer whales are likely highly mobile in the marine environment with no known concentration areas in the Mariana Islands. There was only one pygmy killer whale sighting of a group of six animals during the 2007 systematic survey of the MITT Study Area (Fulling *et al.,* 2011). The sighting occurred near the Mariana Trench, south of Guam, where the bottom depth was over 4,413 m. This is consistent with the known habitat preference of this species for deep, oceanic waters. However, in the Mariana Islands, pygmy killer whale sightings close to shore are not unexpected due to deep bathymetry surrounding most islands. There is no information on population range of pygmy killer whales off Guam (Hill *et al.,* 2019), or any information suggesting that the area recommended by the Commenter is of specific biological importance such that mitigation measures would result in a reduction of impacts. Therefore, consideration of geographic mitigation, beyond the procedural mitigation measures that reduce the likelihood of injury or more severe behavioral impacts for pygmy killer whales and all other species during all activities, is not warranted. See Section 3.4.1.26.1 (Geographic Range and Distribution) of the 2020 MITT FSEIS/OEIS for more information.

For spinner dolphin habitat, there are numerous other locations around Guam and other islands where resting behavior has been observed or has the potential to occur (*i.e.,* the habitat is suitable), however, the data suggest that no single area, including the area recommended by the Commenter, is of particular biological importance (*i.e.,* with the predictable regular recurrence of larger pods of resting dolphins seen at Agat Bay). See Section 3.4.1.32.2 (Geographic Range and Distribution) of the 2020 MITT FSEIS/OEIS for more information. As such, a mitigation area here is not likely to meaningfully reduce impacts to spinner dolphins and, therefore, consideration of geographic mitigation, beyond the procedural mitigation measures that reduce the likelihood of injury or more severe behavioral impacts for spinner dolphins and all other species during all activities, is not warranted.

Comment 41: A Commenter recommended that NMFS should designate a mitigation area to protect, at minimum, the ten percent ''highest use area'' for short-finned pilot whales in core use areas, west of Guam and Rota.

Response: NMFS has considered the best available information for this suggested mitigation area. During the 2010–2018 small boat surveys in the Mariana Islands, short-finned pilot whale groups were encountered on 23 occasions in a median depth of approximately 720 m and median distance from shore of approximately 5 km, including one pod of 35 individuals off Marpi Reef north of Saipan (Hill *et al.,* 2014; Hill *et al.,* 2017a; Hill *et al.,* 2018b; Hill *et al.,* 2018d; Hill *et al.,* 2019). Satellite tags deployed on 17 individuals between 2013 and 2018 suggest multiple areas are used frequently by short-finned pilot whales in the Marianas, including but not limited to areas west of Guam and Rota (Hill *et al.,* 2018d; Hill *et al.,* 2019). Satellite tags on short-finned pilot whales lasting from approximately 9–128 days showed that individuals ranged from south at Tumon Bay off Guam to as far north as the waters west of Anatahan (Hill *et al.,* 2019). The Commenter uses tag data from the movement of eleven individuals to suggest probability density contours centered northwest of Guam, however, multiple locations of eleven animals are not necessarily representative of the distribution of all of the animals in the population. Altogether, tag locations and visual detections suggest multiple areas of frequent use by short-finned pilot whales in the Mariana Islands and do not support that the areas west of Guam and Rota are key areas of biological importance for short-finned pilot whales. Accordingly, specific geographic mitigation measures, beyond the procedural measures that reduce the likelihood of injury or more severe behavioral impacts for short-finned pilot whales during all activities, is not warranted.

Comment 42: A Commenter recommended that NMFS should establish a mitigation area to protect important habitat for multiple species of marine mammals at Rota Bank, particularly as important habitat for spinner and bottlenose dolphins and potential feeding habitat for Bryde's whales.

Response: NMFS has considered the best available information for this suggested mitigation area. As discussed in Appendix I (Geographic Mitigation Assessment) of the 2020 MITT FSEIS/OEIS, there is insufficient evidence to identify Rota Bank as an important area for spinner dolphins or bottlenose dolphins and therefore additional mitigation beyond the procedural measures that reduce impacts for all species is not warranted. The Commenter notes the potentially higher relative abundance of spinner dolphins in the area, as well as the potential for a genetically distinct population of bottlenose dolphins. However, spinner dolphins have also been sighted at multiple other locations around the Marianas, including important resting habitat in Agat Bay where NMFS has developed a geographic mitigation area, and the Commenter includes no information to support why the identification of a genetically distinct population of bottlenose dolphins in the Marianas would support the

identification of a mitigation area at Rota Bank. Further, the single sighting of a Bryde's whale feeding approximately five years ago does not indicate the presence of an established feeding area for the species.

During nine years of surveys from 2010–2018, spinner dolphins were only sighted at Rota Bank on two years, 2011 and 2012 (Hill *et al.,* 2019). More sightings across all years occurred in shallow water less than 100 m and within 1 km of land. Bottlenose dolphins, similar to spinner dolphins, were only sighted at Rota Bank in 2011 and 2012. Tracking of six bottlenose dolphins with attached satellite tags showed wide variations in tag locations between northern Guam and Rota (tag duration only 3.7–20.5 days). Only four Bryde's whale sightings in 2015 near Guam or Rota were reported based on small boat surveys from 2010–2018. Only one of these four sightings was near, although not on, Rota Bank. There were no other Bryde's whale sightings near Rota Bank in any other year. Accordingly, specific geographic mitigation, beyond the procedural measures that reduce the likelihood of injury or more severe behavioral impacts for dolphins and all species during all activities, is not warranted.

Other Mitigation and Monitoring

Comment 43: Based on the fact that the Commenter did not see reference to the Navy's ongoing Lookout effectiveness study in the 2020 MITT FSEIS/OEIS and was concerned that the results of this 10-year study would not be made available, they recommended that NMFS require the Navy to (1) allocate additional resources to the Lookout effectiveness study, (2) consult with the University of St. Andrews to determine how much additional data is necessary to analyze the data in a statistically significant manner, and (3) plan future Lookout effectiveness cruises to maximize the potential number of sightings so that the study can be completed by the end of 2022.

Response: NMFS has ensured that the results of the Lookout effectiveness study will be made available by including a Term and Condition in the ESA Incidental Take Statement associated with this rule that requires the Navy to provide a report summarizing the status of and/or providing a final assessment on the Navy's Lookout Effectiveness Study following the end of Calendar Year (CY) 2021. The report must be submitted no later than 90 days after the end of CY2021. The report will provide a statistical assessment of the data available to date characterizing the effectiveness of Navy Lookouts relative to trained marine mammal observers for the purposes of implementing the mitigation measures.

Comment 44: A Commenter recommends that NMFS require the Navy to use passive and active acoustic monitoring (such as instrumented ranges), whenever practicable, to supplement visual monitoring during the implementation of its mitigation measures for all activities that could cause injury or mortality beyond those explosive activities for which passive acoustic monitoring already was proposed. At the very least, the sonobuoys, active sources, and hydrophones used during an activity should be monitored for marine mammals.

Response: The Navy does employ passive acoustic monitoring to supplement visual monitoring when practicable to do so (*i.e.,* when assets that have passive acoustic monitoring capabilities are already participating in the activity). We note, however, that sonobuoys have a narrow band that does not overlap with the vocalizations of all marine mammals, and there is no bearing or distance on detections based on the number and type of devices typically used; therefore it is not possible to use these to implement mitigation shutdown procedures. For explosive events in which there are no platforms participating that have passive acoustic monitoring capabilities, adding passive acoustic monitoring capability, either by adding a passive acoustic monitoring device (*e.g.,* hydrophone) to a platform already participating in the activity or by adding a platform with integrated passive acoustic monitoring capabilities to the activity (such as a sonobuoy), for mitigation is not practicable. As discussed in Section 5.6.3 (Active and Passive Acoustic Monitoring Devices) of the 2020 MITT FSEIS/OEIS, which NMFS reviewed and concurs accurately assesses the practicability of utilizing additional passive or active acoustic systems for mitigation monitoring, there are significant manpower and logistical constraints that make constructing and maintaining additional passive acoustic monitoring systems or platforms for each training and testing activity impracticable. Additionally, diverting platforms that have passive acoustic monitoring capability would impact their ability to meet their Title 10 requirements and reduce the service life of those systems.

Regarding the use of instrumented ranges for real-time mitigation, the Commenter is correct that the Navy continues to develop the technology and capabilities on its Ranges for use in marine mammal monitoring, which can be effectively compared to operational information after the fact to gain information regarding marine mammal response. There is no instrumented range in the MITT Study Area to use. Further, the Navy's instrumented ranges were not developed for the purpose of mitigation. The manpower and logistical complexity involved in detecting and localizing marine mammals in relation to multiple fast-moving sound source platforms in order to implement real-time mitigation is significant. Although the Navy is continuing to improve its capabilities to use range instrumentation to aid in the passive acoustic detection of marine mammals, at this time it would not be effective or practicable for the Navy to monitor instrumented ranges for the purpose of real-time mitigation for the reasons discussed in Section 5.6.3 (Active and Passive Acoustic Monitoring Devices) of the 2020 MITT FSEIS/OEIS.

Regarding the use of active sonar for mitigation, we note that during Surveillance Towed Array Sensor System low-frequency active sonar (which is not part of this rulemaking, and uses a high-powered low frequency source), the Navy uses a specially designed adjunct high-frequency marine mammal monitoring active sonar known as ''HF/M3'' to mitigate potential impacts. HF/M3 can only be towed at slow speeds (significantly slower than those used for ASW and the other training and testing uses contemplated for the MITT activities) and operates like a fish finder used by commercial and recreational fishermen. Installing the HF/M3 adjunct system on the tactical sonar ships used during activities in this rule would have implications for safety and mission requirements due to impacts on speed and maneuverability. Furthermore, installing the system would significantly increase costs associated with designing, building, installing, maintaining, and manning the equipment. For these reasons, installation of the HF/M3 system or other adjunct marine mammal monitoring devices as mitigation under the rule would be wholly impracticable. Further, NMFS does not generally recommend the use of active sonar for mitigation, except in certain cases where there is a high likelihood of injury or mortality (*e.g.,* gear entanglement) and other mitigations are expected to be less effective in mitigating those effects. Active sonar generates additional noise with the potential to disrupt marine mammal

behavior, and is operated continuously during the activity that it is intended to mitigate. On the whole, adding this additional stressor is not beneficial unless it is expected to offset, in consideration of other mitigations already being implemented, a high likelihood or amount of injury or mortality. For the Navy's MITT activities, mortality is not anticipated, injury is of a small amount of low-level PTS, and the mitigation is expected to be effective at minimizing impacts. Further, the species most likely to incur a small degree of PTS from the Navy's activities are also the species with high frequency sensitivity that would be more likely to be behaviorally disturbed by the operation of the high frequency active source. For all of these reasons, NMFS does not recommend the use of active sonar to mitigate the Navy's training and testing activities in the MITT Study Area.

Comment 45: A Commenter asserted that given the apparent effect of the post-model analysis on the agency's mortality estimates—accounting perhaps for the drop in expected deaths from 150 (during the previous five-year period) to virtually zero—NMFS should have made the Navy's approach transparent and explained the rationale for its acceptance of that approach. NMFS' failure to do so has prevented the public from effectively commenting on NMFS' approach to this issue, in contravention of the Administrative Procedure Act, on a matter of obvious significance to the agency's core negligible impact findings.

Response: The Commenter is mistaken, there were no mortalities modeled or authorized in the Phase II rulemaking (2015–2020) for the MITT Study Area. Please see 80 FR 46112 (Aug. 3, 2015).

Comment 46: A Commenter recommended that NMFS consider additional measures to address mitigation for explosive events at night and during periods of low-visibility, either by enhancing the observation platforms to include aerial and/or passive acoustic monitoring (such as glider use), as has been done here with sinking exercises, or by restricting events to particular Beaufort sea states (depending on likely species presence and practicability). Another Commenter complains that NMFS has not required aerial or passive acoustic monitoring as mandatory mitigation, appears unwilling to restrict operations in low-visibility conditions, and has set safety-zone bounds that are inadequate to protect high-frequency cetaceans even from PTS.

Response: As described in Section 5.6.2 (Explosives) of the 2020 MITT FSEIS/OEIS, when assessing and developing mitigation, NMFS and the Navy considered reducing the number and size of explosives and limiting the locations and time of day of explosive training and testing in the MITT Study Area. The locations and timing of the training and testing activities that use explosives vary throughout the MITT Study Area based on range scheduling, mission requirements, testing program requirements, and standard operating procedures for safety and mission success. Although activities using explosives typically occur during daytime for safety reasons, it is impractical for the Navy to prohibit every type of explosive activity at night or during low visibility conditions or during different Beaufort sea states. Doing so would diminish activity realism, which would impede the ability for Navy Sailors to train and become proficient in using explosive weapons systems (which would result in a significant risk to personnel safety during military missions and combat operations), and would impede the Navy's ability to certify forces to deploy to meet national security needs.

Passive acoustic devices, whether vessel-deployed or using research sensors on gliders or other devices, can serve as queuing information that vocalizing marine mammals could be in the vicinity. Passive acoustic detection does not account for individuals not vocalizing. Navy surface ships train to localize submarines, not marine mammals. Some aviation assets deploying ordnance do not have concurrent passive acoustic sensors. Furthermore, Navy funded civilian passive acoustic sensors do not report in real-time. Instead, a glider is set on a certain path or floating/bottom-mounted sensor deployed. The sensor has to then be retrieved often many months after deployment (1–8 months), data is sent back to the laboratory, and then subsequently analyzed. Combined with lack of localization, gliders with passive acoustic sensors are therefore not suitable for mitigation. Further, a SINKEX is a highly scripted event that due to its complexity has additional assets involved that are not practicable to bring to bear in all the smaller types of training and testing scenarios.

The Navy does employ passive acoustic monitoring when practicable to do so (*i.e.,* when assets that have passive acoustic monitoring capabilities are already participating in the activity) and several of the procedural mitigation measures reflect this, but many platforms do not have passive acoustic monitoring capabilities. Adding a passive acoustic monitoring capability (either by adding a passive acoustic monitoring device (*e.g.,* hydrophone) to a platform already participating in the activity, or by adding a platform with integrated passive acoustic monitoring capabilities to the activity, such as a sonobuoy) for mitigation is not practicable. As discussed in Section 5.6.3 (Active and Passive Acoustic Monitoring Devices) of the 2020 MITT FSEIS/OEIS, there are significant manpower and logistical constraints that make constructing and maintaining additional passive acoustic monitoring systems or platforms for each training and testing activity impracticable. The Navy is required to implement pre-event observation mitigation, as well as post-event observation when practical, for all in-water explosive events. If there are other platforms participating in these events and in the vicinity of the detonation area, they will also visually observe this area as part of the mitigation team.

The Mitigation Section (Section 5) of the 2020 MITT FSEIS/OEIS includes a full analysis discussion of the mitigation measures that the Navy will implement, as well as those that have been considered but eliminated, including potential measures that have been raised by NMFS or the public in the past. The Navy has explained that training and testing in both good visibility (*e.g.,* daylight, favorable weather conditions) and low visibility (*e.g.,* nighttime, inclement weather conditions) is vital because environmental differences between day and night and varying weather conditions affect sound propagation and the detection capabilities of sonar. Temperature layers that move up and down in the water column and ambient noise levels can vary significantly between night and day. This affects sound propagation and could affect how sonar systems function and are operated. While some small reduction in the probability or severity of impacts could result from the implementation of this measure, it would not be practicable for the Navy to restrict operations in low visibility and the measure is not, therefore, warranted.

Regarding the safety zones for high frequency specialists, as the Commenter notes, for some sources the zone in which PTS could be accrued is larger than the mitigation zones. Because of the lower injury thresholds for high frequency specialists, the zones within which these species may incur PTS are significantly larger than other groups, and for some of the louder or more powerful sources, the injury zones are larger than can be effectively monitored

or practicably mitigated at distances beyond the established shutdown zones. In all cases, the required exclusion zones will prevent injury in the area closer to the source, thus alleviating some Level A harassment and preventing more intense or longer duration exposures that would be likely to have more severe impacts, and the small number remaining of anticipated PTS has been evaluated in the negligible impact analysis and appropriately authorized. In addition to the fact that observance and implementation of larger mitigation zones is impracticable, we also note that Navy Lookouts do not differentiate species and therefore it would not be possible to effectively implement a larger shutdown zone that only applied to the two high frequency specialists (dwarf and pygmy sperm whales), especially at the distances at which this differential mitigation would need to apply (beyond the standard zones).

Comment 47: A Commenter recommended that sonar signals might be modified to reduce the level of impact at the source. Mitigating active sonar impacts might be achieved by employing down-sweeps with harmonics or by reducing the level of side bands (or harmonics). The Commenter strongly recommended that NMFS require and set a timeline for this research within the context of the present rulemaking.

Response: The Commenter notes that NOAA's Ocean Noise Strategy Roadmap puts an emphasis on source modification and habitat modification as an important means for reducing impacts, however, where the modification of sources is discussed, the focus of the Roadmap is on modifying technologies for activities in which low frequency, broadband sound (which contribute far more significantly to increased chronic noise levels) is incidental to the activity (*e.g.,* maritime traffic). As described in the 2020 MITT FSEIS/OEIS, at this time, the science on the differences in potential impacts of up or down sweeps of the sonar signal (*e.g.,* different behavioral reactions) is extremely limited and requires further development before a determination of potential mitigation effectiveness can be made. There is data on behavioral responses of a few captive harbor porpoises to varying signals. Although this very limited data set suggests up or down sweeps of the sonar signal may result in different reactions by harbor porpoises in certain circumstances, the author of those studies highlights the fact that different species respond to signals with varying characteristics in a number of ways. In fact, the same signals cited here were also played to harbor seals, and their responses were different from the harbor porpoises. Furthermore, harmonics in a signal result from a high-intensity signal being detected in close proximity; they could be artificially removed for a captive study, but cannot be whitened in the open ocean. Active sonar signals are designed explicitly to provide optimum performance at detecting underwater objects (*e.g.,* submarines) in a variety of acoustic environments. If future studies indicate that modifying active sonar signals could be an effective mitigation approach, then NMFS with the Navy will investigate if and how the mitigation would affect the sonar's performance and how that mitigation may be applied in future authorizations, but currently NMFS does not have a set timeline for this research and how it may be applied to future rulemakings.

Comment 48: A Commenter recommends that NMFS should consider requiring the Navy to employ thermal detection in optimal conditions, or, alternatively, require the establishment of a pilot program for thermal detection, with annual review under the adaptive management system. According to the 2019 MITT DSEIS/OEIS, the Navy ''plans to continue researching thermal detection technology to determine their effectiveness and compatibility with Navy applications.''

Response: Thermal detection systems are more useful for detecting marine mammals in some marine environments than others. Current technologies have limitations regarding water temperature and survey conditions (*e.g.,* rain, fog, sea state, glare, ambient brightness), for which further effectiveness studies are required. Thermal detection systems are generally thought to be most effective in cold environments, which have a large temperature differential between an animal's temperature and the environment. Current thermal detection systems have proven more effective at detecting large whale blows than the bodies of small animals, particularly at a distance. The effectiveness of current technologies has not been demonstrated for small marine mammals. Research to better understand, and improve, thermal technology continues, as described below.

The Navy has been investigating the use of thermal detection systems with automated marine mammal detection algorithms for future mitigation during training and testing, including on autonomous platforms. Thermal detection technology being researched by the Navy, which is largely based on existing foreign military grade hardware, is designed to allow observers and eventually automated software to detect the difference in temperature between a surfaced marine mammal (*i.e.,* the body or blow of a whale) and the environment (*i.e.,* the water and air). Although thermal detection may be reliable in some applications and environments, the current technologies are limited by their: (1) Low sensor resolution and a narrow fields of view, (2) reduced performance in certain environmental conditions, (3) inability to detect certain animal characteristics and behaviors, and (4) high cost and uncertain long-term reliability.

Thermal detection systems for military applications are deployed on various Department of Defense (DoD) platforms. These systems were initially developed for night time targeting and object detection (*e.g.,* a boat, vehicle, or people). Existing specialized DoD infrared/thermal capabilities on Navy aircraft and surface ships are designed for fine-scale targeting. Viewing arcs of these thermal systems are narrow and focused on a target area. Furthermore, sensors are typically used only in select training events, not optimized for marine mammal detection, and have a limited lifespan before requiring expensive replacement. Some sensor elements can cost upward of $300,000 to $500,000 per device, so their use is predicated on a distinct military need.

One example of trying to use existing DoD thermal systems is being proposed by the U.S. Air Force. The Air Force agreed to attempt to use specialized U.S. Air Force aircraft with military thermal detection systems for marine mammal detection and mitigation during a limited at-sea testing event. It should be noted, however, these systems are specifically designed for and integrated into a small number of U.S. Air Force aircraft and cannot be added or effectively transferred universally to Navy aircraft. The effectiveness remains unknown in using a standard DoD thermal system for the detection of marine mammals without the addition of customized system-specific computer software to provide critical reliability (enhanced detection, cueing for an operator, reduced false positive, etc.)

Current DoD thermal sensors are not always optimized for marine mammal detections versus object detection, nor do these systems have the automated marine mammal detection algorithms the Navy is testing via its ongoing research program. The combination of thermal technology and automated algorithms are still undergoing demonstration and validation under Navy funding.

Thermal detection systems specifically for marine mammal detection have not been sufficiently studied both in terms of their effectiveness within the environmental conditions found in the MITT Study Area and their compatibility with Navy training and testing (*i.e.,* polar waters vs. temperate waters). The effectiveness of even the most advanced thermal detection systems with technological designs specific to marine mammal surveys is highly dependent on environmental conditions, animal characteristics, and animal behaviors. At this time, thermal detection systems have not been proven to be more effective than, or equally effective as, traditional techniques currently employed by the Navy to observe for marine mammals (*i.e.,* naked-eye scanning, hand-held binoculars, high-powered binoculars mounted on a ship deck). The use of thermal detection systems instead of traditional techniques would compromise the Navy's ability to observe for marine mammals within its mitigation zones in the range of environmental conditions found throughout the MITT Study Area. Furthermore, thermal detection systems are designed to detect marine mammals and do not have the capability to detect other resources for which the Navy is required to implement mitigation, including sea turtles. Focusing on thermal detection systems could also provide a distraction from and compromise the Navy's ability to implement its established observation and mitigation requirements. The mitigation measures discussed in the *Mitigation Measures* section include the maximum number of Lookouts the Navy can assign to each activity based on available manpower and resources; therefore, it would be impractical to add personnel to serve as additional Lookouts. For example, the Navy does not have available manpower to add Lookouts to use thermal detection systems in tandem with existing Lookouts who are using traditional observation techniques.

The Defense Advanced Research Projects Agency funded six initial studies to test and evaluate infrared-based thermal detection technologies and algorithms to automatically detect marine mammals on an unmanned surface vehicle. Based on the outcome of these initial studies, the Navy is pursuing additional follow-on research efforts. Additional studies are currently being planned for 2020+ but additional information on the exact timing and scope of these studies is not currently available (still in the development stage).

The Office of Naval Research Marine Mammals and Biology program also funded a project (2013–2019) to test the thermal limits of infrared-based automatic whale detection technology. That project focused on capturing whale spouts at two different locations featuring subtropical and tropical water temperatures, optimizing detector/classifier performance on the collected data, and testing system performance by comparing system detections with concurrent visual observations. Results indicated that thermal detection systems in subtropical and tropical waters can be a valuable addition to marine mammal surveys within a certain distance from the observation platform (*e.g.,* during seismic surveys, vessel movements), but have challenges associated with false positive detections of waves and birds (Boebel, 2017). While Zitterbart *et al.* (2020) reported on the results of land-based thermal imaging of passing whales, their conclusion was that thermal technology under the right conditions and from land can detect a whale within 3 km although there could also be lots of false positives, especially if there are birds, boats, and breaking waves at sea. Thermal detection systems exhibit varying degrees of false positive detections (*i.e.,* incorrect notifications) due in part to their low sensor resolution and reduced performance in certain environmental conditions. False positive detections may incorrectly identify other features (*e.g.,* birds, waves, boats) as marine mammals. In one study, a false positive rate approaching one incorrect notification per 4 min of observation was noted.

The Navy plans to continue researching thermal detection systems for marine mammal detection to determine their effectiveness and compatibility with Navy applications. If the technology matures to the state where thermal detection is determined to be an effective mitigation tool during training and testing, NMFS and the Navy will assess the practicability of using the technology during training and testing events and retrofitting the Navy's observation platforms with thermal detection devices. The assessment will include an evaluation of the budget and acquisition process (including costs associated with designing, building, installing, maintaining, and manning the equipment); logistical and physical considerations for device installment, repair, and replacement (*e.g.,* conducting engineering studies to ensure there is no electronic or power interference with existing shipboard systems); manpower and resource considerations for training personnel to effectively operate the equipment; and considerations of potential security and classification issues. New system integration on Navy assets can entail up to 5 to 10 years of effort to account for acquisition, engineering studies, and development and execution of systems training. The Navy will provide information to NMFS about the status and findings of Navy-funded thermal detection studies and any associated practicability assessments at the annual adaptive management meetings.

Evidence regarding the current state of this technology does not support the assertion that the addition of these devices would meaningfully increase detection of marine mammals beyond the current rate (especially given the narrow field of view of this equipment and the fact that a Lookout cannot use standard equipment when using the thermal detection equipment) and, further, modification of standard Navy equipment, training, and protocols would be required to integrate the use of any such new equipment, which would incur significant cost. At this time, requiring thermal equipment is not warranted given the prohibitive cost and the uncertain benefit (*i.e.,* reduction of impacts) to marine mammals. Likewise requiring the establishment of a pilot program is not appropriate. However, as noted above, the Navy continues to support research and technology development to improve this technology for potential future use.

Comment 49: A Commenter stated that the proposed rule does not contain any indication that a practicability analysis was conducted, nor does it prescribe any speed reduction measure. They ask that NMFS conduct a practicability analysis and implement vessel speed reduction in (at minimum) the Marpi Reef and Chalan Kanoa Reef Mitigation Areas and other areas of importance to humpback whales, as was done for the North Atlantic right whale in the AFTT Study Area. They further recommended that the agency require the Navy to collect and report data on ship speed to allow for objective evaluation by NMFS of ship-strike risk, of harassment resulting from vessel activity, and of the potential benefit of additional speed-focused mitigation measures.

Response: NMFS discussed its evaluation of requiring vessel speed restrictions in Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas in *Comment 17* above. NMFS and the Navy conducted an operational analysis of potential mitigation areas throughout

the entire MITT Study Area to consider a wide range of mitigation options, including but not limited to vessel speed restrictions. Navy ships transit at speeds that are optimal for fuel conservation or to meet operational requirements. In our assessment of potential mitigation, NMFS and the Navy have considered implementing vessel speed restrictions. However, as described in Section 5 (Mitigation), Section 5.3.4.1 (Vessel Movement) of the 2020 MITT FSEIS/OEIS, including vessel speed restrictions would be impracticable due to implications for safety (the ability to avoid potential hazards), sustainability (maintain readiness), and the Navy's ability to continue meeting its Title 10 requirements to successfully accomplish military readiness objectives. Any vessel speed restrictions would prevent vessel operators from gaining skill proficiency, would prevent the Navy from properly testing vessel capabilities, and/or would increase the time on station during training or testing activities as required to achieve skill proficiency or properly test vessel capabilities, which would significantly increase fuel consumption. NMFS thoroughly reviewed and considered the information and analysis in the 2020 MITT FSEIS/OEIS, and concurred with the Navy's determination that vessel speed restrictions are impracticable. As discussed in the *Mitigation Measures* section of this rule, the Navy will implement mitigation to avoid vessel strikes throughout the Study Area. Given the impracticability of vessel speed restrictions combined with the fact that vessel strike is not anticipated in the MITT Study Area and that the required mitigation for vessel movement will already minimize any potential for ship strike, NMFS finds vessel speed reductions are not warranted.

As required through the Navy's Notification and Reporting Plan (Vessel Strike section), Navy vessels are required to report extensive information, including ship speed, pursuant to any marine mammal vessel strikes. Therefore, the data required for ship strike analysis discussed in the comment is already being collected. Any additional data collection requirement would create an unnecessary burden on the Navy.

Regarding vessel noise from Navy ships, Navy vessels are intentionally designed to be quieter than civilian vessels, and given that adverse impacts from vessel noise are not anticipated to result from Navy activities (see the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat* section in the proposed rule), there is no anticipated harassment caused by vessel activity and therefore no need to collect and report data on ship speed for this purpose.

Comment 50: A Commenter recommended that NMFS should consider a compensatory mitigation scheme to help improve the conservation status or habitat of affected populations. NMFS should consider requiring compensatory mitigation for the adverse impacts of the Navy's activity on marine mammals and their habitat that cannot be prevented or mitigated.

Response: Compensatory mitigation is not required under the MMPA. Instead, authorizations include means of effecting the least practicable adverse impact from the activities on the affected species or stocks and their habitat, which this rule has done through the required procedural and geographic area mitigation measures.

For years, the Navy has implemented a broad and comprehensive range of measures in the MITT Study Area to mitigate potential impacts to marine mammals from its training and testing activities. In addition, from 2010 and ongoing, the Navy has funded extensive marine mammal occurrence studies within the Mariana Islands. As described in this rule, NMFS and the Navy have expanded these measures further where practicable. In addition to the mitigation and monitoring measures required under this rule and past MMPA incidental take authorizations, the Navy engages in an extensive spectrum of other activities that greatly benefit marine species in a more general manner that is not necessarily tied to just military readiness activities. As noted in Section 3, Section 3.0.1.1 (Marine Species Monitoring and Research Programs) of the 2020 MITT FSEIS/OEIS, the Navy provides extensive investment for research programs in basic and applied research. The Navy is one of the largest sources of funding for marine mammal research in the world, which has greatly enhanced the scientific community's understanding of marine species more generally. The Navy's support of marine mammal research includes: Marine mammal detection, including the development and testing of new autonomous hardware platforms and signal processing algorithms for detection, classification, and localization of marine mammals; improvements in density information and development of abundance models of marine mammals; and advancements in the understanding and characterization of the behavioral, physiological (hearing and stress response), and potentially population-level consequences of sound exposure on marine life. Importantly, the Commenter did not recommend any specific measures, rendering it impossible to consider its recommendation at a broader level.

Comment 51: A Commenter recommends that NMFS require that the Navy continue to conduct long-term monitoring and prioritize Navy research projects that aim to quantify the impact of training and testing activities at the individual, and ultimately, population-level. The Commenter recommended individual-level behavioral-response studies, such as focal follows and tagging using DTAGs, carried out before, during, and after Navy operations, that can provide important insights for these species and stocks. The Commenter recommended studies be prioritized that further characterize the suite of vocalizations related to social interaction, such as studies using DTAGs that further characterize social communications between individuals of a species or stock, including between mothers and calves. The Commenter recommends the use of unmanned aerial vehicles for surveying marine species and to provide a less invasive approach to undertaking focal follows. Imagery from unmanned aerial vehicles can also be used to assess body condition and, in some cases, health of individuals. The Commenter recommended that NMFS require the Navy to use these technologies for assessing marine mammal behavior (*e.g.,* swim speed and direction, group cohesion) before, during, and after Navy training and testing. Additionally, the Commenter recommended that the Navy support studies to explore how these technologies can be used to assess body condition, as this can provide an important indication of energy budget and health, which can inform the assessment of population-level impacts.

Response: First, the Navy is pursuing many of the topics that the Commenter identifies, either through the monitoring required under the MMPA or monitoring under the ESA, or through other Navy-funded research programs (ONR and LMR). We are confident that the monitoring conducted by the Navy satisfies the requirements of the MMPA. A list of the monitoring studies that the Navy will be conducting under this rule is at the end of the *Monitoring* section of this final rule.

Broadly speaking, in order to ensure that the monitoring the Navy conducts satisfies the requirements of the MMPA, NMFS works closely with the Navy in the identification of monitoring priorities and the selection of projects to

conduct, continue, modify, and/or stop through the Adaptive Management process, which includes annual review and debriefs by all scientists conducting studies pursuant to the MMPA authorization. The process NMFS and the Navy have developed allows for comprehensive and timely input from NMFS, the Navy, the Marine Mammal Commission, and researchers conducting monitoring under the Navy rule, which is based on rigorous reporting out from the Navy and the researchers doing the work.

With extensive input from NMFS, the Navy established the Strategic Planning Process for Marine Species Monitoring to help structure the evaluation and prioritization of projects for funding. The *Monitoring* section of this rule provides an overview of this Strategic Planning Process. More detail, including the current intermediate scientific objectives, is available in section 5 (Mitigation), Section 5.1.2.2.1.3 (Strategic Planning Process) of the 2020 MITT FSEIS/OEIS and on the monitoring portal as well as in the Strategic Planning Process report. The Navy's evaluation and prioritization process is driven largely by a standard set of criteria that help the internal steering committee evaluate how well a potential project would address the primary objectives of the monitoring program. Given that the Navy's Monitoring Program applies to all of the Navy's major Training and Testing activities and, thereby, spans multiple regions and Study Areas to encompass consideration of the entire U.S. EEZ and beyond, one of the key components of the prioritization process is to focus monitoring in a manner that fills regionally-specific data gaps, where possible (*e.g.,* more limited basic marine mammal distribution data in the MITT Study Area), and also takes advantage of regionally-available assets (*e.g.,* instrumented ranges in the HSTT Study Area). NMFS has opportunities to provide input regarding the Navy's intermediate scientific objectives as well as to provide feedback on individual projects through the annual program review meeting and annual report. For additional information, please visit: *https://www.navymarinespeciesmonitoring.us/about/strategic-planning-process/.*

Details on the Navy's involvement with future research will continue to be developed and refined by the Navy and NMFS through the consultation and adaptive management processes, which regularly consider and evaluate the development and use of new science and technologies for Navy applications. Further, the Navy also works with NMFS to target and prioritize data needs that are more appropriately addressed through Navy research programs, such as the Office of Naval Research and Living Marine Resources programs. The Navy has indicated that it will continue to be a leader in funding of research to better understand the potential impacts of Navy training and testing activities and to operate with the least possible impacts while meeting training and testing requirements. Some of the efforts the Navy is leading or has recently completed are described below.

(1) Individual-level behavioral-response studies—There are no ONR or LMR behavioral response studies in the MITT Study Area. The Mariana Islands are too remote for many of the mainland U.S. and international researchers. There is also insufficient background information or infrastructure to support something as specific as a behavioral response study. For example, Navy instrumented ranges in the HSTT Study Area and the Bahamas are critical in providing consistent beaked whale detections which allow researchers in small boats to more efficiently locate detected whales to apply satellite tracking tags. However, many of the studies on species-specific reactions are likely to be applicable across geographic boundaries (*e.g.,* Cuvier's beaked whale studies in the HSTT Study Area).

(2) Tags and other detection technologies to characterize social communication between individuals of a species or stock, including mothers and calves—DTAGs are just one example of animal movement and acoustics tag. From the Navy's Office of Naval Research and Living Marine Resource programs, Navy funding is being used to improve a suite of marine mammal tags to increase attachment times, improve data being collected, and improve data satellite transmission. The Navy has funded a variety of projects that are collecting data that can be used to study social interactions amongst individuals. For example, as of July 2020 the following studies are currently being funded:

- Assessing performance and effects of new integrated transdermal large whale satellite tags 2018–2021 (Organization: Marine Ecology and Telemetry Research)
- Autonomous Floating Acoustic Array and Tags for Cue Rate Estimation 2019–2020 (Organization: Texas A&M University Galveston)
- Development of the next generation automatic surface whale detection system for marine mammal mitigation and distribution estimation 2019–2021 (Organization: Woods Hole Oceanographic Institution)
- High Fidelity Acoustic and Fine-scale Movement Tags 2016–2020 (Organization: University of Michigan)
- Improved Tag Attachment System for Remotely-deployed Medium-term Cetacean Tags 2019–2023 (Organization: Marine Ecology and Telemetry Research)
- Next generation sound and movement tags for behavioral studies on whales 2016–2020 (Organization: University of St. Andrews)
- On-board calculation and telemetry of the body condition of individual marine mammals 2017–2021 (Organization: University of St. Andrews, Sea Mammal Research Unit)
- The wide-band detection and classification system 2018–2020 (Organization: Woods Hole Oceanographic Institution)

(3) Unmanned Aerial Vehicles to assess marine mammal behavior (*e.g.,* swim speed and direction, group cohesion) before, during, and after Navy training and testing activities—Studies that use unmanned aerial vehicles to assess marine mammal behaviors and body condition are being funded by the Office of Naval Research Marine Mammals and Biology program. Although the technology shows promise (as reviewed by Verfuss *et al.,* 2019), the field limitations associated with the use of this technology have hindered its useful application in behavioral response studies in association with Navy training and testing events. For safety, research vessels cannot remain in close proximity to Navy vessels during Navy training or testing events, so battery life of the unmanned aerial vehicles has been an issue. However, as the technology improves, the Navy will continue to assess the applicability of this technology for the Navy's research and monitoring programs. An example project that the Navy already addressed is integrating remote sensing methods to measure baseline behavior and responses of social delphinids to Navy sonar 2016–2019 (Organization: Southall Environmental Associates Inc.).

(4) Modeling methods that could provide indicators of population-level effects—NMFS asked the Navy to expand funding to explore the utility of other, simpler modeling methods that could provide at least an indicator of population-level effects, even if each of the behavioral and physiological mechanisms are not fully characterized. The Office of Naval Research Marine Mammals and Biology program has invested in the Population

Consequences of Disturbance (PCoD) model, which provides a theoretical framework and the types of data that would be needed to assess population level impacts. Although the process is complicated and many species are data poor, this work has provided a foundation for the type of data that is needed. Therefore, in the future, the relevant data pieces that are needed for improving the analytical approaches for population level consequences resulting from disturbances will be collected during projects funded by the Navy's marine species monitoring program. However, currently, PCoD models are dependent on too many unknown factors to produce a reliable answer for most species and activity types, and further work is needed (and underway) to develop a more broadly applicable generalized construct that can be used in an impact assessment.

As discussed in the *Monitoring* section of the final rule, the Navy's marine species monitoring program typically supports 10–15 projects in the Pacific at any given time. Current projects cover a range of species and topics from collecting baseline data on occurrence and distribution, to tracking whales, to conducting behavioral response studies on beaked whales and pilot whales. The Navy's marine species monitoring web portal provides details on past and current monitoring projects, including technical reports, publications, presentations, and access to available data and can be found at: *https://www.navymarinespeciesmonitoring.us/regions/pacific/current-projects/.*

In summary, NMFS and the Navy work closely together to prioritize, review, and adaptively manage the extensive suite of monitoring that the Navy conducts in order to ensure that it satisfies the MMPA requirements. NMFS has laid out a broad set of goals that are appropriate for any entity authorized under the MMPA to pursue, and then we have worked with the Navy to manage their projects to best target the most appropriate goals given their activities, impacts, and assets in the MITT Study Area. Given the scale of the MITT Study Area and the variety of activities conducted, there are many possible combinations of projects that could satisfy the MMPA standard for the rule. The Commenter has recommended more and/or different monitoring than NMFS is requiring and the Navy is conducting or currently plans to conduct, but has in no way demonstrated that the monitoring currently being conducted does not satisfy the MMPA standard. NMFS appreciates the Commenter's input, and will consider it, as appropriate, in the context of our adaptive management process, but is not recommending any changes at this time.

Comment 52: A Commenter recommended that the Navy conduct research and documentation of the residency of populations of spinner dolphins on Guam and impacts of the training to them. The Commenter states that these populations may particularly be impacted by the mine explosion training in areas at Agat and Asan. The Commenter recommends that the Navy provide better information on the impacts of the explosions on these populations before implementing the training at those sites. The Commenter recognizes and supports that an area frequented by the Agat spinner dolphins is identified as a mitigation area (mostly in National Park Service managed waters) because of their presence.

Response: The Navy has been funding the majority of marine species research and surveys in the Mariana Islands. Over a nine year period from 2010–2018 during the Navy-funded small boat surveys in the Mariana Islands, 22,488 km of on-effort surveys were conducted with 157 encounters with pods of spinner dolphins (Hill *et al.,* 2019). The approximate distance from shore for these encounters was 1 km, indicative of their preference for nearshore habitat and prevalence in the MITT Study Area (Hill *et al.,* 2017a; Hill *et al.,* 2018b; Hill *et al.,* 2019). In addition to visual sightings, a photo-identification catalog for spinner dolphins was developed as well as biopsies taken for genetic analysis (Hill *et al.,* 2019). The Navy has also contributed significant funding for NMFS' Pacific Marine Assessment Program for Protected Species (PACMAPPS) program. PACMAPPS is a partnership among Federal agencies to conduct surveys to assess the abundance of multiple species and their ecosystems (NOAA Fisheries, U.S. Navy, Bureau of Ocean Energy Management, U.S. Fish and Wildlife Service). With Navy funding, NMFS will conduct a 60-day marine mammal survey within the Mariana Island EEZ in the spring and summer of 2021. Future Mariana Islands marine mammal surveys after PACMAPPs will be funded by NMFS' Pacific Islands Fisheries Science Center. For an extensive discussion of spinner dolphin sightings near Agat Bay, see Section I.3.3.1.1.1 of the 2020 MITT FSEIS/OEIS.

Regarding the impacts of explosives, activities, including mine countermeasure activities at the Agat Bay and Apra Harbor sites, were modeled to estimate impacts on marine mammals from explosives. No mortalities of any marine mammals are predicted. Asan is not identified as an underwater detonation area. Further, although called Agat Bay Mine Neutralization Site, the actual detonation site is in waters deeper than 1,000 m and over 8 km west of the shallow water Agat Bay Nearshore Geographic Mitigation Area (see Figure 3 of this rule) and therefore there is not a potential for overlap of explosive activities at the Agat Bay Mine Neutralization Site with spinner dolphin resting. Additionally, the Navy uses the Agat Bay Mine Neutralization Site for smaller charge weight mine neutralization activities that are episodic with large temporal variation between successive events. In consideration of the mine neutralization mitigations established for all marine mammals (see the *Procedural Mitigation* subsection in the *Mitigation Measures* section of the rule) and the distance between the actual detonation site and the shallow water spinner dolphin habitat in Agat Bay, the effects to spinner dolphins will be minimal.

Negligible Impact Determination

Comment 53: A Commenter asserts that most of NMFS' discussion consists, once again, of generalized statements meant to suggest why the estimated levels of take will not result in greater than negligible impacts on marine mammals. For example, NMFS discounts the potential for population-level impacts by asserting that based on the nature of the Navy activities and the movement patterns of marine mammals, it is unlikely any particular subset would be taken over more than a few sequential days 85 FR 5875. Yet NMFS presents no details of the Navy's operations in support of this position. Further a Commenter says that the proposed rule makes no attempt to apply any of the methods used by the marine mammal research community to assess population-level harm. Such methods, involving quantitative or detailed qualitative assessment, include but are not limited to the use of reasonable proxies for population-level impact; models of masking effects; energetic models, such as on foraging success; or quantitative assessments of chronic noise or stress. The Commenter asserts that the agency does not consider the effects of these more frequent exposures on individual and population fitness, nor, again, does NMFS provide more than general statements discounting the significance of the expected take.

Response: NMFS fully considered the potential for aggregate effects from all Navy activities and the Commenter

offers no evidence to support the assertion that any individual marine mammals, of any species, would be subject to ''frequent exposures.'' NMFS has explained in detail in the proposed rule and again in this final rule how the estimated takes were calculated for marine mammals, and then how the large size of the Study Area across which activities may be distributed (and the ASW activities utilizing MF1 sonar, which account for the majority of the takes may occur anywhere in the Study Area and predominantly more than 3 nmi from shore) combined with the comparatively small number of takes as compared to the abundance of any species in the area does not support that any individuals would likely be taken over more than a few non-sequential days. We also consider UMEs (where applicable) and previous environmental impacts, where appropriate, to inform the baseline levels of both individual health and susceptibility to additional stressors, as well as stock status. Further, the species-specific assessments in the *Analysis and Negligible Impact Determination* section pull together and address the combined injury, behavioral disturbance, and other effects of the aggregate MITT activities (and in consideration of applicable mitigation) as well as other information that supports our determinations that the Navy activities will not adversely affect any species via impacts on rates of recruitment or survival. We refer the reader to the *Analysis and Negligible Impact Determination* section for this analysis. NMFS has described and applied a reasoned and comprehensive approach to evaluating the effects of the Navy activities on marine mammal species and their habitat. The Commenter cites various articles in which one analytical approach or another was used to evaluate particular scenarios or impacts, with no explanation of why those methods are more appropriate or applicable.

Regarding the assertion that NMFS does not adequately consider stress responses in its analysis, NMFS does not assume that the impacts are insignificant. However, there is currently neither adequate data nor a mechanism by which the impacts of stress from acoustic exposure can be reliably and independently quantified. Stress effects that result from noise exposure likely often occur concurrently with Level B harassment (behavioral disturbance) and many are likely captured and considered in the quantification of other takes by harassment that occur when individuals come within a certain distance of a sound source (behavioral disturbance, PTS, and TTS). The effects of these takes were fully evaluated in the *Analysis and Negligible Impact Determination* section.

Comment 54: A Commenter asserted that counter to NMFS' assertion that no evidence of population-level consequences exists, an apparent beaked whale population sink is observed on the AUTEC range (in the Bahamas), attributed to the high levels of cumulative noise exposure at the site. They further assert that similar concerns have focused attention on resident beaked whale populations on the Navy's SOCAL range, which exhibit strenuous responses to mid-frequency sonar notwithstanding their repeated exposure.

Response: It is incorrect to conclude that there is a ''population sink'' on the Navy's AUTEC range. In the citation provided (Claridge, 2013), that statement is merely a hypothesis, yet to be demonstrated. When considering the portion of the beaked whale population within the SOCAL portion of the HSTT Study Area and as presented in the 2018 HSTT final rule and the 2018 HSTT FEIS/OEIS, multiple studies have documented continued high abundance of beaked whales and the long-term residency of documented individual beaked whales, specifically where the Navy has been training and testing for decades (see for example Debich et al., 2015a, 2015b; Dimarzio et al., 2018, 2020; Falcone and Schorr, 2012, 2014, 2018, 2020; Hildebrand et al., 2009; Moretti, 2016; Širović et al., 2016; Smultea and Jefferson, 2014). There is no evidence that there have been any population-level impacts to beaked whales resulting from Navy training and testing in the SOCAL portion of the HSTT Study Area. Importantly, no resident beaked whale populations have been identified in the MITT Study Area, and both the level of activities and the magnitude and severity of associated impacts on beaked whales are lower than in the HSTT Study Area.

Comment 55: A Commenter stated that NMFS has not apparently considered the impact of Navy activities on a population basis for many of the marine mammal populations within the MITT Study Area. Instead, it has lodged discussion for many populations within broader categories, most prominently mysticetes and odontocetes, that in some cases correspond to general taxonomic groups. Such grouping of stocks elides important differences in abundance, demography, distribution, and other population-specific factors, making it difficult to assume ''that the effects of an activity on the different stock populations'' are identical. *Conservation Council,* 97 F.Supp.3d at 1223. That is particularly true where small, resident populations are concerned, and differences in population abundance, habitat use, and distribution relative to Navy activities can be profoundly significant.

Response: The Commenter erroneously suggests that NMFS makes findings specific only to the level of Odontocetes and Mysticetes or other general taxonomic groups, which is clearly inaccurate. NMFS *first* provides information regarding broader groups (such as Mysticetes or Odontocetes) in order to avoid repeating information that is applicable across multiple species (or stocks if applicable), but analyses have been conducted and determinations made specific to each species. Thus we avoid repeating information applicable to a broader taxonomic group or number of species (or stocks where applicable), while also presenting and integrating all information needed to support the negligible impact determination for a particular species (where no stock information is available). We note that in the MITT Study Area, species have not been assigned to stocks and there is little or no information at the stock level. Please refer to the *Analysis and Negligible Impact Determination* section of this final rule.

Comment 56: A Commenter asserted that NMFS assumes that all of the Navy's estimated impacts would not affect individuals or populations through repeated activity—even though the takes anticipated each year would affect the same populations and, indeed, would admittedly involve extensive use of some of the same biogeographic areas. And, the Commenter asserts, while NMFS states that behavioral harassment (aside from that caused by masking effects) involves a stress response that may contribute to an animal's allostatic load, it assumes without further analysis that any such impacts would be insignificant. The Commenter further asserts that both statements are factually insupportable given the lack of any substantial population analysis or quantitative assessment of long-term effects in the proposed rule, in addition to the numerous deficiencies in the thresholds and modeling that NMFS has adopted from the Navy.

Response: As previously discussed, Navy activities are spread out in the offshore waters around these islands, most activities are unit level events which have relatively small footprints of tens of kilometers resulting in small percentages of overall habitat affected at

any one time, activities that use sonar or explosives are not conducted every day of the year (active sonar use has traditionally been used on 20 percent of days or less, as reported through the CNA analysis of beaked whale strandings), and even within a day sonar use during an activity is intermittent (1 ping every 50 seconds) and often for short duration periods (minutes to up to a few hours at a time). The impacts of stress have been considered in NMFS' assessment (see the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat* section of the proposed rule) and are also addressed in the response to *Comment 53* above. Regarding the take of marine mammals across the multiple years of the rule, NMFS has found that in each of the seven years of the rule (in which no individuals of any species are expected to be taken on more than a few non-sequential days), the authorized take is not expected to affect the reproductive success or survivorship of any individual marine mammal. Given the lack of any impacts on the reproduction or survival of any affected individuals, there will be no effects on any species' annual rates of recruitment or survival in any year, and therefore no basis to suggest that impacts would accrue over the seven years of the rule in a manner that would have a non-negligible impact on an affected species.

Comment 57: A Commenter stated that NMFS does not consider the potential for acute synergistic effects from multiple activities taking place at one time, as happens during major exercises or from Navy activities in combination with other actions. For example, the agency does not consider the greater susceptibility to vessel strike of animals that have been temporarily harassed or disoriented, nor does NMFS consider (for example) the synergistic effects of noise with other stressors in producing or magnifying a stress response. This lack of analysis is not supportable under the MMPA. Without an accurate assessment of existing threats to marine mammals, NMFS lacks a sufficient environmental baseline to determine whether the Navy's action will have more than a negligible impact on marine mammal species and stocks.

Response: NMFS did analyze the potential for aggregate effects from mortality, injury, masking, habitat effects, energetic costs, stress, hearing loss, and behavioral disturbance from the Navy's activities in reaching the negligible impact determinations. The modeling for MTEs and all activities includes the accumulated energy of all sonar sources and stressors. Outside of MTEs or some or the larger coordinated events, it is unlikely for several unit level activities to be conducted in the same day in the same location/time to produce aggregate effects on an individual. Further, we have explicitly discussed the potential interaction of an individual being impacted by TTS and behavioral disturbance simultaneously. We refer the reader to the *Analysis and Negligible Impact Determination* section of the final rule for the discussion on the potential for aggregate effects of the Navy's activities on individuals as well as how these effects on individuals relate to potential effects on annual rates of recruitment and survival for each species.

In addition, NMFS fully considers the potential for aggregate/synergistic effects from all Navy activities. We also consider UMEs (when applicable) and previous environmental impacts, where appropriate, to inform the baseline levels of both individual health and susceptibility to additional stressors, as well as species/stock status. Further, the species assessments in the *Analysis and Negligible Impact Determination* section (which have been updated and expanded for some species, *i.e.,* humpback whales and beaked whales) pull together and address the combined potential mortality, injury, behavioral disturbance, and other effects of the aggregate MITT activities (and in consideration of applicable mitigation measures) as well as additional information from the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat* and *Estimated Take of Marine Mammals* sections to support our determinations that the Navy activities will not adversely affect any species via impacts on rates of recruitment or survival. We refer the reader to the *Analysis and Negligible Impact Determination* section for this analysis.

Widespread, extensive monitoring since 2006 on Navy ranges that have been used for training and testing for decades has demonstrated no evidence of population-level impacts. Based on the best available science, including research by NMFS and the Navy's marine mammal studies, there is no evidence that ''population-level harm'' to marine mammals is occurring in the MITT Study Area. Through the process described in the rule and regulations, NMFS will work with the Navy to assure that the aggregate or cumulative impacts remain at the negligible impact level.

Regarding the consideration of stress responses, NMFS does not assume that the impacts are insignificant. There is currently neither adequate data nor a mechanism by which the impacts of stress from acoustic exposure can be reliably and independently quantified. However, stress effects that result from noise exposure likely often occur concurrently with behavioral disturbance and many are likely captured and considered in the quantification of other takes by harassment that occur when individuals come within a certain distance of a sound source (behavioral disturbance, PTS, and TTS). Further, the Commenter provides no support for the speculative assertion that animals that are harassed would have greater susceptibility to vessel strike, but regardless, the agency's analysis of the likelihood of vessel strikes considers all available and applicable information (see the *Potential Effects of Vessel Strike* subsection of the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat* section of the proposed rule).

NEPA

Comment 58: A Commenter stated that the Navy (and thereby NMFS, since the agency has adopted the 2020 MITT FSEIS/OEIS to satisfy its NEPA obligations for the MMPA rulemaking and subsequent issuance of the Letter of Authorization) failed its NEPA requirements: (1) To inform the public as to its intentions and the potential impacts of those intentions in relation to their continued weapons testing in the MITT Study Area and (2) To consider all available scientific evidence that their activities are resulting in wider take of marine mammals than previously known.

Response: NMFS disagrees that the Navy and NMFS failed to satisfy any NEPA requirements. The Navy prepared, with NMFS participating as a cooperating agency, and made available for public review and comment the 2019 MITT DSEIS/OEIS, which fully analyzed the Navy's and NMFS' proposed actions. To better accommodate stakeholders and the public, the Navy provided 75 days to review and comment on the 2019 MITT DSEIS/OEIS. The comment period for the DSEIS/OEIS was from February 1, 2019 to April 17, 2019, which is 30 days longer than the minimum required time for review (40 CFR 6.203(c)(3)(v)).

The Navy held four open house public meetings, one each on Tinian (March 14, 2019), Rota (March 15, 2019), Saipan (March 18, 2019), and Guam (March 19, 2019). The public meetings were an ideal opportunity for the public to ask questions of Navy team members (and specific subject matter experts on Saipan and Guam) about the analysis documented in the 2020 MITT FSEIS/OEIS. The Navy encouraged the

public to attend these meetings and broadly notified the public through the media, including paid newspaper advertisements and news releases, and direct mail, including letters, postcards, and emails.

Further, the 2020 MITT FSEIS/OEIS includes the best available information regarding the impacts of the Navy's activities on the human environment, including marine mammals.

Comment 59: A Commenter says that NMFS cannot rely on the EIS to fulfill its obligations under NEPA. Without significant revision, the 2019 MITT DSEIS/OEIS cannot meet NMFS' NEPA obligations. The Commenter urges NMFS to recognize that the alternatives and mitigation set forth in the 2019 MITT DSEIS/OEIS are inadequate and to supplement the document accordingly.

Response: Consistent with the regulations published by the Council on Environmental Quality (CEQ), it is common and sound NEPA practice for NOAA to participate as a cooperating agency and adopt a lead agency's NEPA analysis when, after independent review, NOAA determines the document to be sufficient in accordance with 40 CFR 1506.3. Specifically here, NOAA is satisfied that the 2020 MITT FEIS/OEIS adequately addresses the impacts of issuing the MMPA incidental take authorization and that NOAA's comments and concerns have been adequately addressed. NMFS' early participation in the NEPA process and role in shaping and informing analyses using its special expertise ensured that the analysis in the 2020 MITT FSEIS/OEIS is sufficient for purposes of NMFS' own NEPA obligations related to its issuance of incidental take authorization under the MMPA.

Regarding the alternatives and mitigation, NMFS' early involvement in development of the 2020 MITT FSEIS/OEIS and role in evaluating the effects of incidental take under the MMPA ensured that the 2020 MITT FSEIS/OEIS would include adequate analysis of a reasonable range of alternatives. The 2020 MITT FSEIS/OEIS includes a No Action Alternative specifically to address what could happen if NMFS did not issue an MMPA authorization. The other two Alternatives address two action options that the Navy could potentially pursue while also meeting their mandated Title 10 training and testing responsibilities. More importantly, these alternatives fully analyze a comprehensive variety of mitigation measures. This mitigation analysis supported NMFS' evaluation of our mitigation options in potentially issuing an MMPA authorization, which, if the authorization can be issued under the negligible impact standard, primarily revolves around the appropriate mitigation to prescribe. This approach to evaluating a reasonable range of alternatives is consistent with NMFS policy and practice for issuing MMPA incidental take authorizations. NOAA has independently reviewed and evaluated the 2020 MITT FSEIS/OEIS, including the range of alternatives, and determined that the 2020 MITT FSEIS/OEIS fully satisfies NMFS' NEPA obligations related to its decision to issue the MMPA final rule and associated LOA, and we have adopted it.

Comment 60: To satisfy NEPA's mandate to take a hard look at environmental impacts, NMFS and the Navy must incorporate new information (Simonis *et al.,* 2020) into their analysis of the impacts of MITT activities on marine mammals. Moreover, the agencies must evaluate alternatives that prohibit the use of harmful sonar in the biologically important areas for beaked whales around Saipan and Tinian identified in Simonis *et al.* (2020).

Response: NMFS has considered Simonis *et al.* (2020) in the development of this final rule and directs the reader to the *Stranding* section of the rule, as well as the response to Comment 19, in which we address the areas around Saipan and Tinian referenced in Simonis *et al.* (2020). Likewise the Navy has considered this new information from Simonis *et al.* (2020) in the 2020 MITT FSEIS/OEIS.

Other Comments

Comment 61: The Commenter argued that an analysis based on reported strikes by Navy vessels alone does not account for the additional risk of undetected under-reported whale strikes. In assessing ship-strike risk, NMFS and the Navy should include offsets to account for potentially undetected and unreported collisions.

Response: First, it is important to note that NMFS' assessment of whether ship strike is likely does not rely wholly on whether or not there have been reported strikes by the Navy in the past, but also considers the seasonal occurrence and density of large whales, the stranding record (which could note strikes by other entities), and the relative percentage of Navy vessel traffic. Regarding the likelihood of undetected Navy strikes, under Navy-wide policy Navy ships are mandated to report any Navy ship strike to marine mammals. To date, there have been none in the MITT Study Area from Navy ships. While NMFS agrees that broadly speaking the number of total ship strikes from all sources may be underestimated due to incomplete information from other sectors (shipping, etc.), NMFS is confident that any whales struck by Navy vessels are detected and reported (as has occurred in other Navy study areas), and therefore relying on the history of Navy vessel strikes is appropriate and supported. Navy ships have multiple Lookouts, including on the forward part of the ship that can visually detect a struck whale (which has occasionally occurred elsewhere), in the unlikely event ship personnel do not feel the strike. The Navy's strict internal procedures and mitigation requirements in this and previous rules include reporting of any vessel strikes of marine mammals, and the Navy's discipline, extensive training (not only for detecting marine mammals, but for detecting and reporting any potential navigational obstruction), and strict chain of command give NMFS a high level of confidence that all strikes actually get reported. For more discussion of the specific circumstances that make it less likely that Navy vessels will strike a marine mammal, see the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat* section in the proposed rule. Accordingly, NMFS is confident that the information used to support the vessel-strike analysis is accurate and complete, and there is no need to include offsets to account for potentially undetected and unreported collisions allegedly associated with the Navy's training and testing activities.

Separately, there is no evidence that Navy training and testing activities (including acoustic activities) increase the risk of nearby non-Navy vessels (or other nearby Navy vessels not involved in the training or testing activities) striking marine mammals.

Changes From the Proposed Rule to the Final Rule

Between the proposed rule and the final rule, mitigation, monitoring, reporting, and adaptive management measures have been added, augmented, and clarified, and the negligible impact analysis for humpback whales around Saipan has been modified.

Specifically regarding the humpback whale assessment, since publication of the proposed rule, additional information and analysis have been used to refine the assessment for the impacts of sonar training and testing on humpback whales around Saipan, resulting in an increase in the total take numbers for humpback whales. A subsection describing this additional analysis and how it changes the take numbers (*Humpback Whales Around*

Saipan) has been added to the *Estimated Take of Marine Mammals* section and the total take numbers for humpback whales have been changed in Table 28 and Table 47.

Regarding the changes to mitigation measures, in the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas, where there was previously a limitation on the use of explosives but no limitation on the use of active sonar, there is now a 20-hr annual cap between December 1 and April 30 on the use of hull-mounted MF1 mid-frequency active sonar for these areas (20 hrs total for both areas combined), as well as a requirement that the Navy report all active sonar use (all bins, by bin) in these areas between December 1 and April 30. These changes are discussed in greater detail in the *Mitigation Measures* section of this rule.

In addition, the Navy has committed to the following actions, which will expand the science and inform future adaptive management actions related to beaked whales, specifically, as well as other species in the MITT Study Area:

1. Co-funding the Pacific Marine Assessment Program for Protected Species (PACMAPPS) survey in spring-summer 2021 to help document beaked whale occurrence, abundance, and distribution in the Mariana Islands. This effort will include deployments of a towed array as well as floating passive acoustic buoys.

2. Continuing to fund additional stranding response/necropsy analyses for the Pacific Islands region.

3. Submitting a proposal through the annual Federally Funded Research and Development Center (FFRDC) call to fund Center for Naval Analysis (CNA) to develop a framework to improve the analysis of single and mass stranding events, including the development of more advanced statistical methods to better characterize the uncertainty associated with data parameters.

4. Increasing analysis for any future beaked whale stranding in the Mariana Islands to include detailed Navy review of available records of sonar use.

5. Monitoring future beaked whale occurrence within select portions of the MITT Study Area starting in 2022 (so as to not duplicate efforts from item number 1 above).

6. Including Cuvier's beaked whales as a priority species for analysis under a 2020–2023 Navy research-funded program entitled Marine Species Monitoring for Potential Consequences of Disturbance (MSM4PCOD).

7. Funding and co-organizing with NMFS an expert panel to provide recommendations on scientific data gaps and uncertainties for further protective measure consideration to minimize the impact of Navy training and testing activities on beaked whales in the Mariana Islands.

These changes are discussed in greater detail in the *Monitoring* and *Adaptive Management* sections of this rule.

Description of Marine Mammals and Their Habitat in the Area of the Specified Activities

Marine mammal species that have the potential to occur in the MITT Study Area are presented in Table 7. The Navy anticipates the take of individuals of 26 marine mammal species by Level A and Level B harassment incidental to training and testing activities from the use of sonar and other transducers, and in-water detonations. There are no areas of critical habitat designated under the Endangered Species Act (ESA), National Marine Sanctuaries, or unusual mortality events (UMEs) for marine mammals in the MITT Study Area. However, there are areas known to be important for humpback whale breeding and calving which are described below.

The proposed rule included additional information about the species in this rule, all of which remains valid and applicable but has not been reprinted in this final rule, including a subsection entitled *Marine Mammal Hearing* that described the importance of sound to marine mammals and characterized the different groups of marine mammals based on their hearing sensitivity. Therefore, we refer the reader to our **Federal Register** notice of proposed rulemaking (85 FR 5782; January 31, 2020) for more information.

Information on the status, distribution, abundance, population trends, habitat, and ecology of marine mammals in the MITT Study Area also may be found in Section 4 of the Navy's rulemaking/LOA application. NMFS reviewed this information and found it to be accurate and complete. Additional information on the general biology and ecology of marine mammals is included in the 2020 MITT FSEIS/OEIS. The marine mammal populations in the MITT Study Area have not been assigned to stocks and there are no associated SARs. There is only one species, humpback whales for which stock information exists for species that occur in the MITT Study Area. Table 7 incorporates the best available science, including data from the U.S. Pacific and the Alaska Marine Mammal Stock Assessments Reports (SARs) (Carretta *et al.,* 2019, Muto *et al.,* 2019), as well as monitoring data from the Navy's marine mammal research efforts. NMFS also has reviewed the most recent 2019 draft SARs (which can be found at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports*) and new scientific literature, and determined that none of these nor any other new information changes our determination of which species have the potential to be affected by the Navy's activities or the pertinent information in this final rulemaking.

TABLE 7—MARINE MAMMAL OCCURRENCE WITHIN THE MITT STUDY AREA

Common name	Scientific name	Status		Occurrence *	
		MMPA	ESA	Mariana Islands	Transit Corridor
Mysticetes:					
Blue whale	*Balaenoptera musculus*	D	E	Seasonal	Seasonal.
Bryde's whale	*Balaenoptera edeni*		n/a	Regular	Regular.
Fin whale	*Balaenoptera physalus*	D	E	Rare	Rare.
Humpback whale	*Megaptera novaeangliae*	(1)	E	Seasonal	Seasonal.
Minke whale	*Balaenoptera acutorostrata*		n/a	Seasonal	Seasonal.
Omura's whale	*Balaenoptera omurai*		n/a	Rare	Rare.
Sei whale	*Balaenoptera borealis*	D	E	Seasonal	Seasonal.
Odontocetes:					
Blainville's beaked whale	*Mesoplodon densirostris*		n/a	Regular	Regular.

TABLE 7—MARINE MAMMAL OCCURRENCE WITHIN THE MITT STUDY AREA—Continued

Common name	Scientific name	Status		Occurrence *	
		MMPA	ESA	Mariana Islands	Transit Corridor
Common bottlenose dolphin	*Tursiops truncatus*		n/a	Regular	Regular.
Cuvier's beaked whale	*Ziphius cavirostris*		n/a	Regular	Regular.
Dwarf sperm whale	*Kogia sima*		n/a	Regular	Regular.
False killer whale	*Pseudorca crassidens*		n/a	Regular	Regular.
Fraser's dolphin	*Lagenodelphis hosei*		n/a	Regular	Regular.
Ginkgo-toothed beaked whale	*Mesoplodon ginkgodens*		n/a	Regular	Regular.
Killer whale	*Orcinus orca*		n/a	Regular	Regular.
Longman's beaked whale	*Indopacetus pacificus*		n/a	Regular	Regular.
Melon-headed whale	*Peponocephala electra*		n/a	Regular	Regular.
Pantropical spotted dolphin	*Stenella attenuata*		n/a	Regular	Regular.
Pygmy killer whale	*Feresa attenuata*		n/a	Regular	Regular.
Pygmy sperm whale	*Kogia breviceps*		n/a	Regular	Regular.
Risso's dolphin	*Grampus griseus*		n/a	Regular	Regular.
Rough-toothed dolphin	*Steno bredanensis*		n/a	Regular	Regular.
Short-finned pilot whale	*Globicephala macrorhynchus*		n/a	Regular	Regular.
Sperm whale	*Physeter macrocephalus*	D	E	Regular	Regular.
Spinner dolphin	*Stenella longirostris*		n/a	Regular	Regular.
Striped dolphin	*Stenella coeruleoalba*		n/a	Regular	Regular.

[1] Humpback whales in the Mariana Islands have not been assigned a stock by NMFS in the Alaska or Pacific Stock Assessment Reports given they are not recognized in those reports as being present in U.S. territorial waters (Carretta et al., 2017c; Carretta et al., 2018; Caretta et al., 2019; Muto et al., 2017b; Muto et al., 2018, Muto et al., 2019), but because individuals from the Western North Pacific Distinct Population Segment have been photographically identified in the MITT Study Area, humpback whales in the Mariana Islands are assumed to be part of the Western North Pacific Stock.

Note: Status MMPA, D = depleted; ESA, E = endangered.

* Species occur in both the Mariana Islands and in the Transit Corridor, both of which are included in the overall MITT Study Area. The transit corridor is outside the geographic boundaries of the MIRC, but is a route across the high seas for Navy ships transiting between the MIRC and the HRC. Although not part of a defined range complex, vessels and aircraft would at times conduct basic and routine unit-level activities such as gunnery and sonar training while in transit in the corridor as long as the training would not interfere with the primary objective of reaching their intended destination. Ships also conduct sonar maintenance, which includes active sonar transmissions.

Humpback Reproductive Areas

The humpback whales in the MITT Study Area are indirectly addressed in the Alaska SAR, given that the historic range of humpbacks in the ''Asia wintering area'' includes the Mariana Islands. The observed presence of humpback whales in the Mariana Islands (Hill *et al.,* 2016a; Hill e*t al.,* 2017a; Hill *et al.,* 2018; Hill *et al.,* 2020a; Klinck *et al.,* 2016a; Munger *et al.,* 2014; NMFS, 2018; Oleson *et al.,* 2015; Uyeyama, 2014) is consistent with the MITT Study Area as a plausible migratory destination for humpback whales from Alaska (Muto *et al.,* 2017a). It was considered likely that humpback whales in the Mariana Islands are part of the endangered Western North Pacific (WNP) Distinct Population Segment (DPS) based on the best available science (Bettridge *et al.,* 2015; Calambokidis *et al.,* 2008; Calambokidis *et al.,* 2010; Carretta *et al.,* 2017b; Hill *et al.,* 2017b; Hill *et al.,* 2020a; Muto *et al.,* 2017a; NMFS, 2016a; NOAA, 2015b; Wade *et al.,* 2016) although the breeding range of the humpback whale WNP DPS is not fully resolved. Individual photo-identification data for whales sampled off Saipan within the Mariana Archipelago in February–March 2015 to 2018, suggest that these whales belong to the WNP DPS (Hill *et al.,* 2020a). Specifically, comparisons with existing WNP humpback whale photo-identification catalogs showed that 11 of 41 (27 percent) whales within the Mariana Archipelago humpback whale catalog were previously sighted in Western North Pacific humpback whale breeding areas (Japan and Philippines) and/or in a Western North Pacific humpback whale feeding area off Russia (Hill *et al.,* 2020a). Hill e*t al.* (2020a) completed DNA profiling of 28 biopsy samples that identified 24 individuals (14 females, 10 males) representing seven mitochondrial DNA haplotypes. The haplotype frequencies from the Mariana Archipelago showed the greatest identity with the Ogasawara breeding ground and Commander Islands feeding ground in the Western North Pacific. This study establishes the Mariana Archipelago as a breeding area for the endangered WNP DPS of humpback whales (Hill *et al.,* 2020a). No ESA critical habitat has been proposed for the WNP DPS of humpback whales in the MITT Study Area, although critical habitat has been proposed in Alaska (84 FR 54534; October 9, 2019).

Humpback whale breeding and calving have been documented in the MITT Study Area and particularly in the shallow waters (mostly within the 200-m isobath) offshore of Saipan at Marpi Reef and Chalan Kanoa Reef. Based on surveys conducted by NMFS' Pacific Islands Fisheries Science Center (PIFSC) during the winter months (January to March) 2015–2019, there were 22 encounters with mother/calf pairs with a total of 14 mother/calf pairs and all calves were considered born within the current season and one neotate (Hill *et al.,* 2020a). Additionally, competitive groups were observed in 2017 and 2018 (Hill *et al.,* 2020a). Surveys and passive acoustic hydrophone recordings in the Mariana Islands has confirmed the presence of mother-calf pairs, non-calf whales, and singing males in the MITT Study Area (Fulling *et al.,* 2011; Hill *et al.,* 2016a; Hill *et al.,* 2018; Munger *et al.,* 2014; Munger *et al.,* 2015; Norris *et al.,* 2012; Oleson and Hill, 2010a; Oleson *et al.,* 2015; U.S. Department of the Navy, 2007; Uyeyama *et al.,* 2012). Future surveys are needed to determine the full extent of the humpback whale breeding habitat throughout the Mariana Archipelago; however, the available data confirms the shallow waters surrounding Marpi Reef and Chalan Kanoa Reef are important to breeding and calving humpback whales.

Species Not Included in the Analysis

Consistent with the analysis provided in the 2015 MITT FEIS/OEIS and the

previous Phase II rulemaking for the MITT Study Area, the species carried forward for analysis and in the Navy's rulemaking/LOA application are those likely to be found in the MITT Study Area based on the most recent sighting, survey, and habitat modeling data available. The analysis does not include species that may have once inhabited or transited the area, but have not been sighted in recent years (*e.g.,* species that no longer occur in the area due to factors such as 19th-century commercial exploitation). These species include the North Pacific right whale (*Eubalaena japonica*), the western subpopulation of gray whale (*Eschrichtius robustus*), short-beaked common dolphin (*Delphinus delphis*), Indo-Pacific bottlenose dolphin (*Tursiops aduncus*), northern elephant seal (*Mirounga angustirostris*), and dugong (*Dugong dugon*). The reasons for not including each of these species was explained in detail in the proposed rulemaking (85 FR 5782; January 31, 2020) and NMFS agrees these species are unlikely to occur in the MITT Study Area.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

We provided a detailed discussion of the potential effects of the specified activity on marine mammals and their habitat in our **Federal Register** notice of proposed rulemaking (85 FR 5782; January 31, 2020). In the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat* section of the proposed rule, NMFS provided a description of the ways marine mammals may be affected by these activities in the form of, among other things, serious injury or mortality, physical trauma, sensory impairment (permanent and temporary threshold shift and acoustic masking), physiological responses (particularly stress responses), behavioral disturbance, or habitat effects. All of this information remains valid and applicable. Therefore, we do not reprint the information here but refer the reader to that document.

NMFS has also reviewed new relevant information from the scientific literature since publication of the proposed rule. Summaries of the new key scientific literature since publication of the proposed rule are presented below.

Accomando *et al.* (2020) examined the directional dependence of hearing thresholds for 2, 10, 20, and 30 kHz in two adult bottlenose dolphins. They observed that source direction (*i.e.,* the relative angle between the sound source location and the dolphin) impacted hearing thresholds for these frequencies. Sounds projected from directly behind the dolphins resulted in frequency-dependent increases in hearing thresholds of up to 18.5 dB when compared to sounds projected from in front of the dolphins. Sounds projected directly above the dolphins resulted in thresholds that were approximately 8 dB higher than those obtained when sounds were projected below the dolphins. These findings suggest that dolphins may receive lower source levels when they are oriented 180 degrees away from the sound source, and dolphins are less sensitive to sound projected from above (leading to some spatial release from masking). Directional or spatial hearing also allows animals to locate sound sources. This study indicates dolphins can detect source direction at lower frequencies than previously thought, allowing them to successfully avoid or approach biologically significant or anthropogenic sound sources at these frequencies.

Houser *et al.* (2020) measured cortisol, aldosterone, and epinephrine levels in the blood samples of 30 bottlenose dolphins before and after exposure to simulated U.S. Navy mid-frequency sonar from 115–185 dB re: 1 μPa. They collected blood samples approximately one week prior to, immediately following, and approximately one week after exposures and analyzed for hormones via radioimmunoassay. Aldosterone levels were below the detection limits in all samples. While the observed severity of behavioral responses scaled (increased) with SPL, levels of cortisol and epinephrine did not show consistent relationships with received SPL. The authors note that it is still unclear whether intermittent, high-level acoustic stimuli elicit endocrine responses consistent with a stress response, and that additional research is needed to determine the relationship between behavioral responses and physiological responses.

In an effort to compare behavioral responses to continuous active sonar (CAS) and pulsed (intermittent) active sonar (PAS), Isojunno *et al.* (2020) conducted at-sea experiments on 16 sperm whales equipped with animal-attached sound- and movement-recording tags in Norway. They examined changes in foraging effort and proxies for foraging success and cost during sonar and control exposures after accounting for baseline variation. They observed no reduction in time spent foraging during exposures to medium-level PAS transmitted at the same peak amplitude as CAS, however they observed similar reductions in foraging during CAS and PAS when they were received at similar energy levels (SELs). The authors note that these results support the hypothesis that sound energy (SEL) is the main cause of behavioral responses rather than sound amplitude (SPL), and that exposure context and measurements of cumulative sound energy are important considerations for future research and noise impact assessments.

Frankel and Stein (2020) used shoreline theodolite tracking to examine potential behavioral responses of southbound migrating eastern gray whales to a high-frequency active sonar system transmitted by a vessel located off the coast of California. The sonar transducer deployed from the vessel transmitted 21–25 kHz sweeps for half of each day (experimental period), and no sound the other half of the day (control period). In contrast to low-frequency active sonar tests conducted in the same area (Clark et al., 1999; Tyack and Clark, 1998), no overt behavioral responses or deflections were observed in field or visual data. However, statistical analysis of the tracking data indicated that during experimental periods at received levels of approximately 148 dB re: 1 μPa^2 (134 dB re: 1 μPa^2s) and less than 2 km from the transmitting vessel, gray whales deflected their migration paths inshore from the vessel. The authors indicate that these data suggest the functional hearing sensitivity of gray whales extends to at least 21 kHz. These findings agree with the predicted mysticete hearing curve and behavioral response functions used in the analysis to estimate take by Level A harassment (PTS) and Level B harassment (behavioral response) for this rule (see the Technical Report ''Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)'').

Having considered the new information, along with information provided in public comments on the proposed rule, we have determined that there is no new information that substantively affects our analysis of potential impacts on marine mammals and their habitat that appeared in the proposed rule, all of which remains applicable and valid for our assessment of the effects of the Navy's activities during the seven-year period of this rule.

Vessel Strike

NMFS also considered the chance that a vessel utilized in training or testing activities could strike a marine mammal. Vessel strikes have the potential to result in incidental take from serious injury and/or mortality. Vessel strikes are not specific to any particular training or testing activity,

but rather are a limited, sporadic, and incidental result of Navy vessel movement within a study area. NMFS' detailed analysis of the likelihood of vessel strike was provided in the *Potential Effects of Vessel Strike* section of our **Federal Register** notice of proposed rulemaking (85 FR 5782; January 31, 2020); please see that notice of proposed rulemaking or the Navy's application for more information. No additional information has been received since publication of the proposed rule that substantively changes the agency's analysis or conclusions. Therefore the information and analysis included in the proposed rule supports NMFS' concurrence with the Navy's conclusion and our final determination that vessel strikes of marine mammals, and associated serious injury or mortality, are not likely to result from the Navy's activities included in this seven-year rule, and vessel strikes are not discussed further.

Stranding

In the proposed rule, NMFS discussed the potential mechanisms that could lead from acoustic exposure to marine mammal strandings and described the small number of global events in which strandings (predominantly of beaked whales) have been causally associated with exposure to active sonar in certain circumstances. Given the available information, NMFS did not anticipate or propose to authorize mortality of beaked whales resulting from the Navy activities covered under the rule. Public commenters questioned this preliminary determination and additional information has become available since the proposed rule was published. Therefore an updated and expanded rationale, in addition to what was included in the proposed rule, describing why NMFS continues to conclude that mortality is not reasonably likely to result from these activities following careful and thorough review of all available information is included here.

In February 2020, a study (Simonis *et al.,* 2020) was published titled ''Co-occurrence of beaked whale strandings and naval sonar in the Mariana Islands, Western Pacific.'' In summary, the authors compiled the publicly available information regarding Navy training exercises from 2006–2019 (from press releases, etc.), as well as the passive acoustic monitoring data indicating sonar use that they collected at two specific locations on HARP recorders over a shorter amount of time, and compared it to the dates of beaked whale strandings. Using this data, they reported that six of the 10 Cuvier's beaked whales, from four of eight events, stranded during or within six days of a naval ASW exercise using sonar. In a Note to the article, the authors acknowledged additional information provided by the Navy while the article was in press that one of the strandings occurred a day prior to sonar transmissions and so should not be considered coincident with sonar. The authors' analysis examined the probability that the now three of eight random days would fall during, or within six days after, a naval event (utilizing the Navy training events and sonar detections of which the authors were aware). Their test results indicated that the probability that three of eight stranding events were randomly associated with naval sonar was one percent.

The authors did not have access to the Navy's classified data (in the Note added to the article, Simonis *et al.* noted that the Navy was working with NMFS to make the broader classified dataset available for further statistical analysis). Later reporting by the Navy indicated there were more than three times as many sonar days in the Marianas during the designated time period than Simonis *et al.* (2020) reported. Primarily for this reason, the Navy tasked the Center for Naval Analysis (CNA) with repeating the statistical examination of Simonis *et al.* using the full classified sonar record, including ship movement information to document the precise times and locations of Navy sonar use throughout the time period of consideration (2007–2019).

CNA re-evaluated the relationship between the strandings and sonar activities using the entire classified data set in two ways. First, from their sonar database, CNA tabulated the number of ''sonar days'' for use in their analysis. The total number of sonar days from the classified database was 923 days (or approximately 19.5 percent of all days in the study timeframe). In comparison, the Simonis *et al.* (2020) analysis assumed only 293 days of sonar (or approximately 6.1 percent of all days in the study timeframe). CNA conducted re-constructions for each stranding event to determine/confirm if Navy sonar use coincided in time and space with each stranding location. The Navy extended the analysis through the entire year of 2019 to capture both sonar use and stranding events. As a result, the CNA analysis included consideration of the November 2019 stranding of a single beaked whale on Rota, which was not addressed in the Simonis *et al.* (2020) paper.

A distance of 80 nmi is used in NMFS' incidental take regulations to evaluate strandings in the context of major training events (MTE), although of note none of the Marianas stranding events occurred during an MTE. All strandings reported to have been coincident with sonar use in Simonis *et al.,* as well as the additional stranding that occurred while Simonis *et al.* was in press, were confirmed to be coincident by the CNA analysis (*i.e.,* within 80 nmi) and, for the first analysis, CNA examined the four strandings in relation to the total sonar days (throughout the MITT Study Area) recorded in the classified data set. Based on the calculations conducted by CNA, when the analysis is conducted consistent with the Simonis *et al.* (2020) assumptions (*i.e.,* without considering proximity of sonar to strandings in counting ''sonar days''), but with consideration of the accurate number of sonar days from the classified record and the additional stranding at Rota, the analysis suggests that the probability that four of nine stranding events were randomly associated with naval events is 10 percent, which the Navy interpreted as insufficient evidence, at $P<0.10$ threshold level, to claim a relationship between sonar use and stranding in the Mariana Islands.

For the second CNA analysis, the same four coincident strandings were considered, but only sonar use within a maximum distance of 80 nmi from a stranding location would be considered as possibly influencing a potential stranding event and, therefore, included in the ''sonar days'' for this analysis. This analysis resulted in the calculations being performed separately for Guam, Rota, and Saipan.

When the analysis was conducted specifically for Guam including only those sonar days within 80 nmi, the results suggested that the probability that the strandings are randomly associated with sonar was notably higher, at 26 percent ($p=0.26$). This is notable because this location had the highest number of overall stranding events ($n=7$), coincident stranding events ($n=2$), and sonar days ($n=681$) of all the locations within the Mariana Islands. The calculations for Saipan and Rota ($p=0.06$ and 0.14, respectively) should be viewed with caution given that statistical analyses considering single data points (*i.e.,* one stranding each) have low power and high uncertainty and, similarly, the Navy reported insufficient evidence to claim a relationship (at $P<0.05$ and 0.10 levels, respectively) between sonar use and strandings. NMFS has evaluated the Navy's analysis and results along with the analysis and results of Simonis *et al.* (2020), and has determined that both

analyses are appropriate to consider in NMFS' assessment of whether beaked whale mortality is reasonably likely to occur as a result of the Navy's activities described in this seven-year rule.

Standard statistical significance thresholds of 0.05 and 0.1 are often used in the interpretation of the results of statistical tests, and the Navy stated that their results show that the data showing the relationship between sonar and stranding is not statistically significant, and does not allow one to rule out a null hypothesis that there is no relationship. NMFS consulted guidance from the American Statistical Association, which cautions against strict interpretations of p-values and notes that ''researchers should bring many contextual factors into play to derive scientific inferences, including the design of a study, the quality of the measurements, the external evidence for the phenomenon under study, and the validity of assumptions that underlie the data analysis. Pragmatic considerations often require binary, ''yes-no'' decisions, but this does not mean that p-values alone can ensure that a decision is correct or incorrect.'' Separately, we also note that the Navy strove to use identical methods as the Simonis *et al.* (2020) paper to conduct their analysis. A miscommunication resulted in the Navy initially using a Poisson distribution, while Simonis *et al.* used a permutation test, however, additional tests were run to ensure an apples-to-apples comparison. The tests were consistent and the results are reflected in the discussion above. Last, and importantly, we note that correlation does not equate to causation.

In addition to examining the correlation (or lack thereof) of activities with strandings, necropsies of stranded animals can provide insight into the potential cause of death. The number of strandings that can be thoroughly investigated through necropsy, sample collection, and advanced diagnostics is limited to animals that are not returned to the sea and those that are found and accessible prior to extensive decomposition. In the case of beaked whale strandings that occurred in the MITT Study Area during this time period, necropsy examinations were performed and high quality tissue samples were collected from three live stranded or fresh dead individuals: one of the whales from the August 2011 Saipan stranding, the single whale from the March 2015 Guam stranding, and the single whale from the January 2019 Guam stranding. For the stranding events for which necropsies and histopathology analyses were conducted, only the 2011 and 2015 events were coincident with the use of Navy sonar.

None of the three beaked whales from the Mariana Islands had evidence of gas bubble formation in the organs examined grossly and histologically. Stranding response staff from the University of Hawaii conducted the examinations and compared the results to the diagnostic features of gas and fat embolic syndrome described by Bernaldo de Quiros *et al.* (2019). Bernaldo de Quiros *et al.* (2019) established that to date, strandings which have a confirmed association with naval exercise have exhibited all seven of the following diagnostic features:

1. Individual or multiple animals stranded within hours or a few days of an exercise in good body condition;
2. Food remnants in the first gastric compartment ranging from undigested food to squid beaks;
3. Abundant gas bubbles widely distributed in veins (subcutaneous, mesenteric, portal, coronary, subarachnoid veins, etc.) composed primarily of N2 in fresh carcasses;
4. Gross subarachnoid and/or acoustic fat hemorrhages;
5. Microscopic multi-organ gas and fat emboli associated with bronchopulmonary shock;
6. Diffuse, mild to moderate, acute, monophasic myonecrosis (hyaline degeneration) with ''disintegration'' of the interstitial connective tissue and related structures, including fat deposits, and their replacement by amorphous hyaline material (degraded material) in fresh and well preserved carcasses; and
7. Multi-organ microscopic hemorrhages of varying severity in lipid-rich tissues such as the central nervous system, spinal cord, and the coronary and kidney fat when present.

Results from the necropsies for the 2011 and 2015 stranded animals indicate that they only exhibited one to three of the diagnostic features, but not all seven. Additionally, the necropsy results from both animals indicated severe parasite infestations. The 2015 specimen also had indication of myocardial fibrosis which could have impacted cardiac function. Results for the 2019 animal, which was a stranding that was not coincident with sonar, indicated that it exhibited up to 3[1] of the 7 diagnostic features. Overall, the results of these necropsies appear to align with evidence from single beaked whale strandings in the Canary Islands between 2002 and 2015 (n=45) which stranded with no known correlation in space or time with active sonar. These individuals had one or more diagnostic features of gas and fat embolic syndrome for beaked whales stranded in association with MFAS exercises, but not all seven (Bernaldo de Quiros *et al.* 2019). NMFS acknowledges that situations could potentially occur in which beaked whales might strand as a result of sonar exposure and not exhibit all seven of the features of gas and fat embolic syndrome described above, however, taken as a whole, these necropsy and histopathology results do not support a conclusion that the 2011 and 2015 strandings resulted from exposure to naval sonar. Furthermore, the role of natural stressors or other non-Navy factors as they affect beaked whale strandings is not understood. The majority of strandings in the MITT Study Area occurred without the presence of Navy sonar.

As noted previously, NMFS has acknowledged that it is possible for naval activities using hull-mounted tactical sonar to contribute to the death of marine mammals in certain circumstances via strandings resulting from behaviorally mediated physiological impacts or other gas-related injuries. In the proposed rule, NMFS discussed these potential causes and outlined the few cases where active naval sonar (in the United States or, largely, elsewhere) had either potentially contributed to or (as with the Bahamas example) been more definitively causally linked with marine mammal mass strandings (more than two animals). There have been no documented mass strandings of beaked whales in the Marianas since stranding data was collected, and the first beaked whale stranding was documented in 2007, while the Navy has been using sonar in the Marianas since the 1960s. As also noted previously, there are a suite of factors that have been associated with the specific cases of strandings directly causally associated with sonar (steep bathymetry, multiple hull-mounted platforms using sonar simultaneously, constricted channels, strong surface ducts, etc.) that are not present together in the MITT Study Area

[1] One of the diagnostic features is ''individual or multiple animals stranded within hours or a few days of an exercise in good body condition,'' however, Bernaldo de Quiros et al. (2019) does not specify if the stranding had to occur after an exercise in which sonar use occurred. One would presume it does since it investigated sonar's ability to cause strandings. The 2019 animal stranded close in time to the outset of a Navy training event, however, sonar use did not occur until the day after the stranding. Therefore, this event is *not* considered coincident, but due to the ambiguity in the description of this diagnostic factor, the 2019 stranding is conservatively assumed to be positive for this factor.

and during the specified activities (and which the Navy takes care across the world not to operate under without additional monitoring). Further none of the documented strandings in the MITT Study Area have coincided with MTEs.

While the results of the Simonis *et al.* (2020) paper and the fuller CNA analysis both suggest (the latter to a notably lesser degree) that it is more probable than not that there was some form of non-random relationship between sonar days and strandings in the Marianas during this period of time, the results of the Navy analysis (using the full dataset) allow, statistically, that the strandings and sonar use may not be related. Given the uncertainties and assumptions inherent in these correlation analyses, the small sample size (in terms of the strandings), and the fact that correlation does not equate to causation—these results, alone, do not indicate a reasonable likelihood that the Navy's activities under this rule will result in serious injury or mortality of beaked whales. Further, the necropsies of the two animals stranded in the MITT Study Area in 2011 and 2015 do not support a conclusion that the 2011 and 2015 strandings resulted from exposure to naval sonar. When this information is considered in combination with the absence of mass beaked whale strandings in the MITT Study Area and the absence of beaked whale strandings coinciding with any MTEs, despite Navy sonar training activity in the area since the 1960s, NMFS has concluded that serious injury or mortality of beaked whales is unlikely to result from the Navy activities covered under this seven-year rule.

While we have found that serious injury or mortality are not likely to result from the activities covered by this rule, we note the number of beaked whale strandings in the MITT Study Area (acknowledging the comparatively lower carcass recovery rate for offshore species), the paucity of beaked whale data in the region, and the Simonis *et al.* and Navy analysis results, all of which highlight the need for additional data-gathering and future analysis. Accordingly, as part of the monitoring and adaptive management requirements of the final rule (as described elsewhere), in addition to continuing to fund stranding investigations in the Marianas and other monitoring measures, the Navy will fund and co-organize with NMFS an expert panel to provide recommendations addressing scientific data gaps and uncertainties to further inform consideration of future protective measures to minimize the impact of Navy training and testing activities on beaked whales in the Mariana Islands.

Estimated Take of Marine Mammals

This section indicates the number of takes that NMFS is authorizing, which are based on the maximum amount of take that NMFS anticipates is likely to occur. NMFS coordinated closely with the Navy in the development of their incidental take application, and agrees that the methods the Navy put forth to estimate take (including the model, thresholds, and density estimates), and the resulting numbers are based on the best available science and appropriate for authorization. Nonetheless, since publication of the proposed rule, additional information and analysis have been used to refine the assessment for the impacts of sonar training and testing on humpback whales around Saipan, resulting in a change in the total take numbers for humpback whales. A subsection describing this additional analysis and how it changes the take numbers (*Humpback Whales Around Saipan*) is included below and the total take numbers for humpback whales has increased in Table 28 and 47.

Takes are in the form of harassment only. For military readiness activities, the MMPA defines ''harassment'' as (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) Any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered (Level B harassment).

Authorized takes will primarily be in the form of Level B harassment, as use of the acoustic and explosive sources (*i.e.,* sonar and explosives) is more likely to result in behavioral disruption (rising to the level of a take as described above) or temporary threshold shift (TTS) for marine mammals than other forms of take. There is also the potential for Level A harassment, however, in the form of auditory injury and/or tissue damage (the latter from explosives only) to result from exposure to the sound sources utilized in training and testing activities.

Generally speaking, for acoustic impacts NMFS estimates the amount and type of harassment by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be taken by Level B harassment (in this case, as defined in the military readiness definition of Level B harassment included above) or incur some degree of temporary or permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day or event; (3) the density or occurrence of marine mammals within these ensonified areas; and (4) the number of days of activities or events. Below, we describe these components in more detail and present the take estimates.

Acoustic Thresholds

Using the best available science, NMFS, in coordination with the Navy, has established acoustic thresholds that identify the most appropriate received level of underwater sound above which marine mammals exposed to these sound sources could be reasonably expected to experience a disruption in behavior patterns to a point where they are abandoned or significantly altered, or to incur TTS (equated to Level B harassment) or PTS of some degree (equated to Level A harassment). Thresholds have also been developed to identify the pressure levels above which animals may incur non-auditory injury from exposure to pressure waves from explosive detonation.

Despite the quickly evolving science, there are still challenges in quantifying expected behavioral responses that qualify as take by Level B harassment, especially where the goal is to use one or two predictable indicators (*e.g.,* received level and distance) to predict responses that are also driven by additional factors that cannot be easily incorporated into the thresholds (*e.g.,* context). So, while the behavioral harassment thresholds have been refined here to better consider the best available science (*e.g.,* incorporating both received level and distance), they also still have some built-in conservative factors to address the challenge noted. For example, while duration of observed responses in the data are now considered in the thresholds, some of the responses that are informing take thresholds are of a very short duration, such that it is possible some of these responses might not always rise to the level of disrupting behavior patterns to a point where they are abandoned or significantly altered. We describe the application of this behavioral harassment threshold as identifying the maximum number of instances in which marine mammals could be reasonably expected to experience a disruption in behavior patterns to a point where they are abandoned or significantly altered. In summary, we believe these behavioral

harassment thresholds are the most appropriate method for predicting Level B harassment by behavioral disturbance given the best available science and the associated uncertainty.

Hearing Impairment (TTS/PTS), Tissues Damage, and Mortality

NMFS' Acoustic Technical Guidance (NMFS, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The Acoustic Technical Guidance also identifies criteria to predict TTS, which is not considered injury and falls into the Level B harassment category. The Navy's planned activity includes the use of non-impulsive (sonar) and impulsive (explosives) sources. These thresholds (Tables 8 and 9) were developed by compiling and synthesizing the best available science and soliciting input multiple times from both the public and peer reviewers. The references, analysis, and methodology used in the development of the thresholds are described in Acoustic Technical Guidance, which may be accessed at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 8—ACOUSTIC THRESHOLDS IDENTIFYING THE ONSET OF TTS AND PTS FOR NON-IMPULSIVE SOUND SOURCES BY FUNCTIONAL HEARING GROUPS

Functional hearing group	Non-impulsive	
	TTS Threshold SEL (weighted)	PTS threshold SEL (weighted)
Low-Frequency Cetaceans	179	199
Mid-Frequency Cetaceans	178	198
High-Frequency Cetaceans	153	173

Note: SEL thresholds in dB re 1 μPa^2s.

Based on the best available science, the Navy (in coordination with NMFS) used the acoustic and pressure thresholds indicated in Table 9 to predict the onset of TTS, PTS, tissue damage, and mortality for explosives (impulsive) and other impulsive sound sources.

TABLE 9—ONSET OF TTS, PTS, TISSUE DAMAGE, AND MORTALITY THRESHOLDS FOR MARINE MAMMALS FOR EXPLOSIVES AND OTHER IMPULSIVE SOURCES

Functional hearing group	Species	Onset TTS	Onset PTS	Mean onset slight GI tract injury	Mean onset slight lung injury	Mean onset mortality
Low-frequency cetaceans.	All mysticetes	168 dB SEL (weighted) or 213 dB Peak SPL.	183 dB SEL (weighted). or 219 dB Peak SPL.	237 dB Peak SPL	Equation 1	Equation 2.
Mid-frequency cetaceans.	Most delphinids, medium and large toothed whales.	170 dB SEL (weighted) or 224 dB Peak SPL.	185 dB SEL (weighted) or 230 dB Peak SPL.	237 dB Peak SPL.		
High-frequency cetaceans.	Porpoises and Kogia spp..	140 dB SEL (weighted) or 196 dB Peak SPL.	155 dB SEL (weighted) or 202 dB Peak SPL.	237 dB Peak SPL.		

Notes:
Equation 1: $47.5M^{1/3}\ (1+[D^{Rm}/10.1])^{1/6}$ Pa-sec.
Equation 2: $103M^{1/3}\ (1+[D^{Rm}/10.1])^{1/6}$ Pa-sec.
M = mass of the animals in kg.
D^{Rm} = depth of the receiver (animal) in meters.
SPL = sound pressure level.

The criteria used to assess the onset of TTS and PTS due to exposure to sonars (non-impulsive, see Table 8 above) are discussed further in the Navy's rulemaking/LOA application (see Hearing Loss from Sonar and Other Transducers in Section 6, Section 6.4.2.1, Methods for Analyzing Impacts from Sonars and Other Transducers). Refer to the *Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis* (Phase III) report (U.S. Department of the Navy, 2017c) for detailed information on how the criteria and thresholds were derived. Non-auditory injury (*i.e.,* other than PTS) and mortality from sonar and other transducers is so unlikely as to be discountable under normal conditions for the reasons explained in the proposed rule under the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat* section—*Acoustically Mediated Bubble Growth and other Pressure-related Injury,* and is therefore not considered further in this analysis. As noted previously, additional information and analysis has been added to the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat* section of this final rule specifically addressing and ruling out the likelihood of mortality of beaked whales through strandings associated with sonar exposure.

The mitigation measures associated with explosives are expected to be effective in preventing tissue damage to

any potentially affected species, and when considered in combination with the modeled exposure results, no species are anticipated to incur tissue damage during the period of this rule. Tables 26 indicate the range to effects for tissue damage for different explosive types. The Navy will implement mitigation measures (described in the *Mitigation Measures* section) during explosive activities, including delaying detonations when a marine mammal is observed in the mitigation zone. Nearly all explosive events will occur during daylight hours to improve the sightability of marine mammals and thereby improve mitigation effectiveness. Observing for marine mammals during the explosive activities will include visual and passive acoustic detection methods (when they are available and part of the activity) before the activity begins, in order to cover the mitigation zones that can range from 200 yds (183 m) to 2,500 yds (2,286 m) depending on the source (*e.g.,* explosive sonobuoy, explosive torpedo, explosive bombs), and 2.5 nmi for sinking exercise (see Tables 34–39).

Level B Harassment by Behavioral Disturbance

Though significantly driven by received level, the onset of Level B harassment by 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 (Ellison *et al.,* 2011; Southall *et al.,* 2007). Based on what the available science indicates and the practical need to use thresholds based on a factor, or factors, that are both predictable and measurable for most activities, NMFS uses generalized acoustic thresholds based primarily on received level (and distance in some cases) to estimate the onset of Level B harassment by behavioral disturbance.

Sonar—As noted above, the Navy coordinated with NMFS to develop, and propose for use in this rule, behavioral harassment thresholds specific to their military readiness activities utilizing active sonar. These behavioral harassment thresholds consist of behavioral response functions (BRFs) and associated cutoff distances, and are also referred to, together, as ''the criteria.'' These criteria are used to estimate the number of animals that may exhibit a behavioral response that rises to the level of a take when exposed to sonar and other transducers. The way the criteria were derived is discussed in detail in the *Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)* report (U.S. Department of the Navy, 2017c). Developing these behavioral harassment thresholds involved multiple steps. All peer-reviewed published behavioral response studies conducted both in the field and on captive animals were examined in order to understand the breadth of behavioral responses of marine mammals to sonar and other transducers. NMFS has carefully reviewed the Navy's criteria, *i.e.,* BRFs and cutoff distances for the species, and agrees that they are the best available science and the appropriate method to use at this time for determining impacts to marine mammals from sonar and other transducers and for calculating take and to support the determinations made in this rule. The Navy and NMFS will continue to evaluate the information as new science becomes available. The criteria have been rigorously vetted within the Navy community, among scientists during expert elicitation, and then reviewed by the public before being applied. It is not necessary or possible to revise and update the criteria and risk functions every time a new paper is published. The Navy is considering new information as it becomes available for updates to the criteria in the future, when the next round of updated criteria will be developed. Thus far, no new information has been published or otherwise conveyed that would fundamentally change the assessment of impacts or conclusions of the 2020 MITT FSEIS/OEIS or this rule.

As discussed above, marine mammal responses to sound (some of which are considered disturbances that rise to the level of a take) are highly variable and context specific, *i.e.,* they are affected by differences in acoustic conditions; differences between species and populations; differences in gender, age, reproductive status, or social behavior; or other prior experience of the individuals. This means that there is support for considering alternative approaches for estimating Level B harassment by behavioral disturbance. Although the statutory definition of Level B harassment for military readiness activities states that a natural behavior pattern of a marine mammal is significantly altered or abandoned, the current state of science for determining those thresholds is somewhat unsettled.

In its analysis of impacts associated with sonar acoustic sources (which was coordinated with NMFS), the Navy used an updated conservative approach that likely overestimates the number of takes by Level B harassment due to behavioral disturbance and response. Many of the behavioral responses identified using the Navy's quantitative analysis are most likely to be of moderate severity as described in the Southall *et al.* (2007) behavioral response severity scale. These ''moderate'' severity responses were considered significant if they were sustained for the duration of the exposure or longer. Within the Navy's quantitative analysis, many reactions are predicted from exposure to sound that may exceed an animal's threshold for Level B harassment by behavioral disturbance for only a single exposure (a few seconds) to several minutes, and it is likely that some of the resulting estimated behavioral responses that are counted as Level B harassment would not constitute significant alteration or abandonment of the natural behavioral patterns. The Navy and NMFS have used the best available science to address the challenging differentiation between significant and non-significant behavioral reactions (*i.e.,* whether the behavior has been abandoned or significantly altered such that it qualifies as harassment), but have erred on the cautious side where uncertainty exists (*e.g.,* counting these lower duration reactions as take), which likely results in some degree of overestimation of Level B harassment by behavioral disturbance. We consider application of these behavioral harassment thresholds, therefore, as identifying the maximum number of instances in which marine mammals could be reasonably expected to experience a disruption in behavior patterns to a point where they are abandoned or significantly altered (*i.e.,* Level B harassment). Because this is the most appropriate method for estimating Level B harassment given the best available science and uncertainty on the topic, it is these numbers of Level B harassment by behavioral disturbance that are analyzed in the *Analysis and Negligible Impact Determination* section and are authorized.

In the Navy's acoustic impact analyses during Phase II (the previous phase of Navy testing and training, 2015–2020; see also Navy's *Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis Technical Report,* 2012), the likelihood of Level B harassment by behavioral disturbance in response to sonar and other transducers was based on a probabilistic function (BRF) that related the likelihood (*i.e.,* probability) of a behavioral response (at the level of a Level B harassment) to the received SPL. The BRF was used to estimate the percentage of an exposed population that is likely to exhibit Level

B harassment due to altered behaviors or behavioral disturbance at a given received SPL. This BRF relied on the assumption that sound poses a negligible risk to marine mammals if they are exposed to SPL below a certain ''basement'' value. Above the basement exposure SPL, the probability of a response increased with increasing SPL. Two BRFs were used in Navy acoustic impact analyses: BRF1 for mysticetes and BRF2 for other species. BRFs were not used for beaked whales during Phase II analyses. Instead, a step function at an SPL of 140 dB re 1 µPa was used for beaked whales as the threshold to predict Level B harassment by behavioral disturbance.

Developing the criteria for Level B harassment by behavioral disturbance for Phase III (the current phase of Navy training and testing activities) involved multiple steps: all available behavioral response studies conducted both in the field and on captive animals were examined to understand the breadth of behavioral responses of marine mammals to sonar and other transducers (see also Navy's *Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III) Technical Report,* 2017). Six behavioral response field studies with observations of 14 different marine mammal species reactions to sonar or sonar-like signals and 6 captive animal behavioral studies with observations of 8 different species reactions to sonar or sonar-like signals were used to provide a robust data set for the derivation of the Navy's Phase III marine mammal behavioral response criteria. All behavioral response research that has been published since the derivation of the Navy's Phase III criteria (c.a. December 2016) has been examined and is consistent with the current behavioral response functions. Marine mammal species were placed into behavioral criteria groups based on their known or suspected behavioral sensitivities to sound. In most cases these divisions were driven by taxonomic classifications (*e.g.,* mysticetes, pinnipeds). The data from the behavioral studies were analyzed by looking for significant responses, or lack thereof, for each experimental session. The resulting four Bayesian Biphasic Dose Response Functions (referred to as the BRFs) that were developed for odontocetes, pinnipeds, mysticetes, and beaked whales predict the probability of a behavioral response qualifying as Level B harassment given exposure to certain received levels of sound. These BRFs are then used in combination with the cutoff distances described below to estimate the number of takes by Level B harassment.

The Navy used cutoff distances beyond which the potential of significant behavioral responses (and therefore Level B harassment) is considered to be unlikely (see Table 10 below). This was determined by examining all available published field observations of behavioral reactions to sonar or sonar-like signals that included the distance between the sound source and the marine mammal. The longest distance, rounded up to the nearest 5-km increment, was chosen as the cutoff distance for each behavioral criteria group (*i.e.,* odontocetes, mysticetes, and beaked whales). For animals within the cutoff distance, a behavioral response function based on a received SPL as presented in Section 3, Section 3.1.0 of the Navy's rulemaking/LOA application was used to predict the probability of a potential significant behavioral response. For training and testing events that contain multiple platforms or tactical sonar sources that exceed 215 dB re 1 µPa @1 m, this cutoff distance is substantially increased (*i.e.,* doubled) from values derived from the literature. The use of multiple platforms and intense sound sources (high source level) are factors that probably increase responsiveness in marine mammals overall (however, we note that helicopter dipping sonars were considered in the intense sound source group, despite lower source levels, because of data indicating that marine mammals are sometimes more responsive to the less predictable employment of this source). There are currently few behavioral observations under these circumstances; therefore, the Navy conservatively predicted significant behavioral responses that will rise to Level B harassment at farther ranges as shown in Table 10, versus less intense events.

TABLE 10—CUTOFF DISTANCES FOR MODERATE SOURCE LEVEL, SINGLE PLATFORM TRAINING AND TESTING EVENTS AND FOR ALL OTHER EVENTS WITH MULTIPLE PLATFORMS OR SONAR WITH SOURCE LEVELS AT OR EXCEEDING 215 dB RE 1 µPa @1 m

Criteria group	Moderate SL/ single platform cutoff distance (km)	High SL/ multi-platform cutoff distance (km)
Odontocetes	10	20
Mysticetes	10	20
Beaked Whales	25	50

Note: dB re 1 µPa @1 m = decibels referenced to 1 micropascal at 1 meter; km = kilometer; SL = source level.

The range to received sound levels in 6-dB steps from five representative sonar bins and the percentage of animals that may be taken by Level B harassment at the received level and distance indicated under each behavioral response function are shown in Table 11 through Table 15. Cells are shaded if the mean range value for the specified received level exceeds the distance cutoff range for a particular hearing group and therefore are not included in the estimated take. See Section 6, Section 6.4.2.1.1 (Methods for Analyzing Impacts from Sonars and Other Transducers) of the Navy's rulemaking/LOA application for further details on the derivation and use of the behavioral response functions, thresholds, and the cutoff distances to identify takes by Level B harassment, which were coordinated with NMFS. Table 11 illustrates the maximum likely percentage of exposed individuals taken at the indicated received level and associated range (in which marine mammals would be reasonably expected to experience a disruption in behavior patterns to a point where they are abandoned or significantly altered) for LFAS. As noted previously, NMFS carefully reviewed, and contributed to, the Navy's behavioral harassment thresholds (*i.e.,* the BRFs and the cutoff distances) for the species, and agrees that these methods represent the best available science at this time for determining impacts to marine mammals from sonar and other transducers.

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Table 11--Ranges to estimated Level B harassment by behavioral disturbance for sonar bin LF4 over a representative range of environments within the MITT Study Area

Received Level (dB re 1 µPa)	Average Range (m) with Minimum and Maximum Values in Parenthesis	Probability of Level B Harassment by Behavioral Disturbance for Sonar Bin LF4		
		Odontocetes	Mysticetes	Beaked Whales
196	1 (1–1)	100%	100%	100%
190	3 (3–3)	100%	98%	100%
184	6 (6–6)	99%	88%	100%
178	12 (12–12)	97%	59%	100%
172	25 (25–25)	91%	30%	99%
166	51 (50–55)	78%	20%	97%
160	130 (130–160)	58%	18%	93%
154	272 (270–300)	40%	17%	83%
148	560 (550–675)	29%	16%	66%
142	1,048 (1,025–1,525)	25%	13%	45%
136	2,213 (1,525–4,525)	23%	9%	28%
130	4,550 (2,275–24,025)	20%	5%	18%
124	16,903 (4,025–66,275)	17%	2%	14%
118	43,256 (7,025–87,775)	12%	1%	12%

Tables 12 through 15 identify the maximum likely percentage of exposed individuals taken at the indicated received level and associated range for MFAS.

112	60,155 (7,775–100,000*)	6%	0%	11%
106	80,689 (8,775–100,000*)	3%	0%	11%
100	92,352 (9,025–100,000*)	1%	0%	8%

Notes: dB re 1 µPa = decibels referenced to 1 micropascal, m = meters

* Indicates maximum range to which acoustic model was run, a distance of approximately 100 kilometers from the sound source. Cells are shaded if the mean range value for the specified received level exceeds the distance cutoff range for a particular hearing group. Any impacts within the cutoff range for a criteria group are included in the estimated impacts. Cut-off ranges in this table are for activities with high source levels and/or multiple platforms (see Table 6.4-1 from the Navy's rule making/LOA application for behavioral cut-off distances).

Table 12--Ranges to estimated Level B harassment by behavioral disturbance for sonar bin MF1 over a representative range of environments within the MITT Study Area

Received Level (dB re 1 µPs)	Average Range (m) with Minimum and Maximum Values in Parenthesis	Probability of Level B Harassment by Behavioral Disturbance for Sonar Bin MF1		
		Odontocetes	Mysticetes	Beaked Whales
196	106 (100–110)	100%	100%	100%
190	240 (240–250)	100%	98%	100%
184	501 (490–525)	99%	88%	100%
178	1,019 (975–1,025)	97%	59%	100%
172	3,275 (2,025–5,275)	91%	30%	99%
166	7,506 (2,525–11,025)	78%	20%	97%
160	15,261 (4,775–20,775)	58%	18%	93%

154	27,759 (5,525–36,525)	40%	17%	83%
148	43,166 (7,525–65,275)	29%	16%	66%
142	58,781 (8,525–73,525)	25%	13%	45%
136	71,561 (11,275–90,775)	23%	9%	28%
130	83,711 (13,025–100,000*)	20%	5%	18%
124	88,500 (23,525–100,000*)	17%	2%	14%
118	90,601 (27,025–100,000*)	12%	1%	12%
112	92,750 (27,025–100,000*)	6%	0%	11%
106	94,469 (27,025–100,000*)	3%	0%	11%
100	95,838 (27,025–100,000*)	1%	0%	8%

Notes: dB re 1 µPa = decibels referenced to 1 micropascal, m = meters

* Indicates maximum range to which acoustic model was run, a distance of approximately 100 kilometers from the sound source. Cells are shaded if the mean range value for the specified received level exceeds the distance cutoff range for a particular hearing group. Any impacts within the cutoff range for a criteria group are included in the estimated impacts. Cut-off ranges in this table are for activities with high source levels and/or multiple platforms (see Table 6.4-1 of the Navy's rulemaking/LOA application for behavioral cut-off distances).

Table 13--Ranges to estimated Level B harassment by behavioral disturbance for sonar bin MF4 over a representative range of environments within the MITT Study Area

Received Level (dB re 1 µPa)	Average Range (m) with Minimum and Maximum Values in Parenthesis	Probability of Level B Harassment by Behavioral Disturbance for Sonar Bin MF4		
		Odontocetes	Mysticetes	Beaked Whales
196	8 (8–8)	100%	100%	100%
190	17 (17–17)	100%	98%	100%
184	35 (35–35)	99%	88%	100%
178	70 (65–70)	97%	59%	100%
172	141 (140–150)	91%	30%	99%
166	354 (330–420)	78%	20%	97%
160	773 (725–1,275)	58%	18%	93%
154	1,489 (1,025–3,275)	40%	17%	83%
148	3,106 (1,775–6,775)	29%	16%	66%
142	8,982 (3,025–18,775)	25%	13%	45%
136	15,659 (3,775–31,025)	23%	9%	28%
130	25,228 (4,775–65,775)	20%	5%	18%
124	41,778 (5,525–73,275)	17%	2%	14%
118	51,832 (6,025–89,775)	12%	1%	12%

112	62,390 (6,025–100,000*)	6%	0%	11%
106	69,235 (6,775–100,000*)	3%	0%	11%
100	73,656 (7,025–100,000*)	1%	0%	8%

Notes: dB re 1 µPa = decibels referenced to 1 micropascal, m = meters

*Indicates maximum range to which acoustic model was run, a distance of approximately 100 kilometers from the sound source.

Cells are shaded if the mean range value for the specified received level exceeds the distance cutoff range for a particular hearing group. Any impacts within the cutoff range for a criteria group are included in the estimated impacts. Cut-off ranges in this table are for activities with high source levels and/or multiple platforms (see Table 6.4-1 of the Navy's rulemaking/LOA application for behavioral cut-off distances).

Table 14--Ranges to estimated Level B harassment by behavioral disturbance for sonar bin MF5 over a representative range of environments within the MITT Study Area

Received Level (dB re 1 µPa)	Average Range (m) with Minimum and Maximum Values in Parenthesis	Probability of Level B Harassment by Behavioral Disturbance for Sonar Bin MF5		
		Odontocetes	Mysticetes	Beaked Whales
196	0 (0–0)	100%	100%	100%
190	1 (0–3)	100%	98%	100%
184	4 (0–7)	99%	88%	100%
178	14 (0–15)	97%	59%	100%
172	29 (0–30)	91%	30%	99%
166	58 (0–60)	78%	20%	97%
160	125 (0–150)	58%	18%	93%
154	284 (160–525)	40%	17%	83%
148	607 (450–1,025)	29%	16%	66%
142	1,213 (875–4,025)	25%	13%	45%
136	2,695 (1,275–7,025)	23%	9%	28%
130	6,301 (2,025–12,525)	20%	5%	18%
124	10,145 (3,025–19,525)	17%	2%	14%
118	14,359 (3,525–27,025)	12%	1%	12%

112	19,194 (3,525–37,275)	6%	0%	11%
106	24,153 (4,025–48,025)	3%	0%	11%
100	29,325 (5,025–57,775)	1%	0%	8%

Notes: dB re 1 µPa = decibels referenced to 1 micropascal, m= meters

Cells are shaded if the mean range value for the specified received level exceeds the distance cutoff range for a particular hearing group. Any impacts within the cutoff range for a criteria group are included in the estimated impacts. Cut-off ranges in this table are for activities with high source levels and/or multiple platforms (see Table 6.4-1 of the Navy's rulemaking/LOA application for behavioral cut-off distances).

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TABLE 15—RANGES TO ESTIMATED LEVEL B HARASSMENT BY BEHAVIORAL DISTURBANCE FOR SONAR BIN HF4 OVER A REPRESENTATIVE RANGE OF ENVIRONMENTS WITHIN THE MITT STUDY AREA

Received level (dB re 1 µPa)	Average range (m) with minimum and maximum values in parenthesis	Probability of level B harassment by behavioral disturbance for sonar bin HF4		
		Odontocetes (percent)	Mysticetes (percent)	Beaked whales
196	3 (2–4)	100	100	100
190	8 (6–10)	100	98	100
184	16 (12–20)	99	88	100
178	32 (24–40)	97	59	100
172	63 (45–80)	91	30	99
166	120 (75–160)	78	20	97
160	225 (120–310)	58	18	93
154	392 (180–550)	40	17	83
148	642 (280–1,275)	29	16	66
142	916 (420–1,775)	25	13	45
136	1,359 (625–2,525)	23	9	28
130	1,821 (950–3,275)	20	5	18
124	2,567 (1,275–5,025)	17	2	14
118	3,457 (1,775–6,025)	12	1	12
112	4,269 (2,275–7,025)	6	0	11
106	5,300 (3,025–8,025)	3	0	11
100	6,254 (3,775–9,275)	1	0	8

Notes: dB re 1 µPa = decibels referenced to 1 micropascal, m = meters.

Explosives—Phase III explosive thresholds for Level B harassment by behavioral disturbance for marine mammals is the hearing groups' TTS threshold minus 5 dB (see Table 16 below and Table 9 for the TTS thresholds for explosives) for events that contain multiple impulses from explosives underwater. This was the same approach as taken in Phase II for explosive analysis. See the *Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)* report (U.S. Department of the Navy, 2017c) for detailed information on how the criteria and thresholds were derived. NMFS continues to concur that this approach represents the best available science for determining impacts to marine mammals from explosives.

TABLE 16—THRESHOLDS FOR LEVEL B HARASSMENT BY BEHAVIORAL DISTURBANCE FOR EXPLOSIVES FOR MARINE MAMMALS

Medium	Functional hearing group	SEL (weighted)
Underwater	LF	163

TABLE 16—THRESHOLDS FOR LEVEL B HARASSMENT BY BEHAVIORAL DISTURBANCE FOR EXPLOSIVES FOR MARINE MAMMALS—Continued

Medium	Functional hearing group	SEL (weighted)
Underwater	MF	165
Underwater	HF	135

Note: Weighted SEL thresholds in dB re 1 μPa^2s underwater.

Navy's Acoustic Effects Model

The Navy's Acoustic Effects Model calculates sound energy propagation from sonar and other transducers and explosives during naval activities and the sound received by animat dosimeters. Animat dosimeters are virtual representations of marine mammals distributed in the area around the modeled naval activity and each dosimeter records its individual sound ''dose.'' The model bases the distribution of animats over the MITT Study Area on the density values in the *Navy Marine Species Density Database* and distributes animats in the water column proportional to the known time that species spend at varying depths.

The model accounts for environmental variability of sound propagation in both distance and depth when computing the received sound level received by the animats. The model conducts a statistical analysis based on multiple model runs to compute the estimated effects on animals. The number of animats that exceed the thresholds for effects is tallied to provide an estimate of the number of marine mammals that could be affected.

Assumptions in the Navy model intentionally err on the side of overestimation when there are unknowns. Naval activities are modeled as though they would occur regardless of proximity to marine mammals, meaning that no mitigation is considered (*i.e.,* no power down or shut down modeled) and without any avoidance of the activity by the animal. The final step of the quantitative analysis of acoustic effects is to consider the implementation of mitigation and the possibility that marine mammals would avoid continued or repeated sound exposures. For more information on this process, see the discussion in the *Take Estimation* subsection below.

Many explosions from ordnance such as bombs and missiles actually occur upon impact with above-water targets. However, for this analysis, sources such as these were modeled as exploding underwater, which overestimates the amount of explosive and acoustic energy entering the water.

The model estimates the impacts caused by individual training and testing exercises. During any individual modeled event, impacts to individual animats are considered over 24-hour periods. The animats do not represent actual animals, but rather they represent a distribution of animals based on density and abundance data, which allows for a statistical analysis of the number of instances that marine mammals may be exposed to sound levels resulting in an effect. Therefore, the model estimates the number of instances in which an effect threshold was exceeded over the course of a year, but does not estimate the number of individual marine mammals that may be impacted over a year (*i.e.,* some marine mammals could be impacted several times, while others would not experience any impact). A detailed explanation of the Navy's Acoustic Effects Model is provided in the technical report *Quantifying Acoustic Impacts on Marine Mammals and Sea Turtles: Methods and Analytical Approach for Phase III Training and Testing report* (U.S. Department of the Navy, 2018).

Range to Effects

The following section provides range to effects for sonar and other active acoustic sources, as well as explosives, to specific acoustic thresholds determined using the Navy Acoustic Effects Model. Marine mammals exposed within these ranges for the shown duration are predicted to experience the associated effect. Range to effects is important information in not only predicting acoustic impacts, but also in verifying the accuracy of model results against real-world situations and determining adequate mitigation ranges to avoid higher level effects, especially physiological effects to marine mammals.

Sonar

The range to received sound levels in 6-dB steps from five representative sonar bins and the percentage of the total number of animals that may exhibit a significant behavioral response (and therefore Level B harassment) under each behavioral response function are shown in Table 11 through Table 15 above, respectively. See Section 6, Section 6.4.2.1 (Methods for Analyzing Impacts from Sonars and Other Transducers) of the Navy's rulemaking/LOA application for additional details on the derivation and use of the behavioral response functions, thresholds, and the cutoff distances that are used to identify Level B harassment by behavioral disturbance. NMFS has reviewed the range distance to effect data provided by the Navy and concurs with the analysis.

The ranges to PTS for five representative sonar systems for an exposure of 30 seconds is shown in Table 17 relative to the marine mammal's functional hearing group. This period (30 seconds) was chosen based on examining the maximum amount of time a marine mammal would realistically be exposed to levels that could cause the onset of PTS based on platform (*e.g.,* ship) speed and a nominal animal swim speed of approximately 1.5 m per second. The ranges provided in the table include the average range to PTS, as well as the range from the minimum to the maximum distance at which PTS is possible for each hearing group.

TABLE 17—RANGE TO PERMANENT THRESHOLD SHIFT (METERS) FOR FIVE REPRESENTATIVE SONAR SYSTEMS

Hearing group	Approximate range in meters for PTS from 30 second exposure [1]				
	Sonar bin HF4	Sonar bin LF4	Sonar bin MF1	Sonar bin MF4	Sonar bin MF5
High-frequency cetaceans	29 (22–35)	0 (0–0)	181 (180–190)	30 (30–30)	9 (8–10)
Low-frequency cetaceans	0 (0–0)	0 (0–0)	65 (65–65)	15 (15–15)	0 (0–0)
Mid-frequency cetaceans	1 (0–1)	0 (0–0)	16 (16–16)	3 (3–3)	0 (0–0)

[1] PTS ranges extend from the sonar or other active acoustic sound source to the indicated distance. The average range to PTS is provided as well as the range from the estimated minimum to the maximum range to PTS in parenthesis.

The tables below illustrate the range to TTS for 1, 30, 60, and 120 seconds from five representative sonar systems (see Table 18 through Table 22).

TABLE 18—RANGES TO TEMPORARY THRESHOLD SHIFT (METERS) FOR SONAR BIN LF4 OVER A REPRESENTATIVE RANGE OF ENVIRONMENTS WITHIN THE MITT STUDY AREA

Hearing group	Approximate TTS ranges (meters) [1]			
	Sonar bin LF4			
	1 second	30 seconds	60 seconds	120 seconds
High-frequency cetaceans	0 (0–0)	0 (0–0)	0 (0–0)	0 (0–0)
Low-frequency cetaceans	3 (3–3)	4 (4–4)	6 (6–6)	9 (9–9)
Mid-frequency cetaceans	0 (0–0)	0 (0–0)	0 (0–0)	0 (0–0)

[1] Ranges to TTS represent the model predictions in different areas and seasons within the MITT Study Area. The zone in which animals are expected to experience TTS extend from onset-PTS to the distance indicated. The average range to TTS is provided as well as the range from the estimated minimum to the maximum range to TTS in parentheses.

TABLE 19—RANGES TO TEMPORARY THRESHOLD SHIFT (METERS) FOR SONAR BIN MF1 OVER A REPRESENTATIVE RANGE OF ENVIRONMENTS WITHIN THE MITT STUDY AREA

Hearing group	Approximate TTS ranges (meters) [1]			
	Sonar Bin MF1			
	1 second	30 seconds	60 seconds	120 seconds
High-frequency cetaceans	3,181 (2,025–5,025)	3,181 (2,025–5,025)	5,298 (2,275–7,775)	6,436 (2,525–9,775)
Low-frequency cetaceans	898 (850–1,025)	898 (850–1,025)	1,271 (1,025–1,525)	1,867 (1,275–3,025)
Mid-frequency cetaceans	210 (200–210)	210 (200–210)	302 (300–310)	377 (370–390)

[1] Ranges to TTS represent the model predictions in different areas and seasons within the MITT Study Area. The zone in which animals are expected to experience TTS extend from onset-PTS to the distance indicated. The average range to TTS is provided as well as the range from the estimated minimum to the maximum range to TTS in parentheses.

Note: Ranges for 1-second and 30-second periods are identical for Bin MF1 because this system nominally pings every 50 seconds; therefore, these periods encompass only a single ping.

TABLE 20—RANGES TO TEMPORARY THRESHOLD SHIFT (METERS) FOR SONAR BIN MF4 OVER A REPRESENTATIVE RANGE OF ENVIRONMENTS WITHIN THE MITT STUDY AREA

Hearing group	Approximate TTS ranges (meters) [1]			
	Sonar bin MF4			
	1 second	30 seconds	60 seconds	120 seconds
High-frequency cetaceans	232 (220–260)	454 (420–600)	601 (575–875)	878 (800–1,525)
Low-frequency cetaceans	85 (85–90)	161 (160–170)	229 (220–250)	352 (330–410)
Mid-frequency cetaceans	22 (22–22)	35 (35–35)	50 (45–50)	70 (70–70)

[1] Ranges to TTS represent the model predictions in different areas and seasons within the MITT Study Area. The zone in which animals are expected to experience TTS extend from onset-PTS to the distance indicated. The average range to TTS is provided as well as the range from the estimated minimum to the maximum range to TTS in parentheses.

TABLE 21—RANGES TO TEMPORARY THRESHOLD SHIFT (METERS) FOR SONAR BIN MF5 OVER A REPRESENTATIVE RANGE OF ENVIRONMENTS WITHIN THE MITT STUDY AREA

Hearing group	Approximate TTS ranges (meters) [1]			
	Sonar bin MF5			
	1 second	30 seconds	60 seconds	120 seconds
High-frequency cetaceans	114 (110–130)	114 (110–130)	168 (150–200)	249 (210–290)
Low-frequency cetaceans	11 (10–12)	11 (10–12)	16 (16–17)	23 (23–24)
Mid-frequency cetaceans	5 (0–9)	5 (0–9)	12 (11–13)	18 (17–18)

[1] Ranges to TTS represent the model predictions in different areas and seasons within the MITT Study Area. The zone in which animals are expected to experience TTS extend from onset-PTS to the distance indicated. The average range to TTS is provided as well as the range from the estimated minimum to the maximum range to TTS in parentheses.

TABLE 22—RANGES TO TEMPORARY THRESHOLD SHIFT (METERS) FOR SONAR BIN HF4 OVER A REPRESENTATIVE RANGE OF ENVIRONMENTS WITHIN THE MITT STUDY AREA

Hearing group	Approximate TTS ranges (meters) [1]			
	Sonar bin HF4			
	1 second	30 seconds	60 seconds	120 seconds
High-frequency cetaceans	155 (110–210)	259 (180–350)	344 (240–480)	445 (300–600)
Low-frequency cetaceans	1 (0–2)	2 (1–3)	4 (3–5)	7 (5–8)
Mid-frequency cetaceans	10 (7–12)	17 (12–21)	24 (17–30)	33 (25–40)

[1] Ranges to TTS represent the model predictions in different areas and seasons within the MITT Study Area. The zone in which animals are expected to experience TTS extend from onset-PTS to the distance indicated. The average range to TTS is provided as well as the range from the estimated minimum to the maximum range to TTS in parentheses.

Explosives

The following section provides the range (distance) over which specific physiological or behavioral effects are expected to occur based on the explosive criteria (see Section 6, Section 6.5.2.1.1 of the Navy's rulemaking/LOA application and the *Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis (Phase III)* report (U.S. Department of the Navy, 2017c)) and the explosive propagation calculations from the Navy Acoustic Effects Model (see Section 6, Section 6.5.2.1.3, Navy Acoustic Effects Model of the Navy's rulemaking/LOA application). The range to effects are shown for a range of explosive bins, from E1 (up to 0.25 lb net explosive weight) to E12 (up to 1,000 lb net explosive weight) (Tables 23 through 27). Ranges are determined by modeling the distance that noise from an explosion would need to propagate to reach exposure level thresholds specific to a hearing group that would cause behavioral response (to the degree of Level B harassment), TTS, PTS, and non-auditory injury. Ranges are provided for a representative source depth and cluster size for each bin. For events with multiple explosions, sound from successive explosions can be expected to accumulate and increase the range to the onset of an impact based on SEL thresholds. Ranges to non-auditory injury and mortality are shown in Tables 26 and 27, respectively. NMFS has reviewed the range distance to effect data provided by the Navy and concurs with the analysis. For additional information on how ranges to impacts from explosions were estimated, see the technical report *Quantifying Acoustic Impacts on Marine Mammals and Sea Turtles: Methods and Analytical Approach for Phase III Training and Testing* (U.S. Navy, 2018).

Table 23 shows the minimum, average, and maximum ranges to onset of auditory and likely behavioral effects that rise to the level of Level B harassment for high-frequency cetaceans based on the developed thresholds.

TABLE 23—SEL-BASED RANGES (METERS) TO ONSET PTS, ONSET TTS, AND LEVEL B HARASSMENT BY BEHAVIORAL DISTURBANCE FOR HIGH-FREQUENCY CETACEANS

Range to effects for explosives bin: high-frequency cetaceans [1]					
Bin	Source Depth (m)	Cluster Size	PTS	TTS	Behavioral disturbance
E1	0.1	1	353 (340–370)	1,303 (1,275–1,775)	2,139 (2,025–4,275)
	.....	18	1,031 (1,025–1,275)	3,409 (2,525–8,025)	4,208 (3,025–11,525)
E2	0.1	1	431 (410–700)	1,691 (1,525–2,775)	2,550 (2,025–4,525)
	.....	5	819 (775–1,275)	2,896 (2,275–6,775)	3,627 (2,525–10,275)
E3	0.1	1	649 (625–700)	2,439 (2,025–4,525)	3,329 (2,525–7,525)
	.....	12	1,682 (1,525–2,275)	4,196 (3,025–11,525)	5,388 (4,525–16,275)
	18.25	1	720 (675–775)	4,214 (2,275–6,275)	7,126 (3,525–8,775)
	.....	12	1,798 (1,525–2,775)	10,872 (4,525–13,775)	14,553 (5,525–17,775)
E4	10	2	1,365 (1,025–2,775)	7,097 (4,275–10,025)	9,939 (5,025–15,275)
	60	2	1,056 (875–2,275)	3,746 (2,775–5,775)	5,262 (3,025–7,775)
E5	0.1	20	2,926 (1,525–6,275)	6,741 (4,525–16,025)	9,161 (4,775–20,025)
	30	20	4,199 (3,025–6,275)	13,783 (8,775–17,775)	17,360 (10,525–22,775)
E6	0.1	1	1,031 (1,025–1,275)	3,693 (2,025–8,025)	4,659 (3,025–12,775)
	30	1	1,268 (1,025–1,275)	7,277 (3,775–8,775)	10,688 (5,275–12,525)
E8	0.1	1	1,790 (1,775–3,025)	4,581 (4,025–10,775)	6,028 (4,525–15,775)
	45.75	1	1,842 (1,525–2,025)	9,040 (4,525–12,775)	12,729 (5,025–18,525)
E9	0.1	1	2,343 (2,275–4,525)	5,212 (4,025–13,275)	7,573 (5,025–17,025)
E10	0.1	1	2,758 (2,275–5,025)	6,209 (4,275–16,525)	8,578 (5,275–19,775)
E11	45.75	1	3,005 (2,525–3,775)	11,648 (5,025–18,775)	14,912 (6,525–24,775)
	91.4	1	3,234 (2,525–4,525)	5,772 (4,775–11,775)	7,197 (5,775–14,025)
E12	0.1	1	3,172 (3,025–6,525)	7,058 (5,025–17,025)	9,262 (6,025–21,775)
	.....	4	4,209 (3,775–10,025)	9,817 (6,275–22,025)	12,432 (7,525–27,775)

[1] Average distance (m) to PTS, TTS, and behavioral disturbance thresholds are depicted above the minimum and maximum distances which are in parentheses. Values depict the range produced by SEL hearing threshold criteria levels.

Table 24 shows the minimum, average, and maximum ranges to onset of auditory and likely behavioral effects that rise to the level of Level B harassment for mid-frequency cetaceans based on the developed thresholds.

TABLE 24—SEL-BASED RANGES (METERS) TO ONSET PTS, ONSET TTS, AND LEVEL B HARASSMENT BY BEHAVIORAL DISTURBANCE FOR MID-FREQUENCY CETACEANS

Range to effects for explosives bin: mid-frequency cetaceans [1]					
Bin	Source depth (m)	Cluster size	PTS	TTS	Behavioral disturbance
E1	0.1	1	25 (25–25)	116 (110–120)	199 (190–210)
		18	94 (90–100)	415 (390–440)	646 (525–700)
E2	0.1	1	30 (30–35)	146 (140–170)	248 (230–370)
		5	63 (60–70)	301 (280–410)	481 (430–675)
E3	0.1	1	50 (50–50)	233 (220–250)	381 (360–400)
		12	155 (150–160)	642 (525–700)	977 (700–1,025)
	18.25	1	40 (40–40)	202 (190–220)	332 (320–350)
		12	126 (120–130)	729 (675–775)	1,025 (1,025–1,025)
E4	10	2	76 (70–90)	464 (410–550)	783 (650–975)
	60	2	60 (60–60)	347 (310–675)	575 (525–900)
E5	0.1	20	290 (280–300)	1,001 (750–1,275)	1,613 (925–3,275)
	30	20	297 (240–420)	1,608 (1,275–2,775)	2,307 (2,025–2,775)
E6	0.1	1	98 (95–100)	430 (400–450)	669 (550–725)
	30	1	78 (75–80)	389 (370–410)	619 (600–650)
E8	0.1	1	162 (150–170)	665 (550–700)	982 (725–1,025)
	45.75	1	127 (120–130)	611 (600–625)	985 (950–1,025)
E9	0.1	1	215 (210–220)	866 (625–1,000)	1,218 (800–1,525)
E10	0.1	1	270 (250–280)	985 (700–1,275)	1,506 (875–2,525)
E11	45.75	1	241 (230–250)	1,059 (1,000–1,275)	1,874 (1,525–2,025)
	91.4	1	237 (230–270)	1,123 (900–2,025)	1,731 (1,275–2,775)
E12	0.1	1	332 (320–370)	1,196 (825–1,525)	1,766 (1,025–3,525)
		4	572 (500–600)	1,932 (1,025–4,025)	2,708 (1,275–6,775)

[1] Average distance (m) to PTS, TTS, and behavioral disturbance thresholds are depicted above the minimum and maximum distances which are in parentheses. Values depict the range produced by SEL hearing threshold criteria levels.

Table 25 shows the minimum, average, and maximum ranges to onset of auditory and likely behavioral effects that rise to the level of Level B harassment for low-frequency cetaceans based on the developed thresholds.

TABLE 25—SEL-BASED RANGES (METERS) TO ONSET PTS, ONSET TTS, AND LEVEL B HARASSMENT BY BEHAVIORAL DISTURBANCE FOR LOW-FREQUENCY CETACEANS

Range to effects for explosives bin: low-frequency cetaceans [1]					
Bin	Source depth (m)	Cluster size	PTS	TTS	Behavioral disturbance
E1	0.1	1	51 (50–55)	231 (200–250)	378 (280–410)
		18	183 (170–190)	691 (450–775)	934 (575–1,275)
E2	0.1	1	66 (65–70)	291 (220–320)	463 (330–500)
		5	134 (110–140)	543 (370–600)	769 (490–950)
E3	0.1	1	113 (110–120)	477 (330–525)	689 (440–825)
		12	327 (250–370)	952 (600–1,525)	1,240 (775–4,025)
	18.25	1	200 (200–200)	955 (925–1,000)	1,534 (1,275–1,775)
		12	625 (600–625)	5,517 (2,275–7,775)	10,299 (3,775–13,025)
E4	10	2	429 (370–600)	2,108 (1,775–2,775)	4,663 (3,025–6,025)
	60	2	367 (340–470)	1,595 (1,025–2,025)	2,468 (1,525–4,275)
E5	0.1	20	702 (380–1,275)	1,667 (850–11,025)	2,998 (1,025–19,775)
	30	20	1,794 (1,275–2,775)	8,341 (3,775–11,525)	13,946 (4,025–22,275)
E6	0.1	1	250 (190–410)	882 (480–1,775)	1,089 (625–6,525)
	30	1	495 (490–500)	2,315 (2,025–2,525)	5,446 (3,275–6,025)
E8	0.1	1	415 (270–725)	1,193 (625–4,275)	1,818 (825–8,525)
	45.75	1	952 (900–975)	6,294 (3,025–9,525)	12,263 (4,275–20,025)
E9	0.1	1	573 (320–1,025)	1,516 (725–7,275)	2,411 (950–14,275)
E10	0.1	1	715 (370–1,525)	2,088 (825–28,275)	4,378 (1,025–32,275)
E11	45.75	1	1,881 (1,525–2,275)	12,425 (4,275–27,275)	23,054 (7,025–65,275)
	91.4	1	1,634 (1,275–2,525)	5,686 (3,775–11,275)	11,618 (5,525–64,275)
E12	0.1	1	790 (420–2,775)	2,698 (925–25,275)	6,032 (1,025–31,275)
		4	1,196 (575–6,025)	6,876 (1,525–31,275)	13,073 (3,775–64,275)

[1] Average distance (m) to PTS, TTS, and behavioral disturbance thresholds are depicted above the minimum and maximum distances which are in parentheses. Values depict the range produced by SEL hearing threshold criteria levels.

Table 26 shows the minimum, average, and maximum ranges due to varying propagation conditions to non-auditory injury as a function of animal mass and explosive bin (*i.e.,* net explosive weight). Ranges to gastrointestinal tract injury typically exceed ranges to slight lung injury; therefore, the maximum range to effect

is not mass-dependent. Animals within these water volumes would be expected to receive minor injuries at the outer ranges, increasing to more substantial injuries, and finally mortality as an animal approaches the detonation point.

TABLE 26—RANGES [1] TO 50 PERCENT NON-AUDITORY INJURY RISK FOR ALL MARINE MAMMAL HEARING GROUPS

Bin	Range (m) (min-max)
1	12 (11–13)
E2	16 (15–16)
E3	25 (25–25)
E4	30 (30–35)
E5	40 (40–65)
E6	52 (50–60)
E8	98 (90–150)
E9	123 (120–270)
E10	155 (150–430)
E11	418 (410–420)
E12	195 (180–675)

[1] Distances in meters (m). Average distance is shown with the minimum and maximum distances due to varying propagation environments in parentheses.

Note: All ranges to non-auditory injury within this table are driven by gastrointestinal tract injury thresholds regardless of animal mass.

Ranges to mortality, based on animal mass, are shown in Table 27 below.

TABLE 27—RANGES [1] TO 50 PERCENT MORTALITY RISK FOR ALL MARINE MAMMAL HEARING GROUPS AS A FUNCTION OF ANIMAL MASS

Bin	Range to mortality (meters) for various animal mass intervals (kg) [1]					
	10	250	1,000	5,000	25,000	72,000
E1	3 (3–3)	1 (0–2)	0 (0–0)	0 (0–0)	0 (0–0)	0 (0–0)
E2	4 (3–4)	2 (1–3)	1 (0–1)	0 (0–0)	0 (0–0)	0 (0–0)
E3	9 (7–10)	4 (2–8)	2 (1–2)	1 (0–1)	0 (0–0)	0 (0–0)
E4	13 (12–15)	7 (4–12)	3 (3–4)	2 (1–3)	1 (1–1)	1 (0–1)
E5	13 (12–30)	7 (4–25)	3 (2–7)	2 (1–5)	1 (1–2)	1 (0–2)
E6	16 (15–25)	9 (5–23)	4 (3–8)	3 (2–6)	1 (1–2)	1 (1–2)
E8	42 (25–65)	22 (9–50)	11 (6–19)	8 (4–13)	4 (2–6)	3 (1–5)
E9	33 (30–35)	20 (13–30)	10 (9–12)	7 (5–9)	4 (3–4)	3 (2–3)
E10	55 (40–170)	24 (16–35)	13 (11–15)	9 (7–11)	5 (4–5)	4 (3–4)
E11	206 (200–210)	98 (55–170)	44 (35–50)	30 (25–35)	16 (14–18)	12 (10–15)
E12	86 (50–270)	35 (20–210)	16 (13–19)	11 (9–13)	6 (5–6)	5 (4–5)

[1] Average distance (m) to mortality is depicted above the minimum and maximum distances, which are in parentheses.

Marine Mammal Density

A quantitative analysis of impacts on a species or stock requires data on their abundance and distribution that may be affected by anthropogenic activities in the potentially impacted area. The most appropriate metric for this type of analysis is density, which is the number of animals present per unit area. Marine species density estimation requires a significant amount of effort to both collect and analyze data to produce a reasonable estimate. Unlike surveys for terrestrial wildlife, many marine species spend much of their time submerged, and are not easily observed. In order to collect enough sighting data to make reasonable density estimates, multiple observations are required, often in areas that are not easily accessible (*e.g.,* far offshore). Ideally, marine mammal species sighting data would be collected for the specific area and time period *(e.g.,* season) of interest and density estimates derived accordingly. However, in many places, poor weather conditions and high sea states prohibit the completion of comprehensive visual surveys.

For most cetacean species, abundance is estimated using line-transect surveys or mark-recapture studies (*e.g.,* Barlow, 2010; Barlow and Forney, 2007; Calambokidis *et al.,* 2008). The result provides one single density estimate value for each species across broad geographic areas. This is the general approach applied in estimating cetacean abundance in NMFS' SARs. Although the single value provides a good average estimate of abundance (total number of individuals) for a specified area, it does not provide information on the species distribution or concentrations within that area, and it does not estimate density for other timeframes or seasons that were not surveyed. More recently, spatial habitat modeling developed by NMFS' Southwest Fisheries Science Center has been used to estimate cetacean densities (Barlow *et al.,* 2009; Becker *et al.,* 2010, 2012a, b, c, 2014, 2016; Ferguson *et al.,* 2006a; Forney *et al.,* 2012, 2015; Redfern *et al.,* 2006). These models estimate cetacean density as a continuous function of habitat variables (*e.g.,* sea surface temperature, seafloor depth, etc.) and thus allow predictions of cetacean densities on finer spatial scales than traditional line-transect or mark recapture analyses and for areas that have not been surveyed. Within the geographic area that was modeled, densities can be predicted wherever these habitat variables can be measured or estimated.

Ideally, density data would be available for all species throughout the study area year-round, in order to best estimate the impacts of Navy activities on marine species. However, in many places, ship availability, lack of funding, inclement weather conditions, and high sea states prevent the completion of comprehensive year-round surveys. Even with surveys that are completed, poor conditions may result in lower sighting rates for species that would typically be sighted with greater frequency under favorable conditions. Lower sighting rates preclude having an acceptably low uncertainty in the density estimates. A high level of uncertainty, indicating a low level of confidence in the density estimate, is typical for species that are rare or difficult to sight. In areas where survey data are limited or non-existent, known or inferred associations between marine

habitat features and the likely presence of specific species are sometimes used to predict densities in the absence of actual animal sightings. Consequently, there is no single source of density data for every area, species, and season because of the fiscal costs, resources, and effort involved in providing enough survey coverage to consistently estimate density.

To characterize marine species density for large oceanic regions, the Navy reviews, critically assesses, and prioritizes existing density estimates from multiple sources, requiring the development of a systematic method for selecting the most appropriate density estimate for each combination of species, area, and season. The selection and compilation of the best available marine species density data resulted in the Navy Marine Species Density Database (NMSDD). The Navy vetted all cetacean densities with NMFS prior to use in the Navy's acoustic analysis for this MITT rulemaking.

A variety of density data and density models are needed in order to develop a density database that encompasses the entirety of the MITT Study Area. Because this data is collected using different methods with varying amounts of accuracy and uncertainty, the Navy has developed a hierarchy to ensure the most accurate data is used when available. The technical report titled *U.S. Navy Marine Species Density Database Phase III for the Mariana Islands Training and Testing Study Area* (U.S. Department of the Navy, 2018), hereafter referred to as the Density Technical Report, describes these models in detail and provides detailed explanations of the models applied to each species density estimate. The list below describes models in order of preference.

1. Spatial density models are preferred and used when available because they provide an estimate with the least amount of uncertainty by deriving estimates for divided segments of the sampling area. These models (see Becker *et al.,* 2016; Forney *et al.,* 2015) predict spatial variability of animal presence as a function of habitat variables (*e.g.,* sea surface temperature, seafloor depth, etc.). This model is developed for areas, species, and, when available, specific timeframes (months or seasons) with sufficient survey data; therefore, this model cannot be used for species with low numbers of sightings.

2. Stratified design-based density estimates use line-transect survey data with the sampling area divided (stratified) into sub-regions, and a density is predicted for each sub-region (see Barlow, 2016; Becker *et al.,* 2016; Bradford *et al.,* 2017; Campbell *et al.,* 2014; Jefferson *et al.,* 2014). While geographically stratified density estimates provide a better indication of a species' distribution within the study area, the uncertainty is typically high because each sub-region estimate is based on a smaller stratified segment of the overall survey effort.

3. Design-based density estimations use line-transect survey data from land and aerial surveys designed to cover a specific geographic area (see Carretta *et al.,* 2015). These estimates use the same survey data as stratified design-based estimates, but are not segmented into sub-regions and instead provide one estimate for a large surveyed area. Although relative environmental suitability (RES) models provide estimates for areas of the oceans that have not been surveyed using information on species occurrence and inferred habitat associations and have been used in past density databases, these models were not used in the current quantitative analysis.

Below we describe how densities were determined for the species in the MITT Study Area. In the MITT Study Area there is a paucity of line-transect survey data, and little is known about the stock structure of the majority of marine mammal species in the region. The only habitat model available for the MITT Study Area was developed for sperm whales based on acoustic data collected during a 2007 line-transect survey (Yack *et al.,* 2016). For other species, the Navy conducted the first comprehensive marine mammal survey of waters off Guam and the Commonwealth of the Northern Mariana Islands in 2007, and data from this survey were used to derive line-transect abundance estimates for 12 cetacean species (Fulling *et al.,* 2011). There has not been a subsequent systematic survey of the MITT Study Area at this scale, so these data still provide the best available density estimates for this region for these species.

In the absence of study-area-specific density data, line-transect estimates derived for Hawaiian waters were used to provide conservative density estimates for the remaining species in the MITT Study Area. For Phase II, these estimates were based on systematic surveys conducted by NMFS' Southwest Fisheries Science Center (SWFSC) within the EEZ of the Hawaiian Islands (2010) and Palmyra Atoll/Kingman Reef (2011–2012) allowed NMFS' PIFSC to update the line-transect density estimates that included new sea-state-specific estimates of trackline detection probability (Bradford *et al.,* 2017) and represent improvements to the estimates used for Phase II. In addition, an updated density estimate for minke whale was available for Phase III based on line-transect analyses of acoustic data collected from a towed hydrophone during the 2007 systematic survey (Norris *et al.,* 2017).

The Navy developed a protocol and database to select the best available data sources based on species, area, and time (season). The resulting Geographic Information System database, used in the NMSDD, includes seasonal density values for every marine mammal species present within the MITT Study Area. This database is described in the Density Technical Report.

The Navy describes some of the challenges of interpreting the results of the quantitative analysis summarized above and described in the Density Technical Report: ''It is important to consider that even the best estimate of marine species density is really a model representation of the values of concentration where these animals might occur. Each model is limited to the variables and assumptions considered by the original data source provider. No mathematical model representation of any biological population is perfect, and with regards to marine mammal biodiversity, any single model method will not completely explain the actual distribution and abundance of marine mammal species. It is expected that there would be anomalies in the results that need to be evaluated, with independent information for each case, to support if we might accept or reject a model or portions of the model (U.S. Department of the Navy, 2017a).''

NMFS coordinated with the Navy in the development of its take estimates and concurs that the Navy's approach for density appropriately utilizes the best available science. Later, in the *Analysis and Negligible Impact Determination* section, we assess how the estimated take numbers compare to abundance in order to better understand the potential number of individuals impacted.

Take Estimation

The 2020 MITT FSEIS/OEIS considered all training and testing activities planned to occur in the MITT Study Area that have the potential to result in the MMPA-defined take of marine mammals. The Navy determined that the two stressors below could result in the incidental taking of marine mammals. NMFS has reviewed the Navy's data and analysis and determined that it is complete and accurate and agrees that the following

stressors have the potential to result in takes by harassment of marine mammals from the Navy's planned activities.

- Acoustics (sonar and other transducers);
- Explosives (explosive shock wave and sound, assumed to encompass the risk due to fragmentation).

The quantitative analysis process used for the 2020 MITT FSEIS/OEIS and the Navy's take request in the rulemaking/LOA application to estimate potential exposures to marine mammals resulting from acoustic and explosive stressors is detailed in the technical report titled *Quantifying Acoustic Impacts on Marine Mammals and Sea Turtles: Methods and Analytical Approach for Phase III Training and Testing* (U.S. Department of the Navy, 2018). The Navy Acoustic Effects Model (NAEMO) brings together scenario simulations of the Navy's activities, sound propagation modeling, and marine mammal distribution (based on density and group size) by species to model and quantify the exposure of marine mammals above identified thresholds for behavioral harassment, TTS, PTS, non-auditory injury, and mortality.

NAEMO estimates acoustic and explosive effects without taking mitigation into account; therefore, the model overestimates predicted impacts on marine mammals within mitigation zones. To account for mitigation for marine species in the take estimates, the Navy conducts a quantitative assessment of mitigation. The Navy conservatively quantifies the manner in which procedural mitigation is expected to reduce the risk for model-estimated PTS for exposures to sonars and for model-estimated mortality for exposures to explosives, based on species sightability, observation area, visibility, and the ability to exercise positive control over the sound source. See the proposed rule (85 FR 5782; January 31, 2020) for a description of the process for assessing the effectiveness of procedural mitigation measures, along with the process for assessing the potential for animal avoidance. Where the analysis indicates mitigation would effectively reduce risk, the model-estimated PTS takes are considered reduced to TTS and the model-estimated mortalities are considered reduced to injury. For a complete explanation of the process for assessing the effects of procedural mitigation, see the Navy's rulemaking/LOA application (Section 6: Take Estimates for Marine Mammals, and Section 11: Mitigation Measures) and the technical report titled *Quantifying Acoustic Impacts on Marine Mammals and Sea Turtles: Methods and Analytical Approach for Phase III Training and Testing* (U.S. Department of the Navy, 2018). The extent to which the mitigation areas reduce impacts on the affected species is addressed qualitatively separately in the *Analysis and Negligible Impact Determination* section.

NMFS coordinated with the Navy in the development of this quantitative method to address the effects of procedural mitigation on acoustic and explosive exposures and takes, and NMFS independently reviewed and concurs with the Navy that it is appropriate to incorporate the quantitative assessment of mitigation into the take estimates based on the best available science.

As a general matter, NMFS does not prescribe the methods for estimating take for any applicant, but we review and ensure that applicants use the best available science, and methodologies that are logical and technically sound. Applicants may use different methods of calculating take (especially when using models) and still get to a result that is representative of the best available science and that allows for a rigorous and accurate evaluation of the effects on the affected populations. There are multiple pieces of the Navy take estimation methods—propagation models, animat movement models, and behavioral thresholds, for example. NMFS evaluates the acceptability of these pieces as they evolve and are used in different rules and impact analyses. Some of the pieces of the Navy's take estimation process have been used in Navy incidental take rules since 2009 and undergone multiple public comment processes, all of them have undergone extensive internal Navy review, and all of them have undergone comprehensive review by NMFS, which has sometimes resulted in modifications to methods or models.

The Navy uses rigorous review processes (verification, validation, and accreditation processes, peer and public review) to ensure the data and methodology it uses represent the best available science. For instance, the NAEMO model is the result of a NMFS-led Center for Independent Experts (CIE) review of the components used in earlier models. The acoustic propagation component of the NAEMO model (CASS/GRAB) is accredited by the Oceanographic and Atmospheric Master Library (OAML), and many of the environmental variables used in the NAEMO model come from approved OAML databases and are based on in-situ data collection. The animal density components of the NAEMO model are base products of the NMSDD, which includes animal density components that have been validated and reviewed by a variety of scientists from NMFS Science Centers and academic institutions. Several components of the model, for example the Duke University habitat-based density models, have been published in peer reviewed literature. Others like the Atlantic Marine Assessment Program for Protected Species, which was conducted by NMFS Science Centers, have undergone quality assurance and quality control (QA/QC) processes. Finally the NAEMO model simulation components underwent QA/QC review and validation for model parts such as the scenario builder, acoustic builder, scenario simulator, etc., conducted by qualified statisticians and modelers to ensure accuracy. Other models and methodologies have gone through similar review processes.

In summary, we believe the Navy's methods, including the underlying NAEMO modeling and the method for incorporating mitigation and avoidance, are the most appropriate methods for predicting non-auditory injury, PTS, TTS, and behavioral disturbance. But even with the consideration of mitigation and avoidance, given some of the more conservative components of the methodology (*e.g.,* the thresholds do not consider ear recovery between pulses), we would describe the application of these methods as identifying the maximum number of instances in which marine mammals would be reasonably expected to be taken through non-auditory injury, PTS, TTS, or behavioral disturbance.

Humpback Whales Around Saipan

As noted above, since publication of the proposed rule, additional information and analysis have been used to refine the assessment for the impacts of sonar training and testing on humpback whales around Saipan, resulting in an increase in the total take numbers for humpback whales. Below, we present updated information describing both the Navy's activities and expected humpback whale occurrence in the specific area, as well as the additional analysis of this information to estimate take of humpback whales in this subset of the MITT Study Area. This information was then used to refine the total take numbers for humpback whales and the change is reflected in Table 28 and Table 47.

Given concern for impacts to humpback whales, including cow-calf pairs, in the Chalan Kanoa Reef and Marpi Reef Geographic Mitigation Areas, more specific information regarding Navy activities, and the

availability of more detailed occurrence data for humpback whales in these areas, and in coordination with NMFS' Interagency Cooperation Division, NMFS has updated and refined the analysis of humpback whale impacts in these areas since publication of the proposed rule. The analysis considers the new annual 20-hour cap on MF1 hull-mounted sonar in both mitigation areas and, specifically, estimates potential take of humpback whales should the Navy conduct the full 20 hours of sonar training and testing in these areas, most likely in the form of a Small Coordinated ASW Exercises or TRACKEX events (or a combination of these two activities).

At the request of NMFS, subsequent to the publication of the proposed rule, the Navy provided refined estimates of the number of humpback whales estimated to be taken as prorated from the NAEMO model. These new estimates were based on 20 hours of MF1 MFAS occurring in the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas (outside of 3 nmi and waters deeper than 60 m) during December through April. The analysis assumed takes could occur in either of the two geographic mitigation areas. The resulting take estimates provided by the Navy were 2.12 takes by behavioral disturbance and 11.08 takes by TTS (a total of 13.20 takes by Level B harassment). These take estimates represent five ASW TRACKEX events with each event using four hours of MF1 sonar. While other configurations of the 20 hours could occur, NMFS and the Navy concur that five 4-hour exercises on five different days best represents the likely scenario that allows for the most appropriate take estimate. A single 4-hr TRACKEX event was expected to result in 0.42 takes by behavioral disturbance and 2.2 takes by TTS (a total of 2.62 takes by Level B harassment). However, the approach used to calculate these take estimates did not adequately consider the concentration of humpback whales found within these established breeding and calving grounds from December through April.

NMFS conducted its own analysis of the take by Level A harassment (by PTS) and Level B harassment (both TTS and behavioral disruption) that could occur in the Chalan Kanoa Reef and Marpi Reef Geographic Mitigation Areas under the 20-hr cap, for the purposes of both better understanding the impacts to adults and calves in this important area and modifying the total take numbers for humpback whales given more granular survey data now being considered in this area. Our exposure analysis is focused on the whales within the areas around Saipan covered by the surveys conducted by the PIFSC and reported in the Hill *et al.* (2020a) paper and the Hill *et al.* (2020b) abundance and density report. We believe this approach more accurately estimates potential exposures and takes of whales as a result of MF1 MFAS in these two Geographic Mitigation Areas. More extensive mark/recapture data in this smaller area provide a more granular and robust estimate of potential abundance and density for this specific area than the density estimate used by the Navy for the broader MITT Study Area. Estimates provided by the PIFSC (Hill *et al.,* 2020b) are preliminary, represent ''snapshots'' of abundance for that survey period based on the timing of the survey, and may change—but these estimates represent the best available scientific data for two reasons: (1) Estimates are area specific; and (2) estimates are far more robust than a non-model approach (*e.g.,* sightings per unit of effort approach).

We used an approach based on the annual abundance estimates from the PIFSC report (Hill *et al.,* 2020b) to derive estimates of animals that may be exposed to MF1 MFAS within these two Geographic Mitigation Areas. Preliminary annual (2015–2019) estimates of abundance, including standard errors (SE), 95 percent confidence intervals (CI), and densities of humpback whales in the PIFSC's study area were calculated using mark-recapture analyses (Table 3 in Hill *et al.,* 2020b). Densities (whales/km^2) are reported for the full survey area (839 km^2) and the truncated survey area where most of the effort and all of the humpback whale encounters occurred (384 km^2) areas off the west side of Saipan to Chalan Kanoa Reef and north to Marpi Reef. The error associated with the average non-calf and total abundance was obtained by summing the variances of the annual estimates even though these estimates are not independent, as using a bootstrap or other approach to estimate uncertainty was beyond the scope of this preliminary analysis. The average non-calf abundance from 2015–2019 was 44 animals (Table 3 in Hill *et al.,* 2020b). PIFSC provided estimates of calf abundance in their annual abundance estimates by increasing the average annual abundance of whales (non-calf) by the proportion of calves seen in the four years of surveys where calves were seen (2015–2018). The proportion of calves ranges from 0.5 to 0.2. This increased the average number of animals (non-calf) from 44 to 61 (total abundance (44) and 17 calves; with a 95 percent CI of 41–91) animals. Therefore, we are conservatively estimating that 61 animals a day could be taken on 5 days in which the exercise occurs for a total of 305 humpback whales taken by Level B harassment annually in the two Geographic Mitigation Areas combined (assuming 20 hrs of MF1 MFAS occurred). The Navy provided updated NAEMO-based calculations (as described above) that estimated 13 takes by Level B harassment during 20 hours of MF1 sonar. Subtracting these 13 takes from our estimate of 305 exposures (takes) results in 292 animals based on the new abundance information. Using the proportions of these takes as presented by the Navy estimated take (12 percent behavioral and 88 percent TTS) results in an additional 35 takes by behavioral disturbance and 257 takes by TTS annually.

This is a greater number of takes and a more conservative approach than the Navy's estimate and increases the total take by Level B harassment, but also provides a more accurate representation of how many takes by Level B harassment could occur during the breeding season in the two Geographic Mitigation Areas. The maximum number of animals (61) that could be taken in a day is a very conservative, worst-case scenario estimate based on the best available abundance data for humpback whales. We do not know how humpback whales move between the two Geographic Mitigation Areas or if more whales may be present in one Geographic Mitigation Area versus the other when the Navy is conducting their activity. We also assume the Navy could engage in exercises that only occur in one of two Geographic Mitigation Areas or it could be split between the two areas and involve multiple ships. We also acknowledge takes of humpback whales would certainly be less if the Navy's MF1 MFAS use occurs at the beginning or toward the end of the breeding season in the Geographic Mitigation Areas.

There is a very low likelihood that a humpback whale would accumulate enough exposure to result in PTS in the two Geographic Mitigation Areas. However, the Navy's approach to accounting for avoidance does not address possible differences in avoidance capability based on an animal's life-stage or particular life function at the time of exposure. Mother-calf pairs on the calving grounds may be less capable of avoiding additional exposures at levels that could cause PTS, as compared to individual adult males or females without calves. The age of the calf may also be a factor in the avoidance capability of a mother-

calf pair (*e.g.,* neonates may be particularly vulnerable). Mother-calf pairs may respond differently to MF1 MFAS at close range. Other potential stressors (*e.g.,* presence of breeding males, other nearby vessel activity, or potential predators) may influence how humpback whales (including cow-calf pairs) respond to acoustic stressors. Therefore, we estimate that up to one mother-calf pair of humpback whales could be taken by Level A harassment by PTS over the total seven-year period of the rule.

Additional mitigation by the Navy will include reporting of all active sonar use (all bins, by bin) in the Marpi Reef and Chalan Kanoa Geographic Mitigation Areas from December 1 through April 30. This will provide NMFS with more specific data in order to evaluate sonar use with current mitigation measures in the Geographic Mitigation Areas and to determine if any changes are needed through Adaptive Management.

Summary of Estimated Take From Training and Testing Activities

Based on the methods discussed in the previous sections and the Navy's model and quantitative assessment of mitigation, the Navy provided its take estimate and request for authorization of takes incidental to the use of acoustic and explosive sources for training and testing activities both annually (based on the maximum number of activities that could occur per 12-month period) and over the seven-year period covered by the Navy's rulemaking/LOA application. NMFS has reviewed the Navy's data, methodology, and analysis and determined that it is complete and accurate. NMFS agrees that the estimates for incidental takes by harassment from all sources requested for authorization are the maximum number of instances in which marine mammals are reasonably expected to be taken.

For training and testing activities, Table 28 summarizes the Navy's take estimate and request and includes the maximum amount of Level A harassment and Level B harassment annually and for the seven-year period that NMFS concurs is reasonably likely to occur by species. Note that take by Level B harassment includes both behavioral disturbance and TTS. Tables 6.4–13 through 6.4–38 in Section 6 of the Navy's rulemaking/LOA application provide the comparative amounts of TTS and behavioral disturbance for each species annually, noting that if a modeled marine mammal was ''taken'' through exposure to both TTS and behavioral disruption in the model, it was recorded as a TTS.

TABLE 28—ANNUAL AND SEVEN-YEAR TOTAL SPECIES-SPECIFIC TAKE ESTIMATES AUTHORIZED FROM ACOUSTIC AND EXPLOSIVE SOUND SOURCE EFFECTS FOR ALL TRAINING AND TESTING ACTIVITIES IN THE MITT STUDY AREA

Species	Annual		7-Year total [1]	
	Level B harassment	Level A harassment	Level B harassment	Level A harassment
Mysticetes				
Blue whale *	24	0	169	0
Bryde's whale	298	0	2,078	0
Fin whale *	25	0	173	0
Humpback whale *	771	0	3,348	** 1
Minke whale	95	0	665	0
Omura's whale	29	0	199	0
Sei whale*	155	0	1,083	0
Odontocetes				
Blainville's beaked whale	1,718	0	12,033	0
Bottlenose dolphin	137	0	961	0
Cuvier's beaked whale	646	0	4,529	0
Dwarf sperm whale	8,499	50	59,459	341
False killer whale	762	0	5,331	0
Fraser's dolphin	13,278	1	92,931	8
Ginkgo-toothed beaked whale	3,726	0	26,088	0
Killer whale	44	0	309	0
Longman's beaked whale	6,066	0	42,487	0
Melon-headed whale	2,815	0	19,691	0
Pantropical spotted dolphin	14,896	1	104,242	7
Pygmy killer whale	104	0	726	0
Pygmy sperm whale	3,410	19	23,853	136
Risso's dolphin	3,170	0	22,179	0
Rough-toothed dolphin	197	0	1,379	0
Short-finned pilot whale	1,163	0	8,140	0
Sperm whale *	203	0	1,420	0
Spinner dolphin	1,414	1	9,896	4
Striped dolphin	4,007	0	28,038	0

* ESA-listed species within the MITT Study Area.

** There is one mother-calf pair of humpback whales estimated to be taken by Level A harassment by PTS over the period of the rule. See the *Estimated Take of Marine Mammals* section for further details.

[1] The 7-year totals may be less than the annual totals times seven, given that not all activities occur every year, some activities occur multiple times within a year, and some activities only occur a few times over the course of a 7-year period.

Mitigation Measures

Under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable adverse impact on the 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 subsistence uses (''least practicable

adverse impact''). NMFS does not have a regulatory definition for least practicable adverse impact. The 2004 NDAA amended the MMPA as it relates to military readiness activities and the incidental take authorization process such that a determination of ''least practicable adverse impact'' shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

In *Conservation Council for Hawaii* v. *National Marine Fisheries Service,* 97 F. Supp.3d 1210, 1229 (D. Haw. 2015), the Court stated that NMFS ''appear[s] to think [it] satisf[ies] the statutory 'least practicable adverse impact' requirement with a 'negligible impact' finding.'' More recently, expressing similar concerns in a challenge to a U.S. Navy Surveillance Towed Array Sensor System Low Frequency Active Sonar (SURTASS LFA) incidental take rule (77 FR 50290), the Ninth Circuit Court of Appeals in *Natural Resources Defense Council (NRDC)* v. *Pritzker,* 828 F.3d 1125, 1134 (9th Cir. 2016), stated, ''[c]ompliance with the 'negligible impact' requirement does not mean there [is] compliance with the 'least practicable adverse impact' standard.'' As the Ninth Circuit noted in its opinion, however, the Court was interpreting the statute without the benefit of NMFS' formal interpretation. We state here explicitly that NMFS is in full agreement that the ''negligible impact'' and ''least practicable adverse impact'' requirements are distinct, even though both statutory standards refer to species and stocks. With that in mind, we provide further explanation of our interpretation of least practicable adverse impact, and explain what distinguishes it from the negligible impact standard. This discussion is consistent with previous rules we have issued, such as the Navy's HSTT rule (83 FR 66846; December 27, 2018), Atlantic Fleet Training and Testing rule (84 FR 70712; December 23, 2019), and the Northwest Training and Testing (NWTT) proposed rule (0648–BJ30; June 02, 2020).

Before NMFS can issue incidental take regulations under section 101(a)(5)(A) of the MMPA, it must make a finding that the total taking will have a ''negligible impact'' on the affected ''species or stocks'' of marine mammals. NMFS' and U.S. Fish and Wildlife Service's implementing regulations for section 101(a)(5) both define ''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 and 50 CFR 18.27(c)). Recruitment (*i.e.,* reproduction) and survival rates are used to determine population growth rates [2] and therefore are considered in evaluating population level impacts.

As stated in the preamble to the proposed rule for the MMPA incidental take implementing regulations, not every population-level impact violates the negligible impact requirement. The negligible impact standard does not require a finding that the anticipated take will have ''no effect'' on population numbers or growth rates: The statutory standard does not require that the same recovery rate be maintained, rather that no significant effect on annual rates of recruitment or survival occurs. The key factor is the significance of the level of impact on rates of recruitment or survival. (54 FR 40338, 40341–42; September 29, 1989).

While some level of impact on population numbers or growth rates of a species or stock may occur and still satisfy the negligible impact requirement—even without consideration of mitigation—the least practicable adverse impact provision separately requires NMFS to prescribe means of effecting the least practicable adverse impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, 50 CFR 216.102(b), which are typically identified as mitigation measures.[3]

The negligible impact and least practicable adverse impact standards in the MMPA both call for evaluation at the level of the ''species or stock.'' The MMPA does not define the term ''species.'' However, Merriam-Webster Dictionary defines ''species'' to include ''related organisms or *populations* potentially capable of interbreeding.'' See *www.merriam-webster.com/dictionary/species* (emphasis added). Section 3(11) of the MMPA defines ''stock'' as a group of marine mammals of the same species or smaller taxa in a common spatial arrangement that interbreed when mature. The definition of ''population'' is a group of interbreeding organisms that represents the level of organization at which speciation begins. *www.merriam-webster.com/dictionary/population.* The definition of ''population'' is strikingly similar to the MMPA's definition of ''stock,'' with both definitions involving groups of individuals that belong to the same species and that are located in a manner that allows for interbreeding. In fact under MMPA section 3(11), the term ''stock'' in the MMPA is interchangeable with the statutory term ''population stock.'' Both the negligible impact standard and the least practicable adverse impact standard call for evaluation at the level of the species or stock, and the terms ''species'' and ''stock'' both relate to populations; therefore, it is appropriate to view both the negligible impact standard and the least practicable adverse impact standard as having a population-level focus.

This interpretation is consistent with Congress' statutory findings for enacting the MMPA, nearly all of which are most applicable at the species or stock (*i.e.,* population) level. *See* MMPA section 2 (finding that it is species and population stocks that are or may be in danger of extinction or depletion; that it is species and population stocks that should not diminish beyond being significant functioning elements of their ecosystems; and that it is species and population stocks that should not be permitted to diminish below their optimum sustainable population level). Annual rates of recruitment (*i.e.,* reproduction) and survival are the key biological metrics used in the evaluation of population-level impacts, and accordingly these same metrics are also used in the evaluation of population level impacts for the least practicable adverse impact standard.

Recognizing this common focus of the least practicable adverse impact and negligible impact provisions on the ''species or stock'' does not mean we conflate the two standards; despite some common statutory language, we recognize the two provisions are different and have different functions. First, a negligible impact finding is required before NMFS can issue an incidental take authorization. Although it is acceptable to use the mitigation measures to reach a negligible impact finding (*see* 50 CFR 216.104(c)), no amount of mitigation can enable NMFS to issue an incidental take authorization for an activity that still would not meet the negligible impact standard. Moreover, even where NMFS can reach a negligible impact finding—which we emphasize does allow for the possibility of some ''negligible'' population-level impact—the agency must still prescribe measures that will effect the least practicable amount of adverse impact upon the affected species or stock.

Section 101(a)(5)(A)(i)(II) requires NMFS to issue, in conjunction with its authorization, binding—and

[2] A growth rate can be positive, negative, or flat.

[3] For purposes of this discussion, we omit reference to the language in the standard for least practicable adverse impact that says we also must mitigate for subsistence impacts because they are not at issue in this rule.

enforceable—restrictions (in the form of regulations) setting forth how the activity must be conducted, thus ensuring the activity has the ''least practicable adverse impact'' on the affected species or stocks. In situations where mitigation is specifically needed to reach a negligible impact determination, section 101(a)(5)(A)(i)(II) also provides a mechanism for ensuring compliance with the ''negligible impact'' requirement. Finally, the least practicable adverse impact standard also requires consideration of measures for marine mammal habitat, with particular attention to rookeries, mating grounds, and other areas of similar significance, and for subsistence impacts, whereas the negligible impact standard is concerned solely with conclusions about the impact of an activity on annual rates of recruitment and survival.[4] In *NRDC* v. *Pritzker,* the Court stated, ''[t]he statute is properly read to mean that even if population levels are not threatened *significantly,* still the agency must adopt mitigation measures aimed at protecting *marine mammals* to the greatest extent practicable in light of military readiness needs.'' *Pritzker* at 1134 (emphases added). This statement is consistent with our understanding stated above that even when the effects of an action satisfy the negligible impact standard (*i.e.,* in the Court's words, ''population levels are not threatened significantly''), still the agency must prescribe mitigation under the least practicable adverse impact standard. However, as the statute indicates, the focus of both standards is ultimately the impact on the affected ''species or stock,'' and not solely focused on or directed at the impact on individual marine mammals.

We have carefully reviewed and considered the Ninth Circuit's opinion in *NRDC* v. *Pritzker* in its entirety. While the Court's reference to ''marine mammals'' rather than ''marine mammal species or stocks'' in the italicized language above might be construed as a holding that the least practicable adverse impact standard applies at the individual ''marine mammal'' level, *i.e.,* that NMFS must require mitigation to minimize impacts to each individual marine mammal unless impracticable, we believe such an interpretation reflects an incomplete appreciation of the Court's holding. In our view, the opinion as a whole turned on the Court's determination that NMFS had not given separate and independent meaning to the least practicable adverse impact standard apart from the negligible impact standard, and further, that the Court's use of the term ''marine mammals'' was not addressing the question of whether the standard applies to individual animals as opposed to the species or stock as a whole. We recognize that while consideration of mitigation can play a role in a negligible impact determination, consideration of mitigation measures extends beyond that analysis. In evaluating what mitigation measures are appropriate, NMFS considers the potential impacts of the Specified Activities, the availability of measures to minimize those potential impacts, and the practicability of implementing those measures, as we describe below.

Implementation of Least Practicable Adverse Impact Standard

Given the *NRDC* v. *Pritzker* decision, we discuss here how we determine whether a measure or set of measures meets the ''least practicable adverse impact'' standard. Our separate analysis of whether the take anticipated to result from the Navy's activities meets the ''negligible impact'' standard appears in the *Analysis and Negligible Impact Determination* section below.

Our evaluation of potential mitigation measures includes consideration of two primary factors:

(1) The manner in which, and the degree to which, implementation of the potential measure(s) is expected to reduce adverse impacts to marine mammal species or stocks, their habitat, and their availability for subsistence uses (where relevant). This analysis considers such things as the nature of the potential adverse impact (such as likelihood, scope, and range), the likelihood that the measure will be effective if implemented, and the likelihood of successful implementation; and

(2) The practicability of the measures for applicant implementation. Practicability of implementation may consider such things as cost, impact on activities, and, in the case of a military readiness activity, specifically considers personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

While the language of the least practicable adverse impact standard calls for minimizing impacts to affected species or stocks, we recognize that the reduction of impacts to those species or stocks accrues through the application of mitigation measures that limit impacts to individual animals. Accordingly, NMFS' analysis focuses on measures that are designed to avoid or minimize impacts on individual marine mammals that are likely to increase the probability or severity of population-level effects.

While direct evidence of impacts to species or stocks from a specified activity is rarely available, and additional study is still needed to understand how specific disturbance events affect the fitness of individuals of certain species, there have been improvements in understanding the process by which disturbance effects are translated to the population. With recent scientific advancements (both marine mammal energetic research and the development of energetic frameworks), the relative likelihood or degree of impacts on species or stocks may often be inferred given a detailed understanding of the activity, the environment, and the affected species or stocks—and the best available science has been used here. This same information is used in the development of mitigation measures and helps us understand how mitigation measures contribute to lessening effects (or the risk thereof) to species or stocks. We also acknowledge that there is always the potential that new information, or a new recommendation could become available in the future and necessitate reevaluation of mitigation measures (which may be addressed through adaptive management) to see if further reductions of population impacts are possible and practicable.

In the evaluation of specific measures, the details of the specified activity will necessarily inform each of the two primary factors discussed above (expected reduction of impacts and practicability), and are carefully considered to determine the types of mitigation that are appropriate under the least practicable adverse impact standard. Analysis of how a potential mitigation measure may reduce adverse impacts on a marine mammal stock or species, consideration of personnel safety, practicality of implementation, and consideration of the impact on effectiveness of military readiness activities are not issues that can be meaningfully evaluated through a yes/no lens. The manner in which, and the degree to which, implementation of a measure is expected to reduce impacts, as well as its practicability in terms of these considerations, can vary widely. For example, a time/area restriction could be of very high value for decreasing population-level impacts (*e.g.,* avoiding disturbance of feeding females in an area of established biological importance) or it could be of

[4] Outside of the military readiness context, mitigation may also be appropriate to ensure compliance with the ''small numbers'' language in MMPA sections 101(a)(5)(A) and (D).

lower value (*e.g.,* decreased disturbance in an area of high productivity but of less biological importance). Regarding practicability, a measure might involve restrictions in an area or time that impedes the Navy's ability to certify a strike group (higher impact on mission effectiveness and national security), or it could mean delaying a small in-port training event by 30 minutes to avoid exposure of a marine mammal to injurious levels of sound (lower impact). A responsible evaluation of ''least practicable adverse impact'' will consider the factors along these realistic scales. Accordingly, the greater the likelihood that a measure will contribute to reducing the probability or severity of adverse impacts to the species or stock or its habitat, the greater the weight that measure is given when considered in combination with practicability to determine the appropriateness of the mitigation measure, and vice versa. We discuss consideration of these factors in greater detail below.

1. *Reduction of adverse impacts to marine mammal species or stocks and their habitat.*[5] The emphasis given to a measure's ability to reduce the impacts on a species or stock considers the degree, likelihood, and context of the anticipated reduction of impacts to individuals (and how many individuals) as well as the status of the species or stock.

The ultimate impact on any individual from a disturbance event (which informs the likelihood of adverse species- or stock-level effects) is dependent on the circumstances and associated contextual factors, such as duration of exposure to stressors. Though any proposed mitigation needs to be evaluated in the context of the specific activity and the species or stocks affected, measures with the following types of effects have greater value in reducing the likelihood or severity of adverse species- or stock-level impacts: Avoiding or minimizing injury or mortality; limiting interruption of known feeding, breeding, mother/young, or resting behaviors; minimizing the abandonment of important habitat (temporally and spatially); minimizing the number of individuals subjected to these types of disruptions; and limiting degradation of habitat. Mitigating these types of effects is intended to reduce the likelihood that the activity will result in energetic or other types of impacts that are more likely to result in reduced reproductive success or survivorship. It is also important to consider the degree of impacts that are expected in the absence of mitigation in order to assess the added value of any potential measures. Finally, because the least practicable adverse impact standard gives NMFS discretion to weigh a variety of factors when determining appropriate mitigation measures and because the focus of the standard is on reducing impacts at the species or stock level, the least practicable adverse impact standard does not compel mitigation for every kind of take, or every individual taken, if that mitigation is unlikely to meaningfully contribute to the reduction of adverse impacts on the species or stock and its habitat, even when practicable for implementation by the applicant.

The status of the species or stock is also relevant in evaluating the appropriateness of potential mitigation measures in the context of least practicable adverse impact. The following are examples of factors that may (either alone, or in combination) result in greater emphasis on the importance of a mitigation measure in reducing impacts on a species or stock: The stock is known to be decreasing or status is unknown, but believed to be declining; the known annual mortality (from any source) is approaching or exceeding the potential biological removal (PBR) level (as defined in MMPA section 3(20)); the affected species or stock is a small, resident population; or the stock is involved in a UME or has other known vulnerabilities, such as recovering from an oil spill.

Habitat mitigation, particularly as it relates to rookeries, mating grounds, and areas of similar significance, is also relevant to achieving the standard and can include measures such as reducing impacts of the activity on known prey utilized in the activity area or reducing impacts on physical habitat. As with species- or stock-related mitigation, the emphasis given to a measure's ability to reduce impacts on a species or stock's habitat considers the degree, likelihood, and context of the anticipated reduction of impacts to habitat. Because habitat value is informed by marine mammal presence and use, in some cases there may be overlap in measures for the species or stock and for use of habitat.

We consider available information indicating the likelihood of any measure to accomplish its objective. If evidence shows that a measure has not typically been effective nor successful, then either that measure should be modified or the potential value of the measure to reduce effects should be lowered.

2. *Practicability.* Factors considered may include cost, impact on activities, and, in the case of a military readiness activity, will include personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity (see MMPA section 101(a)(5)(A)(ii)).

Assessment of Mitigation Measures for the MITT Study Area

Section 216.104(a)(11) of NMFS' implementing regulations requires an applicant for incidental take authorization to include in its request, among other things, ''the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, their habitat, and [where applicable] on their availability for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance.'' Thus NMFS' analysis of the sufficiency and appropriateness of an applicant's measures under the least practicable adverse impact standard will always begin with evaluation of the mitigation measures presented in the application.

NMFS has fully reviewed the specified activities and the mitigation measures included in the Navy's rulemaking/LOA application and the 2020 MITT FSEIS/OEIS to determine if the mitigation measures would result in the least practicable adverse impact on marine mammals and their habitat. NMFS worked with the Navy in the development of the Navy's initially proposed measures, which were informed by years of implementation and monitoring. A complete discussion of the Navy's evaluation process used to develop, assess, and select mitigation measures, which was informed by input from NMFS, can be found in Section 5 (*Mitigation*) and Appendix I (*Geographic Mitigation Assessment*) of the 2020 MITT FSEIS/OEIS. The process described in Section 5 (*Mitigation*) and Appendix I (*Geographic Mitigation Assessment*) of the 2020 MITT FSEIS/OEIS robustly supported NMFS' independent evaluation of whether the mitigation measures meet the least practicable adverse impact standard.

As a general matter, where an applicant proposes measures that are likely to reduce impacts to marine

[5] We recognize the least practicable adverse impact standard requires consideration of measures that will address minimizing impacts on the availability of the species or stocks for subsistence uses where relevant. Because subsistence uses are not implicated for this action, we do not discuss them. However, a similar framework would apply for evaluating those measures, taking into account the MMPA's directive that we make a finding of no unmitigable adverse impact on the availability of the species or stocks for taking for subsistence, and the relevant implementing regulations.

mammals, the fact that they are included in the application indicates that the measures are practicable, and it is not necessary for NMFS to conduct a detailed analysis of the measures the applicant proposed (rather, they are simply included). We note that in their application, the Navy added three geographic mitigation areas with accompanying mitigation measures that are new since the 2015–2020 MITT incidental take regulations: (1) Marpi Reef Geographic Mitigation Area—to avoid potential impacts from explosives on marine mammals and report hours of MFAS–MF1 within the mitigation area, which contains a seasonal presence of humpback whales (2) Chalan Kanoa Reef Geographic Mitigation Area—to avoid potential impacts from explosives on marine mammals and report hours of MFAS–MF1 within the mitigation area, which contains a seasonal presence of humpback whales, and (3) Agat Bay Nearshore Geographic Mitigation Area—to avoid potential impacts from explosives and MFAS–MF1 on spinner dolphins.

However, it is still necessary for NMFS to consider whether there are additional practicable measures that would meaningfully reduce the probability or severity of impacts that could affect reproductive success or survivorship. In the case of this rule, we worked with the Navy after it submitted its 2019 rulemaking/LOA application but prior to the development of the proposed rule to expand the mitigation areas for Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas to more fully encompass the 400-m isobaths based on the available data indicating the presence of humpback whale mother/calf pairs (seasonal breeding area), which is expected to further avoid impacts from explosives that would be more likely to affect reproduction or survival of individuals and could adversely impact the species. The Navy will also implement the Marpi Reef and Chalan Kanoa Reef Awareness Notification Message Area, which require Navy personnel to broadcast the seasonal presence of humpback whales, further minimizing any potential impacts from vessel strikes during training and testing activities as these areas contain important seasonal breeding habitat for this species.

In addition, since publication of the proposed rule, and in consideration of public comments received, NMFS and the Navy have agreed to include additional mitigation requirements that will further reduce the likelihood and/or severity of adverse impacts on marine mammal species and their habitat and are practicable for implementation. Below we describe the added measures that the Navy will implement and explain the manner in which they are expected to reduce the likelihood or severity of adverse impacts on humpback whales and their habitat.

1. Cap on MF1 mid-frequency active sonar use in the Chalan Kanoa and Marpi Reef Geographic Mitigation Areas. The Navy will implement an annual 20-hour cap from December 1 through April 30 on surface ship hull-mounted MF1 mid-frequency active sonar within the Chalan Kanoa Reef and Marpi Reef Geographic Mitigation Areas to reduce impacts to humpback whales while allowing the Navy to retain critical shallow water training flexibility within the MITT Study Area. This cap on activities (MF1 sonar) in these areas with higher concentrations of humpback whales engaged in important reproductive behaviors is expected to reduce the probability or severity of impacts on humpback whales that would be more likely to adversely affect the reproduction or survival of any individual, which in turn reduces the likelihood that any impacts would translate to adverse impacts on the species.

2. Additional reporting of sonar sources in the Chalan Kanoa and Marpi Reef Geographic Mitigation Areas. In addition to the reporting of the total hours of surface ship hull-mounted MF1 mid-frequency active sonar, the Navy will also report all sonar sources used (all bins, by bin) within the Chalan Kanoa and Marpi Reef Geographic Mitigation Areas from December 1 to April 30 in the annual MITT classified Exercise Reports. This will allow NMFS to evaluate sonar use specifically in these areas with higher concentrations of humpback whales and determine if further mitigation is needed through Adaptive Management.

Overall the Navy has agreed to procedural mitigation measures that will reduce the probability and/or severity of impacts expected to result from acute exposure to acoustic sources and explosives, ship strike, and impacts to marine mammal habitat. Specifically, the Navy will use a combination of delayed starts, powerdowns, and shutdowns to avoid mortality or serious injury, minimize the likelihood or severity of PTS or other injury, and reduce instances of TTS or more severe behavioral disruption caused by acoustic sources or explosives. The Navy will also implement multiple time/area restrictions that will reduce take of marine mammals in areas or at times where they are known to engage in important behaviors, such as calving, where the disruption of those behaviors would have a higher probability of resulting in impacts on reproduction or survival of individuals that could lead to population-level impacts.

The Navy assessed the practicability of these measures in the context of personnel safety, practicality of implementation, and their impacts on the Navy's ability to meet their Title 10 requirements and found that the measures are supportable. As described in more detail below, NMFS has independently evaluated the measures the Navy proposed in the manner described earlier in this section (*i.e.,* in consideration of their ability to reduce adverse impacts on marine mammal species and their habitat and their practicability for implementation). We have determined that the measures will significantly and adequately reduce impacts on the affected marine mammal species and their habitat and, further, be practicable for Navy implementation. Therefore, the mitigation measures assure that Navy's activities will have the least practicable adverse impact on the species and their habitat.

Measures Evaluated But Not Included

The Navy also evaluated numerous measures in the 2020 MITT FSEIS/OEIS that were not included in the Navy's rulemaking/LOA application, and NMFS independently reviewed and concurs with the Navy's analysis that their inclusion was not appropriate under the least practicable adverse impact standard based on our assessment. The Navy considered these additional potential mitigation measures in two groups. First, Section 5 (*Mitigation*) of the 2020 MITT FSEIS/OEIS, in the *Measures Considered but Eliminated* section, includes an analysis of an array of different types of mitigation that have been recommended over the years by non-governmental organizations or the public, through scoping or public comment on environmental compliance documents. Appendix I (*Geographic Mitigation Assessment*) of the 2020 MITT FSEIS/OEIS includes an in-depth analysis of time/area restrictions that have been recommended over time. As described in Section 5 (*Mitigation*) of the 2020 MITT FSEIS/OEIS, commenters sometimes recommend that the Navy reduce its overall amount of training and testing, reduce explosive use, modify its sound sources, completely replace live training and testing with computer simulation, or include time of day restrictions. Many of these mitigation measures could potentially reduce the number of marine mammals taken, via direct reduction of the

activities or amount of sound energy put in the water. However, as described in Section 5 (*Mitigation*) of the 2020 MITT FSEIS/OEIS, the Navy needs to train and test in the conditions in which it fights—and these types of modifications fundamentally change the activity in a manner that will not support the purpose and need for the training and testing (*i.e.,* are entirely impracticable) and therefore are not considered further. NMFS finds the Navy's explanation for why adoption of these recommendations will unacceptably undermine the purpose of the testing and training persuasive. After independent review, NMFS finds Navy's judgment on the impacts of these potential mitigation measures to personnel safety, practicality of implementation, and the effectiveness of training and testing within the MITT Study Area persuasive, and for these reasons, NMFS finds that these measures do not meet the least practicable adverse impact standard because they are not practicable.

Second, in Section 5 (*Mitigation*) of the 2020 MITT FSEIS/OEIS, the Navy evaluated additional potential procedural mitigation measures, including increased mitigation zones, ramp-up measures, additional passive acoustic and visual monitoring, and decreased vessel speeds. Some of these measures have the potential to incrementally reduce take to some degree in certain circumstances, though the degree to which this would occur is typically low or uncertain. However, as described in the Navy's analysis, the measures would have significant direct negative effects on mission effectiveness and are impracticable (see Section 5 *Mitigation* of 2020 MITT FSEIS/OEIS). NMFS independently reviewed the Navy's evaluation and concurs with this assessment, which supports NMFS' findings that the impracticability of this additional mitigation would greatly outweigh any potential minor reduction in marine mammal impacts that might result; therefore, these additional mitigation measures are not warranted.

Last, Appendix I (*Geographic Mitigation Assessment*) of the 2020 MITT FSEIS/OEIS describes a comprehensive method for analyzing potential geographic mitigation that includes consideration of both a biological assessment of how the potential time/area limitation would benefit the species and its habitat (*e.g.,* is a key area of biological importance or would result in avoidance or reduction of impacts) in the context of the stressors of concern in the specific area and an operational assessment of the practicability of implementation (including an assessment of the specific importance of that area for training, considering proximity to training ranges and emergency landing fields and other issues). For most of the areas that were considered in the 2020 MITT FSEIS/OEIS but not included as mitigation in this rule, the Navy found that the mitigation was not warranted because the anticipated reduction of adverse impacts on marine mammal species and their habitat was not sufficient to offset the impracticability of implementation. In some cases, potential benefits to marine mammals were non-existent, while in others the consequences on mission effectiveness were too great.

NMFS has reviewed the analysis in Section 5 (*Mitigation*) and Appendix I (*Geographic Mitigation Assessment*) of the 2020 MITT FSEIS/OEIS, which considers the same factors that NMFS considers under the MMPA to satisfy the least practicable adverse impact standard, and concurs with the analysis and conclusions. Therefore, NMFS is not including any of the measures that the Navy ruled out in the 2020 MITT FSEIS/OEIS.

Below, we describe additional measures that were considered but eliminated during the development of the final rule: (1) A full restriction on MF1 sonar use in the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas (versus the 20-hour annual cap between December 1 and April 30) and (2) measures to further minimize any potential risk that beaked whales would strand as a result of Navy training and testing activities.

Regarding the consideration of a full restriction on MF1 sonar use in the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas, areas of shallow depths, which are important for certain types of training, are limited in the Mariana Archipelago, and the Navy determined it would be impractical to completely limit the use of sonar at Chalan Kanoa Reef and Marpi Reef. The Navy provided additional analysis to NMFS that these two Geographic Mitigation Areas account for up to 14.3 percent of all shallow water areas less than 200 m and outside of 3 nmi in the MITT Study Area (generally surrounding land), and up to 22 percent of all shallow water areas less than 200 m and outside of 3 nmi (generally surrounding land) and south (not inclusive) of Farallon De Medinilla in the MITT Study Area. NMFS agreed with these calculations. The Navy has stressed the broader need for flexibility as well as the specific need not to restrict training areas entirely in this part of the MITT Study Area given the proximity to forward deployed operations (*i.e.,* U.S. 7th fleet's continuous presence in the Indo-Pacific region, which is a National Defense Strategy priority theater of operations) and the need to have the option to conduct training quickly and to respond to emergent national security threats. Given the reductions in potential impacts already provided by the full restriction on explosive use and the 20-hour annual cap on MF1 sonar in the areas between December 1 and April 30, combined with the impracticability for the Navy, NMFS found that this measure was not warranted.

In addition, NMFS had thorough discussions with the Navy about the possibility of crafting a mitigation measure to minimize the potential risk that Navy activities could contribute in any way to the potential stranding of beaked whales. These discussions included consideration of all public comments which recommended beaked whale mitigation measures. However, despite years of field surveys conducted under interagency agreements between the Navy and NMFS' PIFSC along with Navy-funded beaked whale monitoring, there remains a lack of scientific information available on beaked whale distribution and other essential species information in the Mariana Islands. Without sufficient scientific data on beaked whale habitat use, bathymetry, and seasonality, and from that a better understanding of the circumstances that could affect the likelihood of a stranding in the MITT Study Area, NMFS is unable to develop mitigation measures that would meaningfully reduce the likelihood of stranding and/or will not result in unreasonable operational/practicability concerns. Consequently, NMFS recommended to the Navy that the two agencies convene a panel of experts, both from the region, as well as beaked whale behavioral response experts from other geographic areas, and Navy experts on biology, operations, and mitigation to review the status of the science, identify data gaps, and identify information applicable for consideration for future mitigation through the Adaptive Management process. The Navy has agreed to fund and co-organize this effort. Additional measures that the Navy has agreed to conduct to increase understanding and decrease uncertainty around beaked whales in the MITT Study Area are discussed in the *Monitoring* section.

The following sections describe the mitigation measures that will be implemented in association with the training and testing activities analyzed in this document. These are the mitigation measures that NMFS has determined will ensure the least

practicable adverse impact on all affected species and their habitat, including the specific considerations for military readiness activities. The mitigation measures are organized into two categories: Procedural mitigation and mitigation areas.

Procedural Mitigation

Procedural mitigation is mitigation that the Navy will implement whenever and wherever an applicable training or testing activity takes place within the MITT Study Area. The Navy customizes procedural mitigation for each applicable activity category or stressor. Procedural mitigation generally involves: (1) The use of one or more trained Lookouts to diligently observe for specific biological resources (including marine mammals) within a mitigation zone, (2) requirements for Lookouts to immediately communicate sightings of specific biological resources to the appropriate watch station for information dissemination, and (3) requirements for the watch station to implement mitigation (*e.g.,* halt an activity) until certain recommencement conditions have been met. The first procedural mitigation measures (Table 29) are designed to train Lookouts and other applicable Navy personnel in their observation, environmental compliance, and reporting responsibilities. The remainder of the procedural mitigation measures (Tables 30 through 46) are organized by stressor type and activity category and includes acoustic stressors (*i.e.,* active sonar, weapons firing noise), explosive stressors (*i.e.,* sonobuoys, torpedoes, medium-caliber and large-caliber projectiles, missiles and rockets, bombs, sinking exercises, mines, anti-swimmer grenades), and physical disturbance and strike stressors (*i.e.,* vessel movement; towed in-water devices; small-, medium-, and large-caliber non-explosive practice munitions; non-explosive missiles and rockets, non-explosive bombs and mine shapes). Note that the procedural mitigation measures for other incidental take regulations in Navy study areas, such as AFTT and HSTT, require that Lookouts observe for floating vegetation in addition to marine mammals because floating vegetation has high ecological protection value (*e.g.,* habitat for juvenile/hatchling sea turtles, potential foraging habitat for marine mammals). The term ''floating vegetation'' in those regulations referred specifically to floating concentrations of detached kelp paddies (off the U.S. West Coast) and sargassum mats (off the U.S. East Coast). However, in the MITT Study Area there are no floating vegetation concentrations so that was not included in the procedural mitigation measures in this rule.

TABLE 29—PROCEDURAL MITIGATION FOR ENVIRONMENTAL AWARENESS AND EDUCATION

Procedural Mitigation Description
Stressor or Activity:
All training and testing activities, as applicable.
Mitigation Requirements:
Appropriate Navy personnel (including civilian personnel) involved in mitigation and training or testing activity reporting under the specified activities will complete one or more modules of the U.S. Navy Afloat Environmental Compliance Training Series, as identified in their career path training plan. Modules include: —Introduction to the U.S. Navy Afloat Environmental Compliance Training Series. The introductory module provides information on environmental laws (*e.g.,* Endangered Species Act, Marine Mammal Protection Act) and the corresponding responsibilities that are relevant to Navy training and testing activities. The material explains why environmental compliance is important in supporting the Navy's commitment to environmental stewardship. —Marine Species Awareness Training. All bridge watch personnel, Commanding Officers, Executive Officers, maritime patrol aircraft aircrews, anti-submarine warfare and mine warfare rotary-wing aircrews, Lookouts, and equivalent civilian personnel must successfully complete the Marine Species Awareness Training prior to standing watch or serving as a Lookout. The Marine Species Awareness Training provides information on sighting cues, visual observation tools and techniques, and sighting notification procedures. Navy biologists developed Marine Species Awareness Training to improve the effectiveness of visual observations for biological resources, focusing on marine mammals and sea turtles, and including floating vegetation, jellyfish aggregations, and flocks of seabirds. —U.S. Navy Protective Measures Assessment Protocol. This module provides the necessary instruction for accessing mitigation requirements during the event planning phase using the Protective Measures Assessment Protocol software tool. —U.S. Navy Sonar Positional Reporting System and Marine Mammal Incident Reporting. This module provides instruction on the procedures and activity reporting requirements for the Sonar Positional Reporting System and marine mammal incident reporting.

TABLE 30—PROCEDURAL MITIGATION FOR ACTIVE SONAR

Procedural Mitigation Description
Stressor or Activity:
• Low-frequency active sonar, mid-frequency active sonar, high-frequency active sonar: —For vessel-based active sonar activities, mitigation applies only to sources that are positively controlled and deployed from manned surface vessels (*e.g.,* sonar sources towed from manned surface platforms). —For aircraft-based active sonar activities, mitigation applies only to sources that are positively controlled and deployed from manned aircraft that do not operate at high altitudes (*e.g.,* rotary-wing aircraft). Mitigation does not apply to active sonar sources deployed from unmanned aircraft or aircraft operating at high altitudes (*e.g.,* maritime patrol aircraft).
Number of Lookouts and Observation Platform:
• Hull-mounted sources: —1 Lookout: Platforms with space or manning restrictions while underway (at the forward part of a small boat or ship) and platforms using active sonar while moored or at anchor (including pierside). —2 Lookouts: Platforms without space or manning restrictions while underway (at the forward part of the ship). • Sources that are not hull-mounted: —1 Lookout on the ship or aircraft conducting the activity.
Mitigation Requirements:
• Mitigation zones: —Refer to During the activity below.

TABLE 30—PROCEDURAL MITIGATION FOR ACTIVE SONAR—Continued

Procedural Mitigation Description
• Prior to the initial start of the activity (*e.g.,* when maneuvering on station): —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will relocate or delay the start of active sonar transmission. • During the activity: —Low-frequency active sonar at or above 200 dB or more, and hull-mounted mid-frequency active sonar: Navy personnel must observe the mitigation zone for marine mammals; Navy personnel will power down active sonar transmission by 6 dB if marine mammals are observed within 1,000 yd of the sonar source; Navy personnel will power down an additional 4 dB (for a total of 10 dB total) within 500 yd; Navy personnel must cease transmission within 200 yd of the sonar source. —Low-frequency active sonar below 200 dB, mid-frequency active sonar sources that are not hull-mounted, and high-frequency active sonar: Navy personnel must observe the mitigation zone for marine mammals; Navy personnel will cease active sonar transmission if observed within 200 yd of the sonar source. • Commencement/recommencement conditions after a marine mammal sighting before or during the activity: —Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing or powering up active sonar transmission) until one of the following conditions has been met: (1) The animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the sonar source; (3) the mitigation zone has been clear from any additional sightings for 10 min. for aircraft-deployed sonar sources or 30 min for vessel-deployed sonar sources; (4) for mobile activities, the active sonar source has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting; or (5) for activities using hull-mounted sonar, the ship concludes that dolphins are deliberately closing in on the ship to ride the ship's bow wave, and are therefore out of the main transmission axis of the sonar (and there are no other marine mammal sightings within the mitigation zone).

TABLE 31—PROCEDURAL MITIGATION FOR WEAPONS FIRING NOISE

Procedural Mitigation Description
Stressor or Activity: • Weapons firing noise associated with large-caliber gunnery activities. *Number of Lookouts and Observation Platform:* • 1 Lookout positioned on the ship conducting the firing. • Depending on the activity, the Lookout could be the same as the one described in Procedural Mitigation for Explosive Medium- and Large-Caliber Projectiles (Table 34) or Procedural Mitigation for Small-, Medium-, and Large-Caliber Non-Explosive Practice Munitions (Table 43). *Mitigation Requirements:* • Mitigation Zone: —30° on either side of the firing line out to 70 yd from the muzzle of the weapon being fired. • Prior to the initial start of the activity: —Navy personnel will observe the mitigation zone for marine mammals; if observed, Navy personnel will relocate or delay the start of weapons firing. • During the activity: —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will cease weapons firing. • Commencement/recommencement conditions after a marine mammal sighting before or during the activity: —Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing weapons firing) until one of the following conditions has been met: (1) The animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the firing ship; (3) the mitigation zone has been clear from any additional sightings for 30 min; or (4) for mobile activities, the firing ship has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

TABLE 32—PROCEDURAL MITIGATION FOR EXPLOSIVE SONOBUOYS

Procedural Mitigation Description
Stressor or Activity: • Explosive sonobuoys. *Number of Lookouts and Observation Platform:* • 1 Lookout positioned in an aircraft or on a small boat. • If additional platforms are participating in the activity, Navy personnel positioned in those assets (*e.g.,* safety observers, evaluators) will support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties. *Mitigation Requirements:* • Mitigation Zone: —600 yd around an explosive sonobuoy. • Prior to the initial start of the activity (*e.g.,* during deployment of a sonobuoy pattern, which typically lasts 20–30 minutes): —Navy personnel will conduct passive acoustic monitoring for marine mammals; Navy personnel will use information from detections to assist visual observations. —Navy personnel will visually observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will relocate or delay the start of sonobuoy or source/receiver pair detonations. • During the activity:

TABLE 32—PROCEDURAL MITIGATION FOR EXPLOSIVE SONOBUOYS—Continued

Procedural Mitigation Description
—Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, cease sonobuoy or source/receiver pair detonations. • Commencement/recommencement conditions after a marine mammal sighting before or during the activity: —Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing detonations) until one of the following conditions has been met: (1) The animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the sonobuoy; or (3) the mitigation zone has been clear from any additional sightings for 10 min when the activity involves aircraft that have fuel constraints, or 30 min when the activity involves aircraft that are not typically fuel constrained. • After completion of the activity (*e.g.,* prior to maneuvering off station): —When practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), Navy personnel will observe the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel will follow established incident reporting procedures. —If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel positioned on these assets will assist in the visual observation of the area where detonations occurred.

TABLE 33—PROCEDURAL MITIGATION FOR EXPLOSIVE TORPEDOES

Procedural Mitigation Description
Stressor or Activity: • Explosive Torpedoes. *Number of Lookouts and Observation Platform:* • 1 Lookout positioned in an aircraft. • If additional platforms are participating in the activity, Navy personnel positioned on those assets (*e.g.,* safety observers, evaluators) will support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties. *Mitigation Requirements:* • Mitigation Zone: —2,100 yd around the intended impact location. • Prior to the initial start of the activity (*e.g.,* during deployment of the target): —Navy personnel will conduct passive acoustic monitoring for marine mammals; Navy personnel will use information from detections to assist visual observations. —Navy personnel will visually observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will relocate or delay the start of firing. • During the activity: —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will cease firing. • Commencement/recommencement conditions after a marine mammal sighting before or during the activity: —Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met: (1) The animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location; or (3) the mitigation zone has been clear from any additional sightings for 10 min when the activity involves aircraft that have fuel constraints, or 30 min when the activity involves aircraft that are not typically fuel constrained. • After completion of the activity (*e.g.,* prior to maneuvering off station): —When practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), Navy personnel will observe the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel will follow established incident reporting procedures. —If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel positioned on these assets will assist in the visual observation of the area where detonations occurred.

TABLE 34—PROCEDURAL MITIGATION FOR EXPLOSIVE MEDIUM-CALIBER AND LARGE-CALIBER PROJECTILES

Procedural Mitigation Description
Stressor or Activity: • Gunnery activities using explosive medium-caliber and large-caliber projectiles. —Mitigation applies to activities using a surface target. *Number of Lookouts and Observation Platform:* • 1 Lookout on the vessel or aircraft conducting the activity. —For activities using explosive large-caliber projectiles, depending on the activity, the Lookout could be the same as the one described in Weapons Firing Noise (Table 31). • If additional platforms are participating in the activity, Navy personnel positioned on those assets (*e.g.,* safety observers, evaluators) will support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties. *Mitigation Requirements:* • Mitigation zones: —200 yd around the intended impact location for air-to-surface activities using explosive medium-caliber projectiles. —600 yd around the intended impact location for surface-to-surface activities using explosive medium-caliber projectiles.

TABLE 34—PROCEDURAL MITIGATION FOR EXPLOSIVE MEDIUM-CALIBER AND LARGE-CALIBER PROJECTILES—Continued

Procedural Mitigation Description
—1,000 yd around the intended impact location for surface-to-surface activities using explosive large-caliber projectiles. • Prior to the initial start of the activity (*e.g.,* when maneuvering on station): —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will relocate or delay the start of firing. • During the activity: —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will cease firing. • Commencement/recommencement conditions after a marine mammal sighting before or during the activity: —Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met: (1) The animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location; (3) the mitigation zone has been clear from any additional sightings for 10 min for aircraft-based firing or 30 min for vessel-based firing; or (4) for activities using mobile targets, the intended impact location has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting. • After completion of the activity (*e.g.,* prior to maneuvering off station): —When practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), Navy personnel will observe the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel will follow established incident reporting procedures. —If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel positioned on these assets will assist in the visual observation of the area where detonations occurred.

TABLE 35—PROCEDURAL MITIGATION FOR EXPLOSIVE MISSILES AND ROCKETS

Procedural Mitigation Description
Stressor or Activity: • Aircraft-deployed explosive missiles and rockets. —Mitigation applies to activities using a surface target. *Number of Lookouts and Observation Platform:* • 1 Lookout positioned in an aircraft. • If additional platforms are participating in the activity, Navy personnel positioned on those assets (*e.g.,* safety observers, evaluators) will support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties. *Mitigation Requirements:* • Mitigation zones: —900 yd around the intended impact location for missiles or rockets with 0.6–20 lb net explosive weight. —2,000 yd around the intended impact location for missiles with 21–500 lb net explosive weight. • Prior to the initial start of the activity (*e.g.,* during a fly-over of the mitigation zone): —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will relocate or delay the start of firing. • During the activity: —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will cease firing. • Commencement/recommencement conditions after a marine mammal sighting before or during the activity: —Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met: (1) The animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location; or (3) the mitigation zone has been clear from any additional sightings for 10 min when the activity involves aircraft that have fuel constraints, or 30 min when the activity involves aircraft that are not typically fuel constrained. • After completion of the activity (*e.g.,* prior to maneuvering off station): —When practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), Navy personnel will observe the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel will follow established incident reporting procedures. —If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel positioned on these assets will assist in the visual observation of the area where detonations occurred.

TABLE 36—PROCEDURAL MITIGATION FOR EXPLOSIVE BOMBS

Procedural Mitigation Description
Stressor or Activity: • Explosive bombs. *Number of Lookouts and Observation Platform:* • 1 Lookout positioned in the aircraft conducting the activity. • If additional platforms are participating in the activity, Navy personnel positioned on those assets (*e.g.,* safety observers, evaluators) will support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties. *Mitigation Requirements:* • Mitigation zone:

TABLE 36—PROCEDURAL MITIGATION FOR EXPLOSIVE BOMBS—Continued

Procedural Mitigation Description
—2,500 yd around the intended target. • Prior to the initial start of the activity (*e.g.,* when arriving on station): —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will relocate or delay the start of bomb deployment. • During the activity (*e.g.,* during target approach): —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will cease bomb deployment. • Commencement/recommencement conditions after a marine mammal sighting before or during the activity: —Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing bomb deployment) until one of the following conditions has been met: (1) The animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended target; (3) the mitigation zone has been clear from any additional sightings for 10 min; or (4) for activities using mobile targets, the intended target has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting. • After completion of the activity (*e.g.,* prior to maneuvering off station): —When practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), Navy personnel will observe the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel will follow established incident reporting procedures. —If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel positioned on these assets will assist in the visual observation of the area where detonations occurred.

TABLE 37—PROCEDURAL MITIGATION FOR SINKING EXERCISES

Procedural Mitigation Description
Stressor or Activity: • Sinking exercises. *Number of Lookouts and Observation Platform:* • 2 Lookouts (one positioned in an aircraft and one on a vessel). • If additional platforms are participating in the activity, Navy personnel positioned on those assets (*e.g.,* safety observers, evaluators) will support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties. *Mitigation Requirements:* • Mitigation Zone: —2.5 nmi around the target ship hulk. • Prior to the initial start of the activity (90 min prior to the first firing): —Navy personnel will conduct aerial observations of the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will delay the start of firing. • During the activity: —Navy personnel will conduct passive acoustic monitoring for marine mammals; Navy personnel will use information from detections to assist visual observations. —Navy personnel will visually observe the mitigation zone for marine mammals from the vessel; if marine mammals are observed, Navy personnel must cease firing. —Immediately after any planned or unplanned breaks in weapons firing of longer than 2 hours, Navy personnel will observe the mitigation zone for marine mammals from the aircraft and vessel; if marine mammals are observed, Navy personnel must delay recommencement of firing. • Commencement/recommencement conditions after a marine mammal sighting before or during the activity: —Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met: (1) The animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the target ship hulk; or (3) the mitigation zone has been clear from any additional sightings for 30 min. • After completion of the activity (for 2 hours after sinking the vessel or until sunset, whichever comes first): —Navy personnel will observe the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel will follow established incident reporting procedures. —If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel positioned on these assets will assist in the visual observation of the area where detonations occurred.

TABLE 38—PROCEDURAL MITIGATION FOR EXPLOSIVE MINE COUNTERMEASURE AND NEUTRALIZATION ACTIVITIES

Procedural Mitigation Description
Stressor or Activity: • Explosive mine countermeasure and neutralization activities. *Number of Lookouts and Observation Platform:* • 1 Lookout positioned on a vessel or in an aircraft. • If additional platforms are participating in the activity, Navy personnel positioned on those assets (*e.g.,* safety observers, evaluators) will support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties. *Mitigation Requirements:*

TABLE 38—PROCEDURAL MITIGATION FOR EXPLOSIVE MINE COUNTERMEASURE AND NEUTRALIZATION ACTIVITIES—Continued

Procedural Mitigation Description
• Mitigation Zone: —600 yd around the detonation site. • Prior to the initial start of the activity (*e.g.,* when maneuvering on station; typically, 10 min when the activity involves aircraft that have fuel constraints, or 30 min when the activity involves aircraft that are not typically fuel constrained): —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will relocate or delay the start of detonations. • During the activity: —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will cease detonations. • Commencement/recommencement conditions after a marine mammal sighting before or during the activity: —Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing detonations) until one of the following conditions has been met: (1) The animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to detonation site; or (3) the mitigation zone has been clear from any additional sightings for 10 min when the activity involves aircraft that have fuel constraints, or 30 min. when the activity involves aircraft that are not typically fuel constrained. • After completion of the activity (typically 10 min when the activity involves aircraft that have fuel constraints, or 30 min when the activity involves aircraft that are not typically fuel constrained): —Navy personnel will observe the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel will follow established incident reporting procedures. —If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel positioned on these assets will assist in the visual observation of the area where detonations occurred.

TABLE 39—PROCEDURAL MITIGATION FOR EXPLOSIVE MINE NEUTRALIZATION ACTIVITIES INVOLVING NAVY DIVERS

Procedural Mitigation Description
Stressor or Activity: • Explosive mine neutralization activities involving Navy divers. *Number of Lookouts and Observation Platforms:* • 2 Lookouts (two small boats with one Lookout each, or one Lookout on a small boat and one in a rotary-wing aircraft) when implementing the smaller mitigation zone. • 4 Lookouts (two small boats with two Lookouts each), and a pilot or member of an aircrew will serve as an additional Lookout if aircraft are used during the activity, when implementing the larger mitigation zone. • All divers placing the charges on mines will support the Lookouts while performing their regular duties and will report applicable sightings to their supporting small boat or Range Safety Officer. • If additional platforms are participating in the activity, Navy personnel positioned on those assets (*e.g.,* safety observers, evaluators) will support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties. *Mitigation Requirements:* • Mitigation Zones: —For Lookouts on small boats or aircraft: 500 yd around the detonation site during activities under positive control. —For Lookouts on small boats or aircraft: 1,000 yd around the detonation site during activities using time-delay fuses. —For divers: The underwater detonation location, which is defined as the sea space within the divers' range of visibility but no further than the mitigation zone specified for Lookouts on small boats or aircraft (500 yd or 1,000 yd depending on the charge type). • Prior to the initial start of the activity (when maneuvering on station for activities under positive control; 30 min for activities using time-delay firing devices): —Lookouts on small boats or aircraft will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will relocate or delay the start of detonations or fuse initiation. • During the activity: —Lookouts on small boats or aircraft will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will cease detonations or fuse initiation. —While performing their normal duties, during the activity. divers will observe the underwater detonation location for marine mammals. Divers will notify their supporting small boat or Range Safety Officer of marine mammal sightings at the underwater detonation location; if observed, Navy personnel will cease detonations or fuse initiation. —To the maximum extent practical depending on mission requirements, safety, and environmental conditions, boats will position themselves near the mid-point of the mitigation zone radius (but outside of the detonation plume and human safety zone), will position themselves on opposite sides of the detonation location (when two boats are used), and will travel in a circular pattern around the detonation location with one Lookout observing inward toward the detonation site and the other observing outward toward the perimeter of the mitigation zone. —If used, aircraft will travel in a circular pattern around the detonation location to the maximum extent practicable. —Navy personnel will not set time-delay firing devices to exceed 10 min. • Commencement/recommencement conditions after a marine mammal before or during the activity:

TABLE 39—PROCEDURAL MITIGATION FOR EXPLOSIVE MINE NEUTRALIZATION ACTIVITIES INVOLVING NAVY DIVERS—Continued

Procedural Mitigation Description
—Navy personnel will allow a sighted marine mammal to leave the underwater detonation location or mitigation zone (as applicable) prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing detonations or fuse initiation) until one of the following conditions has been met: (1) The animal is observed exiting the 500 yd or 1,000 yd mitigation zone; (2) the animal is thought to have exited the 500 yd or 1,000 yd mitigation zone based on a determination of its course, speed, and movement relative to the detonation site; or (3) the 500 yd or 1,000 yd mitigation zone ((for Lookouts on small boats or aircraft) and the underwater detonation location (for divers)) has been clear from any additional sightings for 10 min during activities under positive control with aircraft that have fuel constraints, or 30 min during activities under positive control with aircraft that are not typically fuel constrained and during activities using time-delay firing devices.
• After completion of an activity (for 30 min):
—Navy personnel will observe the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel will follow established incident reporting procedures.
—If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel positioned on these assets will assist in the visual observation of the area where detonations occurred.

TABLE 40—PROCEDURAL MITIGATION FOR MARITIME SECURITY OPERATIONS—ANTI-SWIMMER GRENADES

Procedural Mitigation Description
Stressor or Activity:
• Maritime Security Operations—Anti-Swimmer Grenades.
Number of Lookouts and Observation Platform:
• 1 Lookout positioned on the small boat conducting the activity.
• If additional platforms are participating in the activity, Navy personnel positioned on those assets (*e.g.,* safety observers, evaluators) will support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties.
Mitigation Requirements:
• Mitigation zone:
—200 yd around the intended detonation location.
• Prior to the initial start of the activity (*e.g.,* when maneuvering on station):
—Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will relocate or delay the start of detonations.
• During the activity:
—Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will cease detonations.
• Commencement/recommencement conditions after a marine mammal sighting before or during the activity:
—Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing detonations) until one of the following conditions has been met: (1) The animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended detonation location; (3) the mitigation zone has been clear from any additional sightings for 30 min; or (4) the intended detonation location has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.
• After completion of the activity (*e.g.,* prior to maneuvering off station):
—When practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), Navy personnel will observe the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel will follow established incident reporting procedures.
—If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel positioned on these assets will assist in the visual observation of the area where detonations occurred.

TABLE 41—PROCEDURAL MITIGATION FOR VESSEL MOVEMENT

Procedural Mitigation Description
Stressor or Activity:
• Vessel movement:
—The mitigation will not be applied if (1) the vessel's safety is threatened, (2) the vessel is restricted in its ability to maneuver (*e.g.,* during launching and recovery of aircraft or landing craft, during towing activities, when mooring, etc.), (3) the vessel is submerged or operated autonomously, or (4) when impractical based on mission requirements (*e.g.,* during Amphibious Assault and Amphibious Raid exercises).
Number of Lookouts and Observation Platform:
• 1 Lookout on the vessel that is underway.
Mitigation Requirements:
• Mitigation Zones:
—500 yd around whales.
—200 yd around other marine mammals (except bow-riding dolphins).
• During the activity:
—When underway, Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will maneuver to maintain distance.

TABLE 41—PROCEDURAL MITIGATION FOR VESSEL MOVEMENT—Continued

Procedural Mitigation Description
• Additional requirements: —If a marine mammal vessel strike occurs, Navy personnel will follow the established incident reporting procedures.

TABLE 42—PROCEDURAL MITIGATION FOR TOWED IN-WATER DEVICES

Procedural Mitigation Description
Stressor or Activity: • Towed in-water devices: —Mitigation applies to devices that are towed from a manned surface platform or manned aircraft. —The mitigation will not be applied if the safety of the towing platform or in-water device is threatened. *Number of Lookouts and Observation Platform:* • 1 Lookout positioned on a manned towing platform. *Mitigation Requirements:* • Mitigation Zones: —250 yd. around marine mammals. • During the activity (*i.e.,* when towing an in-water device): —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will maneuver to maintain distance.

TABLE 43—PROCEDURAL MITIGATION FOR SMALL-, MEDIUM-, AND LARGE-CALIBER NON-EXPLOSIVE PRACTICE MUNITIONS

Procedural Mitigation Description
Stressor or Activity: • Gunnery activities using small-, medium-, and large-caliber non-explosive practice munitions. —Mitigation applies to activities using a surface target. *Number of Lookouts and Observation Platform:* • 1 Lookout positioned on the platform conducting the activity. • Depending on the activity, the Lookout could be the same as the one described in Procedural Mitigation for Weapons Firing Noise (Table 31). *Mitigation Requirements:* • Mitigation Zone: —200 yd around the intended impact location. • Prior to the initial start of the activity (*e.g.,* when maneuvering on station): —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will relocate or delay the start of firing. • During the activity: —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will cease firing. • Commencement/recommencement conditions after a marine mammal sighting before or during the activity: —Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met: (1) The animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location; (3) the mitigation zone has been clear from any additional sightings for 10 min for aircraft-based firing or 30 min for vessel-based firing; or (4) for activities using a mobile target, the intended impact location has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

TABLE 44—PROCEDURAL MITIGATION FOR NON-EXPLOSIVE MISSILES AND ROCKETS

Procedural Mitigation Description
Stressor or Activity: • Aircraft-deployed non-explosive missiles and rockets. • Mitigation applies to activities using a surface target. *Number of Lookouts and Observation Platform:* • 1 Lookout positioned in an aircraft. *Mitigation Requirements:* • Mitigation Zone: —900 yd around the intended impact location. • Prior to the initial start of the activity (*e.g.,* during a fly-over of the mitigation zone): —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will relocate or delay the start of firing. • During the activity: —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will cease firing. • Commencement/recommencement conditions after a marine mammal sighting prior to or during the activity:

TABLE 44—PROCEDURAL MITIGATION FOR NON-EXPLOSIVE MISSILES AND ROCKETS—Continued

Procedural Mitigation Description
—Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met: (1) The animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location; or (3) the mitigation zone has been clear from any additional sightings for 10 min when the activity involves aircraft that have fuel constraints, or 30 min when the activity involves aircraft that are not typically fuel constrained.

TABLE 45—PROCEDURAL MITIGATION FOR NON-EXPLOSIVE BOMBS AND MINE SHAPES

Procedural Mitigation Description
Stressor or Activity: • Non-explosive bombs. • Non-explosive mine shapes during mine laying activities. *Number of Lookouts and Observation Platform:* • 1 Lookout positioned in an aircraft. *Mitigation Requirements:* • Mitigation Zone: —1,000 yd around the intended target. • Prior to the initial start of the activity (*e.g.,* when arriving on station): —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will relocate or delay the start of bomb deployment or mine laying. • During the activity (*e.g.,* during approach of the target or intended minefield location): —Navy personnel will observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel will cease bomb deployment or mine laying. • Commencement/recommencement conditions after a marine mammal sighting prior to or during the activity: —Navy personnel will allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing bomb deployment or mine laying) until one of the following conditions has been met: (1) The animal is observed exiting the mitigation zone; (2) the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended target or minefield location; (3) the mitigation zone has been clear from any additional sightings for 10 min; or (4) for activities using mobile targets, the intended target has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

Mitigation Areas

In addition to procedural mitigation, the Navy will implement mitigation measures within mitigation areas to avoid or minimize potential impacts on marine mammals. A full technical analysis (for which the methods were discussed above) of the mitigation areas that the Navy considered for marine mammals is provided in Appendix I (*Geographic Mitigation Assessment*) of the 2020 MITT FSEIS/OEIS. NMFS and the Navy took into account public comments received on the 2019 MITT DSEIS/OEIS and the 2019 MITT proposed rule, best available science, and the practicability of implementing additional mitigation measures and has enhanced the mitigation areas and mitigation measures, beyond the 2015–2020 regulations, to further reduce impacts to marine mammals.

Information on the mitigation measures that the Navy will implement within mitigation areas is provided in Table 46 (see below). The mitigation applies year-round unless specified otherwise in the table.

NMFS conducted an independent analysis of the mitigation areas that the Navy will implement and that are included in this rule, which are described below, in Table 46. NMFS' analysis indicates that the measures in these mitigation areas will reduce the likelihood or severity of adverse impacts to marine mammal species or their habitat in the manner described in this rule and are practicable for the Navy. NMFS is heavily reliant on the Navy's description of operational practicability, since the Navy is best equipped to describe the degree to which a given mitigation measure affects personnel safety or mission effectiveness, and is practical to implement. The Navy considers the measures in this rule to be practicable, and NMFS concurs. We further discuss the manner in which the Geographic Mitigation Areas in the rule will reduce the likelihood or severity of adverse impacts to marine mammal species or their habitat below.

TABLE 46—GEOGRAPHIC MITIGATION AREAS FOR MARINE MAMMALS IN THE MITT STUDY AREA

Mitigation Area Description
Stressor or Activity: • Sonar. • In-water Explosives. *Mitigation Requirements:* • Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas (Figures 1 and 2): —Navy personnel will conduct a maximum annual total of 20 hours of surface ship hull-mounted MF1 mid-frequency active sonar from December 1 through April 30 within the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas combined (20 hours total for both areas). —Navy personnel will report the total hours of active sonar (all bins, by bin) used in the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas from December 1 through April 30 in the annual training and testing exercise report submitted to NMFS. —Navy personnel will not use in-water explosives in the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas year-round.

TABLE 46—GEOGRAPHIC MITIGATION AREAS FOR MARINE MAMMALS IN THE MITT STUDY AREA—Continued

Mitigation Area Description
—Navy personnel will issue an annual seasonal awareness notification message to alert Navy ships and aircraft operating in the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas to the possible presence of increased concentrations of humpback whales from December 1 through April 30. To maintain safety of navigation and to avoid interactions with large whales during transits, Navy personnel will instruct vessels to remain vigilant to the presence of humpback whales, that when concentrated seasonally, may become vulnerable to vessel strikes. Navy personnel will use the information from the awareness notification messages to assist their visual observation of applicable mitigation zones during training and testing activities and to aid in the implementation of procedural mitigation.
—Should national security present a requirement to conduct training or testing prohibited by the mitigation requirements specified in this table, Navy personnel will obtain permission from the appropriate designated Command authority prior to commencement of the activity. Navy personnel will provide NMFS with advance notification and include relevant information (*e.g.,* sonar hours, explosives use) in its annual activity reports submitted to NMFS.
• Agat Bay Nearshore Geographic Mitigation Area (Figure 3):
—Navy personnel will not use surface ship hull-mounted MF1 mid-frequency active sonar in the Agat Bay Nearshore Geographic Mitigation Area year-round.
—Navy personnel will not use in-water explosives in the Agat Bay Nearshore Mitigation Area year-round.
—Should national security require the use of MF1 surface ship hull-mounted mid-frequency active sonar or explosives prohibited by the mitigation requirements, Navy personnel will obtain permission from the appropriate designated Command authority prior to commencement of the activity. Navy personnel will provide NMFS with advance notification and include relevant information (*e.g.,* sonar hours, explosives use) in the annual activity reports submitted to NMFS.

Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas

The proposed rule included a restriction on the use of explosives in these two mitigation areas, but no limitation on the use of active sonar. The final rule includes a 20-hour annual cap from December 1 through April 30 on the use of hull-mounted MF1 mid-frequency active sonar during training and testing activities within the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas (20 hours for both areas combined). In addition to the reporting of the total hours of surface ship hull-mounted MF1 mid-frequency active sonar, the Navy will now also report all sonar sources used (all bins, by bin) within the Chalan Kanoa and Marpi Reef Geographic Mitigation Areas from December 1 to April 30 in the annual MITT classified Exercise Reports. This will provide NMFS with more specific data in order to evaluate sonar use with current mitigation measures in the geographic mitigation areas and to determine if any changes are needed through Adaptive Management.

While the shallower water within the Chalan Kanoa Reef and Marpi Reef Geographic Mitigation Areas has not been a high-use area for Navy MTEs and ASW training events as the area is considered generally less suitable (Navy training is more typically conducted beyond 3 nmi from shore and in waters greater than 200-m depth, with MTEs typically far offshore), the Navy has stressed the broader need for flexibility as well as the specific need not to restrict training areas entirely in this part of the MITT Study Area given the proximity to forward deployed operations (*i.e.,* U.S. 7th fleet's continuous presence in the Indo-Pacific region, which is a National Defense Strategy priority theater of operation) and the need to have the option to conduct training quickly and to respond to emergent national security threats.

Following extensive discussions with the Navy through which more specific information about the Navy's likely activity in the Chalan Kanoa Reef and Marpi Reef Geographic Mitigation Areas was provided, new information about humpback whale occurrence in the two Geographic Mitigation Areas emerged, and new analyses were conducted (see the *Estimated Take of Marine Mammals* section). NMFS has included a requirement for the Navy to implement the annual 20-hr cap from December 1 through April 30 on hull-mounted MF1 MFAS within the two Geographic Mitigation Areas to minimize sonar exposure and reduce take by Level B harassment of humpback whales in this important reproductive area.

To determine the extent of the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas, the Navy obtained all humpback whale sighting data from 2015–2019 in the Marianas from NMFS' PIFSC (Figures 1 and 2). As described in the *Description of Marine Mammals and Their Habitat in the Area of the Specified Activities* section of the rule, humpback whales, including mother-calf pairs, have been seasonally present in shallow waters (out to the 400-m isobath) and the science indicates the areas may be of biological importance to humpback whales for biologically important life processes associated with reproduction (*e.g.,* breeding, birthing, and nursing) during the winter months, generally December through April.

Calves are considered more sensitive and susceptible to adverse impacts from Navy stressors than adults (especially given their lesser weight and the association between weight and explosive impacts), as well as being especially reliant upon mother-calf communication for protection and guidance. Both gestation and lactation increase energy demands for mothers. Breeding activities typically involve vocalizations and complex social interactions that can include violent interactions between males. Reducing exposure of humpback whales to explosive detonations and sonar use in the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas during the months of December through April is expected to reduce the likelihood of impacts that could affect reproduction or survival of individual animals, by minimizing impacts on calves during this sensitive life stage, avoiding or minimizing the additional energetic costs to mothers of avoiding or leaving the area during explosives exercises and sonar use, and minimizing the chances that important breeding behaviors are interrupted to the point that reproduction is inhibited or abandoned for the year, or otherwise interfered with.

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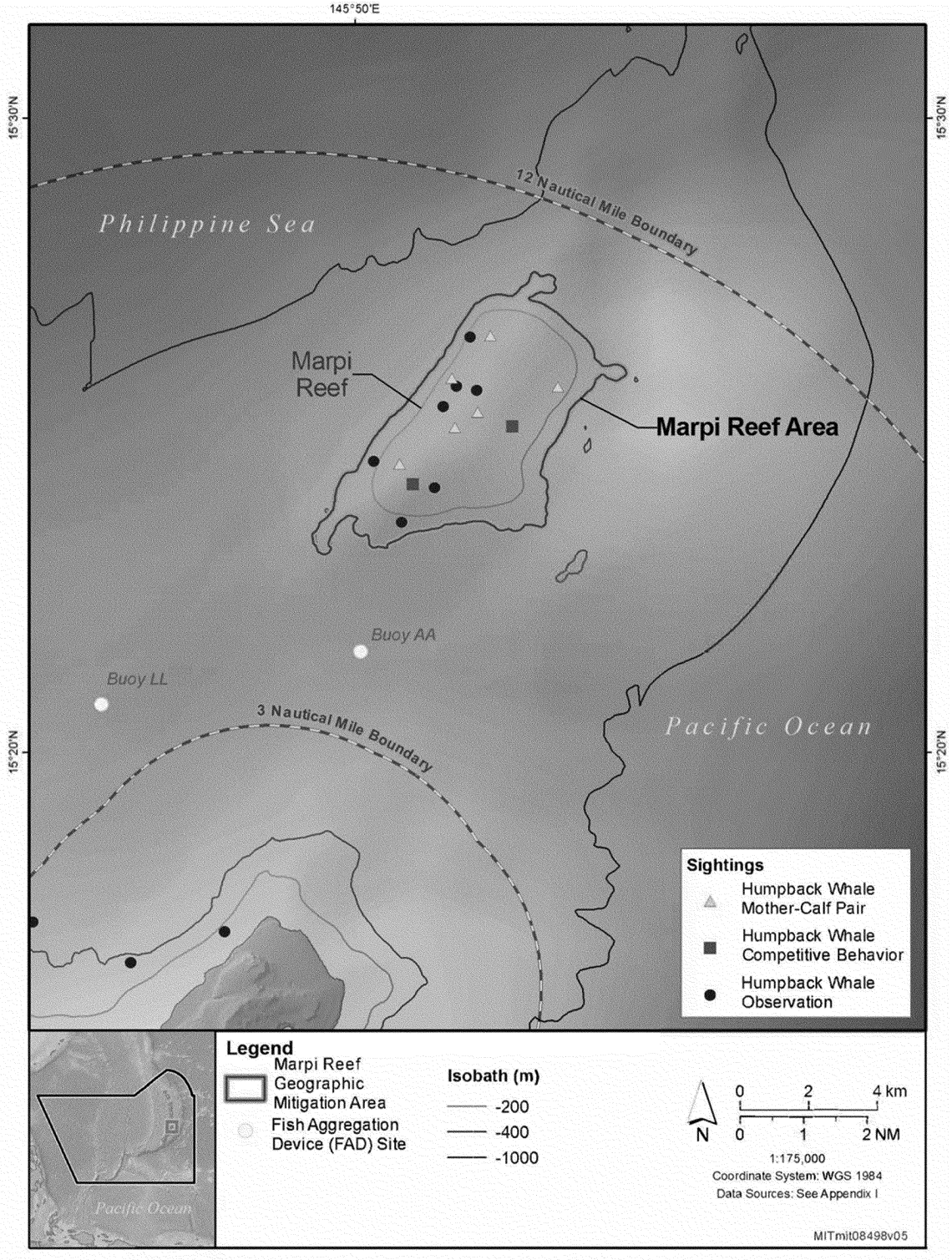

Figure 1. Marpi Reef Geographic Mitigation Area.

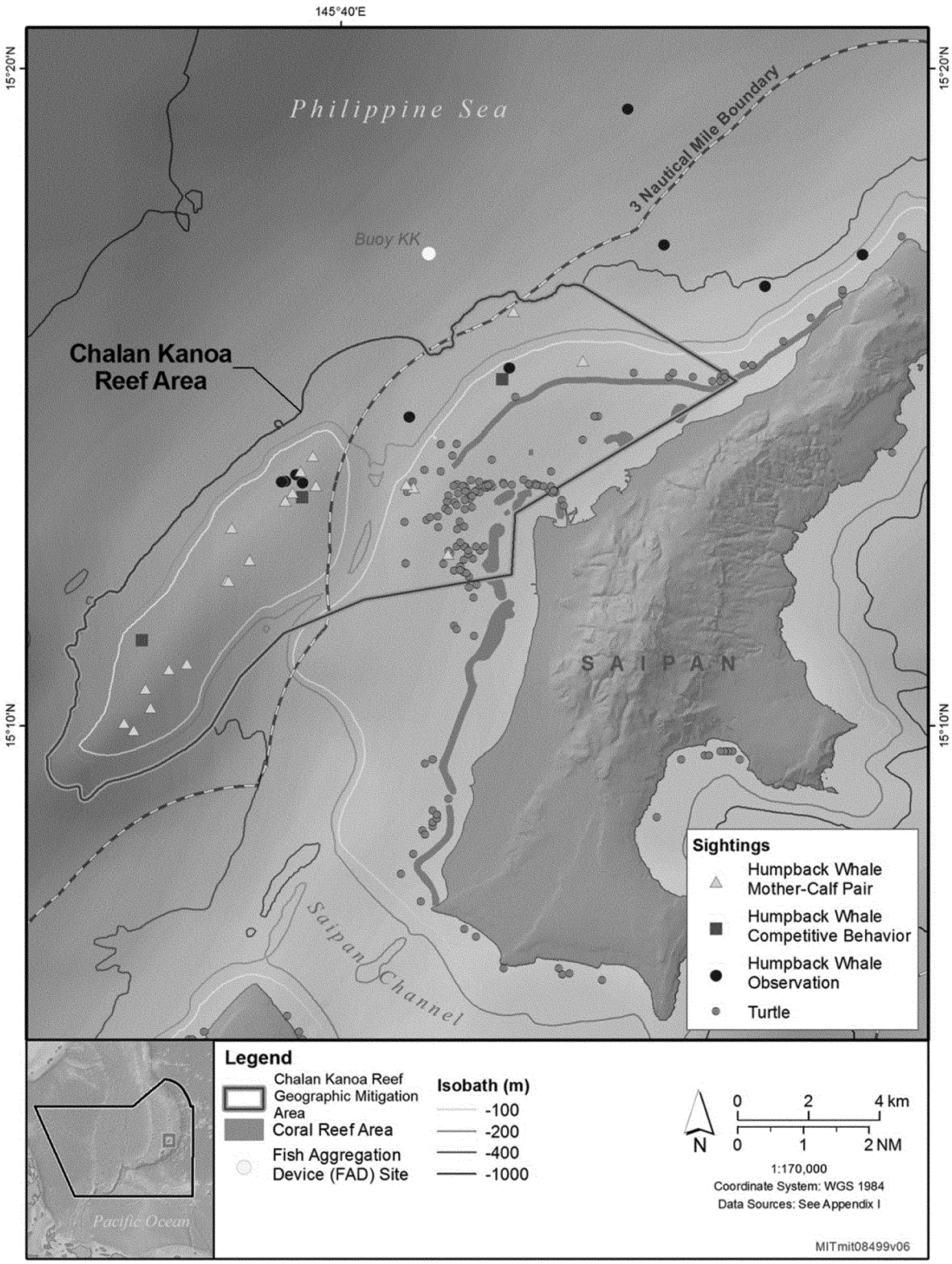

Figure 2. Chalan Kanoa Reef Geographic Mitigation Area.

Agat Bay Nearshore Geographic Mitigation Area

The Agat Bay Nearshore Geographic Mitigation Area encompasses the shoreline between Tipalao, Dadi Beach, and Agat on the west coast of Guam, with a boundary across the bay enclosing an area of approximately 5 km^2 in relatively shallow waters (less than 100 m). The boundaries of the Agat Bay Nearshore Geographic Mitigation Area (Figure 3) were defined by Navy scientists based on spinner dolphin sightings documented during small boat surveys from 2010 through 2014. Spinner dolphins have been the most frequently encountered species during small boat reconnaissance surveys conducted in the Mariana Islands since 2010. Consistent with more intensive studies completed for the species in the Hawaiian Islands, island-associated spinner dolphins are expected to occur in shallow water resting areas (about 50 m deep or less) in the morning and throughout the middle of the day, moving into deep waters offshore during the night to feed (Heenehan *et al.,* 2016b; Heenehan *et al.,* 2017a; Hill *et al.,* 2010; Norris and Dohl, 1980). The best available science, as described above, indicates that Agat Bay is important resting habitat for spinner dolphins.

Behavioral disruptions during resting periods can adversely impact health and energetic budgets by not allowing spinner dolphins to get the needed rest and/or by creating the need to travel and expend additional energy to find other suitable resting areas. Avoiding sonar and explosives in this geographic mitigation area year-round reduces the likelihood of energetic impacts that could accrue and affect reproduction or survival of these individuals.

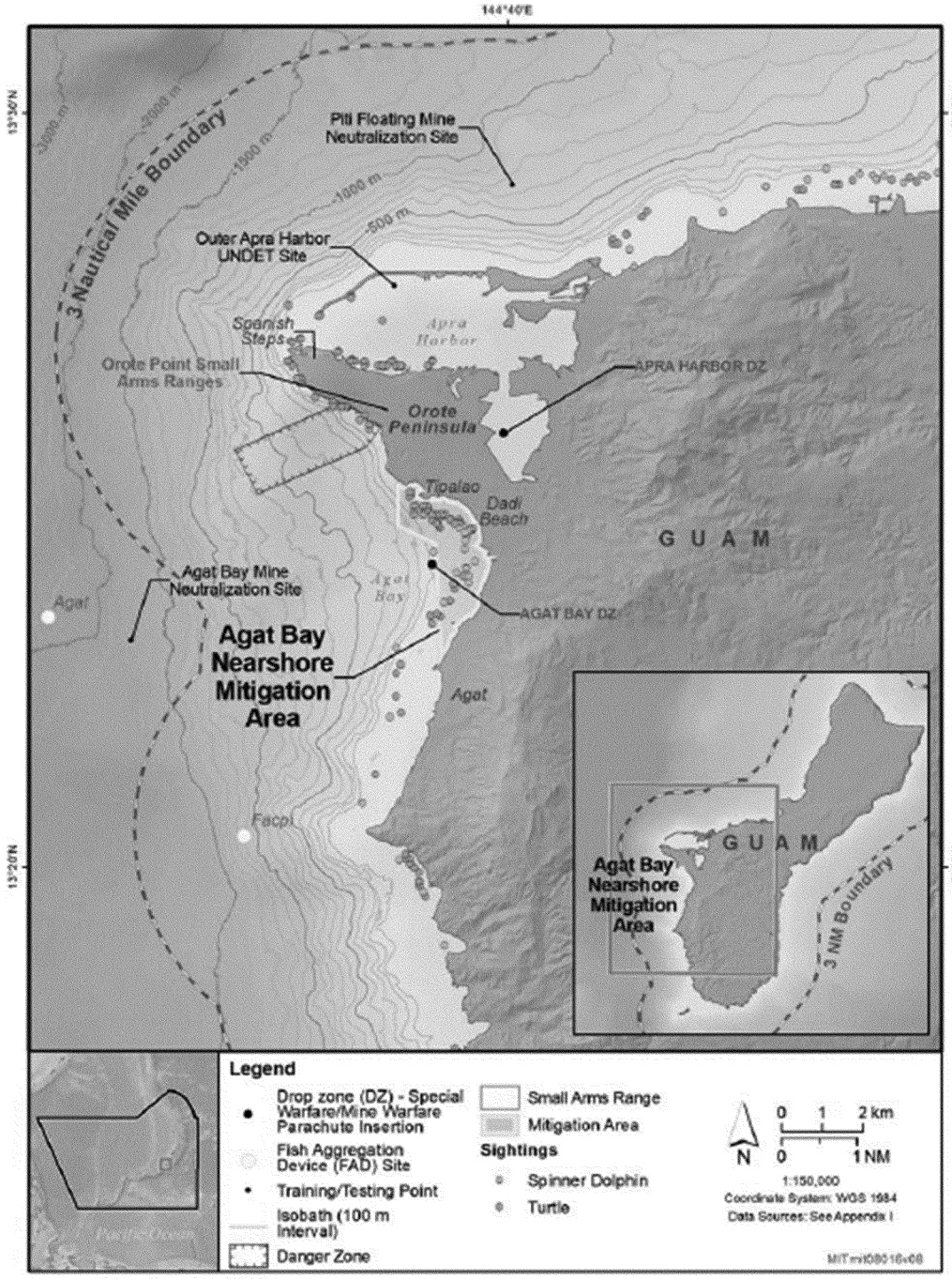

Figure 3: Agat Bay Nearshore Geographic Mitigation Area.

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Mitigation Conclusions

NMFS has carefully evaluated the Navy's mitigation measures—many of which were developed with NMFS' input during the previous phases of Navy training and testing authorizations but several of which are new since implementation of the 2015 to 2020 regulations—and considered a broad range of other measures (*i.e.,* the measures considered but eliminated in the 2020 MITT FSEIS/OEIS, which reflect many of the comments that have arisen via NMFS or public input in past years) in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: The manner in which, and the degree to which, the successful implementation of the mitigation measures is expected to reduce the likelihood and/or magnitude of adverse impacts to marine mammal species and their habitat; the proven or likely efficacy of the measures; and the practicability of the measures for applicant implementation, including consideration of personnel safety, practicality of implementation, and

impact on the effectiveness of the military readiness activity.

Based on our evaluation of the Navy's measures, as well as other measures considered by the Navy and NMFS, NMFS has determined that the mitigation measures included in this final rule are the appropriate means of effecting the least practicable adverse impact on the marine mammal species and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and considering specifically personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. Additionally, an adaptive management provision ensures that mitigation is regularly assessed and provides a mechanism to improve the mitigation, based on the factors above, through modification as appropriate. Thus, NMFS concludes that the mitigation measures outlined in this final rule satisfy the statutory standard and that any adverse impacts that remain cannot practicably be further mitigated.

Monitoring

Section 101(a)(5)(A) of the MMPA states that in order to authorize incidental take for an activity, 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 incidental take 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.

Although the Navy has been conducting research and monitoring in the MITT Study Area for over 20 years, it developed a formal marine species monitoring program in support of the MMPA and ESA authorizations in 2009. This robust program has resulted in hundreds of technical reports and publications on marine mammals that have informed Navy and NMFS analyses in environmental planning documents, rules, and ESA Biological Opinions. The reports are made available to the public on the Navy's marine species monitoring website (*www.navymarinespeciesmonitoring.us*) and the data on the Ocean Biogeographic Information System Spatial Ecological Analysis of Megavertebrate Populations (OBIS–SEAMAP) (*http://seamap.env.duke.edu/*).

The Navy will continue collecting monitoring data to inform our understanding of the occurrence of marine mammals in the MITT Study Area; the likely exposure of marine mammals to stressors of concern in the MITT Study Area; the response of marine mammals to exposures to stressors; the consequences of a particular marine mammal response to their individual fitness and, ultimately, populations; and the effectiveness of implemented mitigation measures. Taken together, mitigation and monitoring comprise the Navy's integrated approach for reducing environmental impacts from the specified activities. The Navy's overall monitoring approach seeks to leverage and build on existing research efforts whenever possible.

As agreed upon between the Navy and NMFS, the monitoring measures presented here, as well as the mitigation measures described above, focus on the protection and management of potentially affected marine mammals. A well-designed monitoring program can provide important feedback for validating assumptions made in analyses and allow for adaptive management of marine resources. Monitoring is required under the MMPA, and details of the monitoring program for the specified activities have been developed through coordination between NMFS and the Navy through the regulatory process for previous Navy at-sea training and testing activities.

Integrated Comprehensive Monitoring Program (ICMP)

The Navy's ICMP is intended to coordinate marine species monitoring efforts across all regions and to allocate the most appropriate level and type of effort for each range complex based on a set of standardized objectives, and in acknowledgement of regional expertise and resource availability. The ICMP is designed to be flexible, scalable, and adaptable through the adaptive management and strategic planning processes to periodically assess progress and reevaluate objectives. This process includes conducting an annual adaptive management review meeting, at which the Navy and NMFS jointly consider the prior-year goals, monitoring results, and related scientific advances to determine if monitoring plan modifications are warranted to more effectively address program goals. Although the ICMP does not specify actual monitoring field work or individual projects, it does establish a matrix of goals and objectives that have been developed in coordination with NMFS. As the ICMP is implemented through the Strategic Planning Process, detailed and specific studies are developed which support the Navy's and NMFS' top-level monitoring goals. In essence, the ICMP directs that monitoring activities relating to the effects of Navy training and testing activities on marine species should be designed to contribute towards one or more of the following top-level goals:

- An increase in our understanding of the likely occurrence of marine mammals and/or ESA-listed marine species in the vicinity of the action (*i.e.,* presence, abundance, distribution, and/or density of species);
- An increase in our understanding of the nature, scope, or context of the likely exposure of marine mammals and/or ESA-listed species to any of the potential stressor(s) associated with the action (*e.g.,* sound, explosive detonation, or military expended materials) through better understanding of the following: (1) The action and the environment in which it occurs (*e.g.,* sound source characterization, propagation, and ambient noise levels); (2) the affected species (*e.g.,* life history or dive patterns); (3) the likely co-occurrence of marine mammals and/or ESA-listed marine species with the action (in whole or part); and/or (4) the likely biological or behavioral context of exposure to the stressor for the marine mammal and/or ESA-listed marine species (*e.g.,* age class of exposed animals or known pupping, calving or feeding areas);
- An increase in our understanding of how individual marine mammals or ESA-listed marine species respond (behaviorally or physiologically) to the specific stressors associated with the action (in specific contexts, where possible, *e.g.,* at what distance or received level);
- An increase in our understanding of how anticipated individual responses, to individual stressors or anticipated combinations of stressors, may impact either: (1) The long-term fitness and survival of an individual or (2) the population, species, or stock (*e.g.,* through effects on annual rates of recruitment or survival);
- An increase in our understanding of the effectiveness of mitigation and monitoring measures;
- A better understanding and record of the manner in which the Navy complies with the incidental take regulations and LOAs and the ESA Incidental Take Statement;
- An increase in the probability of detecting marine mammals (through improved technology or methods), both specifically within the mitigation zone (thus allowing for more effective

implementation of the mitigation) and in general, to better achieve the above goals; and

- Ensuring that adverse impact of activities remains at the least practicable level.

Strategic Planning Process for Marine Species Monitoring

The Navy also developed the Strategic Planning Process for Marine Species Monitoring, which establishes the guidelines and processes necessary to develop, evaluate, and fund individual projects based on objective scientific study questions. The process uses an underlying framework designed around intermediate scientific objectives and a conceptual framework incorporating a progression of knowledge spanning occurrence, exposure, response, and consequence. The Strategic Planning Process for Marine Species Monitoring is used to set overarching intermediate scientific objectives; develop individual monitoring project concepts; identify potential species of interest at a regional scale; evaluate, prioritize and select specific monitoring projects to fund or continue supporting for a given fiscal year; execute and manage selected monitoring projects; and report and evaluate progress and results. This process addresses relative investments to different range complexes based on goals across all range complexes, and monitoring will leverage multiple techniques for data acquisition and analysis whenever possible. The Strategic Planning Process for Marine Species Monitoring is also available online (*http://www.navymarinespeciesmonitoring.us/).*

Past and Current Monitoring in the MITT Study Area

The monitoring program has undergone significant changes since the first rule was issued for the MITT Study Area in 2009, which highlights the monitoring program's evolution through the process of adaptive management. The monitoring program developed for the first cycle of environmental compliance documents (*e.g.,* U.S. Department of the Navy, 2008) utilized effort-based compliance metrics that were somewhat limiting. Through adaptive management discussions, the Navy designed and conducted monitoring studies according to scientific objectives, thereby eliminating basing requirements upon metrics of level-of-effort. Furthermore, refinements of scientific objective have continued through the latest authorization cycle.

Progress has also been made on the conceptual framework categories from the Scientific Advisory Group for Navy Marine Species Monitoring (U.S. Department of the Navy, 2011c), ranging from occurrence of animals, to their exposure, response, and population consequences. The Navy continues to manage the Atlantic and Pacific program as a whole, with monitoring in each range complex taking a slightly different but complementary approach. The Navy has continued to use the approach of layering multiple simultaneous components in many of the range complexes to leverage an increase in return of the progress toward answering scientific monitoring questions. This includes, in the Marianas for example, (a) glider deployment in offshore areas, (b) analysis of existing passive acoustic monitoring datasets, (c) small boat surveys using visual, biopsy, and satellite tagging and (d) seasonal, humpback whale specific surveys.

Specific monitoring under the 2015–2020 regulations includes:

- Review of the available data and analyses in the MITT Study Area 2010 through February 2018 (2019a).
- The continuation of annual small vessel nearshore surveys, sightings, satellite tagging, biopsy and genetic analysis, photo-identification, and opportunistic acoustic recording off Guam, Saipan, Tinian, Rota, and Aguigan in partnership with NMFS (Hill *et al.,* 2015; Hill *et al.,* 2016b; Hill *et al.,* 2017a; Hill *et al.,* 2018, Hill *et al.,* 2019b). The satellite tagging and genetic analyses have resulted in the first information discovered on the movement patterns, habitat preference, and population structure of multiple odontocete species in the MITT Study Area.
- Since 2015, the addition of a series of small vessel surveys in the winter season dedicated to humpback whales has provided new information relating to the occurrence, calving behavior, and population identity of this species (Hill *et al.,* 2016a; Hill *et al.,* 2017b), which had not previously been sighted during the small vessel surveys in the summer or winter. This work has included sighting data, photo ID matches of individuals to other areas demonstrating migration as well as re-sights within the Marianas across different years, and the collection of biopsy samples for genetic analyses of populations.
- The continued deployment of passive acoustic monitoring devices and analysis of acoustic data obtained using bottom-moored acoustic recording devices deployed by NMFS has provided information on the presence and seasonal occurrence of mysticetes, as well as the occurrence of cryptic odontocetes typically found offshore, including beaked whales and *Kogia spp.* (Hill *et al.,* 2015; Hill *et al.,* 2016a; Hill *et al.,* 2016b; Hill *et al.,* 2017a; Munger *et al.,* 2015; Norris *et al.,* 2017; Oleson *et al.,* 2015; Yack *et al.,* 2016).
- Acoustic surveys using autonomous gliders were used to characterize the occurrence of odontocetes and mysticetes in abyssal offshore waters near Guam and CNMI, including species not seen in the small vessel visual survey series such as killer whales and Risso's dolphins. Analysis of collected data also provided new information on the seasonality of baleen whales, patterns of beaked whale occurrence and potential call variability, and identification of a new unknown marine mammal call (Klinck *et al.,* 2016b; Nieukirk *et al.,* 2016).
- Visual surveys were conducted from a shore-station at high elevation on the north shore of Guam to document the nearshore occurrence of marine mammals in waters where small vessel visual surveys are challenging due to regularly high sea states (Deakos & Richlen, 2015; Deakos et al., 2016).
- Analysis of archive data that included marine mammal sightings during Guam Department of Agriculture Division of Aquatic and Wildlife Resources aerial surveys undertaken between 1963 and 2012 (Martin et al., 2016).
- Analysis of archived acoustic towed-array data for an assessment of the abundance and density of minke whales (Norris et al., 2017), abundance and density of sperm whales (Yack et al., 2016), and the characterization of sei and humpback whale vocalizations (Norris et al., 2014).

Numerous publications, dissertations, and conference presentations have resulted from research conducted under the Navy's marine species monitoring program (*https://www.navymarinespeciesmonitoring.us/reading-room/publications/*), resulting in a significant contribution to the body of marine mammal science. Publications on occurrence, distribution, and density have fed the modeling input, and publications on exposure and response have informed Navy and NMFS analyses of behavioral response and consideration of mitigation measures.

Furthermore, collaboration between the monitoring program and the Navy's research and development (*e.g.,* the Office of Naval Research) and demonstration-validation (*e.g.,* Living Marine Resources) programs has been strengthened, leading to research tools and products that have already transitioned to the monitoring program. These include Marine Mammal Monitoring on Ranges (M3R), controlled

exposure experiment behavioral response studies (CEE BRS), acoustic sea glider surveys, and global positioning system-enabled satellite tags. Recent progress has been made with better integration of monitoring across all Navy at-sea study areas, including study areas in the Pacific and the Atlantic Oceans, and various testing ranges. Publications from the Living Marine Resources and the Office of Naval Research programs have also resulted in significant contributions to information on hearing ranges and acoustic criteria used in effects modeling, exposure, and response, as well as developing tools to assess biological significance (*e.g.,* population-level consequences).

NMFS and the Navy also consider data collected during procedural mitigations as monitoring. Data are collected by shipboard personnel on hours spent training, hours of observation, hours of sonar, and marine mammals observed within the mitigation zones when mitigations are implemented. These data are provided to NMFS in both classified and unclassified annual exercise reports, which will continue under this rule.

NMFS has received multiple years' worth of annual exercise and monitoring reports addressing active sonar use and explosive detonations within the MITT Study Area and other Navy range complexes. The data and information contained in these reports have been considered in developing mitigation and monitoring measures for the training and testing activities within the MITT Study Area. The Navy's annual exercise and monitoring reports may be viewed at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities* and *http://www.navymarinespeciesmonitoring.us.*

Prior to Phase I monitoring, the information on marine mammal presence and occurrence in the MIRC was largely absent and limited to anecdotal information from incidental sightings and stranding events (U.S. Department of the Navy, 2005). In 2007, the Navy funded the Mariana Islands Sea Turtle and Cetacean Survey (MISTCS) (U.S. Department of the Navy, 2007) to proactively support the baseline data feeding the MIRC EIS (U.S. Department of the Navy, 2010b). The MISTCS research effort was the first systematic marine survey in these waters. This survey provided the first empirically-based density estimates for marine mammals (Fulling *et al.,* 2011). In cooperation with NMFS, the Phase I monitoring program beginning in 2010 was designed to address basic occurrence-level questions in the MIRC, whereas monitoring the impacts of Navy training such as exposure to mid-frequency active sonar was planned for other Navy range complexes where marine mammal occurrence was already better characterized.

This emphasis on studying occurrence continued through Phase I and II monitoring in the MIRC, and combined various complementary methodologies. Small vessel visual surveys collected occurrence information, and began building the first individual identification catalog for multiple species (Hill *et al.,* 2014). During these visual surveys, biopsies were collected for genetic analysis and satellite tags were also applied, resulting in a progressively improving picture of the habitat use and population structure of various species. Deep water passive acoustic deployments, including autonomous gliders with passive acoustic recorders, added complementary information on species groups such as baleen whales and beaked whales that were rarely sighted on the vessel surveys (Klinck *et al.,* 2015; Munger *et al.,* 2014; Munger *et al.,* 2015; Nieukirk *et al.,* 2016; Norris *et al.,* 2015). Other methodologies were also explored to fill other gaps in waters generally inaccessible to the small boat surveys including a shore-station to survey waters on the windward side of Guam (Deakos *et al.,* 2016). When available, platforms of opportunity on large vessels were utilized for visual survey and tagging (Oleson and Hill, 2010b).

At the close of Phase II monitoring, establishing the fundamentals of marine mammal occurrence in the MITT Study Area had been significantly advanced. The various visual and acoustic platforms have encountered nearly all of the species that are expected to occur in the MITT Study Area. The photographic catalogs have progressively grown to the point that abundance analyses may be attempted for the most commonly-encountered species. Beyond occurrence, questions related to exposure to Navy training have been addressed, such as utilizing satellite tag telemetry to evaluate overlap of habitat use with underwater detonation training sites. Also during Phase II monitoring, a pilot study to investigate reports of humpback whales occasionally occurring off Saipan has proven fruitful, yielding confirmation of this species there, photographic matches of individuals to other waters in the Pacific Ocean, as well as genetics data that provide clues as to the population identity of these animals (Hill *et al.,* 2016a; Hill *et al.,* 2017b). Importantly, the compiled data were also used to inform proposals for new mitigation areas for this rule and associated consultations.

The ongoing regional species-specific study questions and results from recent efforts are publicly available on the Navy's Monitoring Program website. With basic occurrence information now well-established, the primary goal of monitoring in the MITT Study Area under this rule will be to close out these studies with final analyses. As the collection and analysis of basic occurrence data across Navy ranges (including MITT) is completed, the focus of monitoring across all Navy range complexes will progressively move toward addressing the important questions of exposure and response to mid-frequency active sonar and other Navy training, as well as the consequences of those exposures, where appropriate. The Navy's hydrophone-instrumented ranges have proven to be a powerful tool towards this end and because of the lack of such an instrumented range in the MITT Study Area, monitoring investments are expected to begin shifting to other Navy range complexes as the currently ongoing research efforts in the Mariana Islands are completed. Any future monitoring results for the MITT Study Area will continue to be published on the Navy's Monitoring Program website, as well as discussed during annual adaptive management meetings between NMFS and the Navy.

The Navy's marine species monitoring program typically supports several monitoring projects in the MITT Study Area at any given time. Additional details on the scientific objectives for each project can be found at *https://www.navymarinespeciesmonitoring.us/regions/pacific/current-projects/.* Projects can be either major multi-year efforts, or one to two-year special studies. The monitoring projects going into 2020 include:

- Co-fund (with NMFS' Pacific Island Fisheries Science Center) the Pacific Marine Assessment Program for Protected Species (PACMAPPS) Mariana Islands large vessel visual and acoustic survey in spring-summer 2021 to help document marine mammal (including beaked whale) occurrence, abundance, and distribution in the Mariana Islands. This effort will include deployments of a towed array as well as floating passive acoustic buoy;
- Humpback whale visual survey at Farallon De Medinilla;
- Continued coordination with NMFS' PIFSC for small boat humpback

whale surveys at other Mariana Islands (*e.g.,* Saipan);

- Analysis of previously deployed passive acoustic sensors for detection of humpback whale vocalizations at other islands (*e.g.,* Pagan);
- Conduct additional occurrence surveys for beaked whales within the Mariana Islands beginning in fall 2021 or winter-spring 2022 (this allows assessment of PACMAPPs beaked whale analysis to inform decision on deployment locations). This is a new monitoring project since publication of the proposed rule; and
- Funding to researchers with PIFSC for detailed necropsy support for select stranded marine mammals in Hawaii and the Mariana Islands.

Since publication of the proposed rule, the decision has been made that the Navy will not be able to fund support for long-term satellite tag tracking of humpback whales.

The Navy has also committed to a set of actions under the terms of this rule specifically to assist in improving the science on beaked whales (some of which will also benefit other species) and facilitate potential adaptive management actions (*e.g.,* modification of mitigation or monitoring measures) relative to beaked whales in the MITT Study Area:

- Continue to fund additional stranding response/necropsy analyses for the Pacific Islands region. In 2018, the Navy funded the University of Hawaii for two years of additional necropsy support in the MITT Study Area and Hawaii and planned another funding cycle in Fiscal Year 2020. Complementing this, the Navy provided funding for additional stranding data analysis for all species in the MITT Study Area and HRC.
- Fund research on a framework to improve the analysis of single and mass stranding events, including the development of more advanced statistical methods to better characterize the uncertainty associated with data parameters. In addition, the Navy is exploring whether additional funding is available for the Center for Naval Analysis to research improvements to statistical analysis. As of July 2020, the status of this request was still pending.
- Increased analysis for any future beaked whale stranding in the Mariana Islands to include detailed Navy review of available records of sonar use. In the previous regulations (2015–2020), reports included time and location of a stranding. For these regulations, the Navy will provide detailed record reviews including participating units/commands to gain a better idea of what sonar was used and when, For example in the previous regulations, the Navy's report would include if active sonobuoys were deployed, but not information on whether any active pings were transmitted.
- Monitor beaked whale occurrence within select portions of the MITT Study Area starting in 2022, so as to not duplicate efforts from item number 1 above.
- Include Cuvier's beaked whales as a priority species for analysis under a 2020–2023 Navy research-funded program entitled Marine Species Monitoring for Potential Consequences of Disturbance (MSM4PCOD). MSM4PCOD will explore how Navy funded monitoring priorities can be adjusted to provide the best scientific information supporting Population Consequence of Disturbance analysis. The Navy (Living Marine Resources Program) has already funded this program for Fiscal Years 2018–2022 and more information is available here *https://www.navfac.navy.mil/content/dam/navfac/Specialty%20Centers/Engineering%20and%20Expeditionary%20Warfare%20Center/Environmental/lmr/LMRFactSheet_Project43.pdf.* The prioritization for beaked whales was the result of a virtual conference in May 2020. Cuvier's beaked whales in Southern California and Blainville's beaked whales in the Hawaii Range Complex have among the most robust population and exposure studies to date in the Pacific. Given likely similarities between Cuvier's beaked whales across the Pacific, this program will help identify the best way forward for monitoring for Cuvier's beaked whales in the Mariana Islands.

Adaptive Management

The regulations governing the take of marine mammals incidental to Navy training and testing activities in the MITT Study Area contain an adaptive management component. Our understanding of the effects of Navy training and testing activities (*e.g.,* acoustic and explosive stressors) on marine mammals continues to evolve, which makes the inclusion of an adaptive management component both valuable and necessary within the context of seven-year regulations.

The reporting requirements associated with this rule are designed to provide NMFS with monitoring data from the previous year to allow NMFS to consider whether any changes to existing mitigation and monitoring requirements are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from the Navy regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications will have a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring and if the measures are practicable. If the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of the planned LOA in the **Federal Register** and solicit public comment.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) Results from monitoring and exercises reports, as required by MMPA authorizations; (2) results from specific stranding investigations; (3) results from general marine mammal and sound research; and (4) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOA. The results from monitoring reports and other studies may be viewed at *https://www.navymarinespeciesmonitoring.us.*

Beaked Whale Expert Panel

As noted in the discussion of beaked whale mortality in the *Comments and Responses* section, as well as the *Monitoring* section above, both NMFS and the Navy acknowledge the need for more data and continuing discussion on the topic of beaked whales, mitigation, and monitoring. Accordingly, as recommended by public commenters, the Navy has agreed to fund and co-organize with NMFS an expert panel to provide recommendations on scientific data gaps and uncertainties for further protective measure consideration to minimize the impact of Navy training and testing activities on beaked whales in the Mariana Islands. Two years of additional data will be collected for beaked whales in the MITT Study Area prior to the expert panel meeting.

Reporting

In order to issue incidental take authorization for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring. Reports from individual monitoring events, results of analyses, publications, and periodic progress reports for specific monitoring projects

will be posted to the Navy's Marine Species Monitoring web portal: *http://www.navymarinespeciesmonitoring.us.*

Currently, there are several different reporting requirements pursuant to the 2015–2020 regulations. All of these reporting requirements will continue under this rule for the seven-year period.

Notification of Injured, Live Stranded or Dead Marine Mammals

The Navy will consult the Notification and Reporting Plan, which sets out notification, reporting, and other requirements when injured, live stranded, or dead marine mammals are detected. The Notification and Reporting Plan is available at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities.*

Annual MITT Monitoring Report

The Navy will submit an annual report to NMFS of the MITT Study Area monitoring which will be included in a Pacific-wide monitoring report including results specific to the MITT Study Area describing the implementation and results from the previous calendar year. Data collection methods will be standardized across Pacific Range Complexes including the MITT, HSTT, NWTT, and Gulf of Alaska (GOA) Study Areas to the best extent practicable, to allow for comparison in different geographic locations. The report must be submitted to the Director, Office of Protected Resources, NMFS, either within three months after the end of the calendar year, or within three months after the conclusion of the monitoring year, to be determined by the Adaptive Management process. NMFS will submit comments or questions on the draft monitoring report, if any, within three months of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or three months after the submittal of the draft if NMFS does not provide comments on the draft report. Such a report describes progress of knowledge made with respect to monitoring study questions across multiple Navy ranges associated with the ICMP. Similar study questions will be treated together so that progress on each topic is summarized across multiple Navy ranges. The report need not include analyses and content that does not provide direct assessment of cumulative progress on the monitoring study question. This will allow the Navy to provide a cohesive monitoring report covering multiple ranges (as per ICMP goals), rather than entirely separate reports for the MITT, HSTT, NWTT, and GOA Study Areas.

Annual MITT Training and Testing Exercise Report

Each year, the Navy will submit a preliminary report (Quick Look Report) to NMFS detailing the status of authorized sound sources within 21 days after the anniversary of the date of issuance of the LOA. The Navy will also submit a detailed report (MITT Annual Training and Testing Exercise Report) to NMFS within three months after the one-year anniversary of the date of issuance of the LOA. If desired, the Navy may elect to consolidate the MITT Annual Training and Testing Exercise Report with other exercise reports from other range complexes in the Pacific Ocean for a single Pacific Exercise Report. NMFS will submit comments or questions on the report, if any, within one month of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or one month after submittal of the draft if NMFS does not provide comments on the draft report. The annual report will contain information on MTEs, Sinking Exercise (SINKEX) events, and a summary of all sound sources used (total hours or quantity of each bin of sonar or other non-impulsive source; total annual number of each type of explosive exercises; and total annual expended/detonated rounds (missiles, bombs, sonobuoys, etc.) for each explosive bin). The annual report will also specifically include information on sound sources used (*i.e.,* total hours of operation of all active sonar (all bins, by bin)) used in the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas from December 1 to April 30. The annual report will also contain both current year's sonar and explosive use data as well as cumulative sonar and explosive use quantity from previous years' reports Additionally, if there were any changes to the sound source allowance in the reporting year, or cumulatively, the report will include a discussion of why the change was made and include analysis to support how the change did or did not affect the analysis in the 2020 MITT FSEIS/OEIS and MMPA final rule. See the regulations below for more detail on the content of the annual report.

The final annual/close-out report at the conclusion of the authorization period (year seven) will also serve as the comprehensive close-out report and include both the final year annual use compared to annual authorization as well as a cumulative seven-year annual use compared to seven-year authorization. NMFS must submit comments on the draft close-out report, if any, within three months of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or three months after the submittal of the draft if NMFS does not provide comments.

Information included in the annual reports may be used to inform future adaptive management of activities within the MITT Study Area.

Specific sub-reporting in these annual reports will include:

- *Sonar Exercise Notification:* The Navy will submit an electronic report to NMFS within fifteen calendar days after the completion of any major training exercise indicating: Location of the exercise; beginning and end dates of the exercise; and type of exercise.

Other Reporting and Coordination

The Navy will continue to report and coordinate with NMFS for the following:

- Annual marine species monitoring technical review meetings that also include researchers and the Marine Mammal Commission (currently, every two years a joint Pacific-Atlantic meeting is held); and
- Annual Adaptive Management meetings that also include the Marine Mammal Commission (recently modified to occur in conjunction with the annual monitoring technical review meeting).

Analysis and Negligible Impact Determination

General Negligible Impact Analysis

Introduction

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 considering how Level A harassment or Level B harassment (as presented in Table 28) factor into the negligible impact analysis, in addition to considering the number of estimated takes, 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' 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 baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known).

In the *Estimated Take of Marine Mammals* section, we identified the subset of potential effects that are expected to rise to the level of takes both annually and over the seven-year period covered by this rule, and then identified the maximum number of harassment takes that are reasonably expected to occur based on the methods described. The impact that any given take will have on an individual, and ultimately the species or stock, is dependent on many case-specific factors that need to be considered in the negligible impact analysis (*e.g.,* the context of behavioral exposures such as duration or intensity of a disturbance, the health of impacted animals, the status of a species that incurs fitness-level impacts to individuals, etc.). For this rule we evaluated the likely impacts of the enumerated maximum number of harassment takes reasonably expected to occur, and also authorized, in the context of the specific circumstances surrounding these predicted takes. Last, we collectively evaluated this information, as well as other more taxa-specific information and mitigation measure effectiveness, in group-specific assessments that support our negligible impact conclusions for each species. Because the marine mammal populations in the MITT Study Area have not been assigned to stocks, all negligible impact analysis and determinations are at the species level.

As explained in the *Estimated Take of Marine Mammals* section, no take by serious injury or mortality is authorized or anticipated to occur.

The Specified Activities reflect representative levels of training and testing activities. The *Description of the Specified Activity* section describes annual activities. There may be some flexibility in the exact number of hours, items, or detonations that may vary from year to year, but take totals will not exceed the seven-year totals indicated in Table 28. We base our analysis and negligible impact determination on the maximum number of takes that are reasonably expected to occur and are authorized, although, as stated before, the number of takes are only a part of the analysis, which includes extensive qualitative consideration of other contextual factors that influence the degree of impact of the takes on the affected individuals. To avoid repetition, we provide some general analysis in this *General Negligible Impact Analysis* section that applies to all the species listed in Table 28, given that some of the anticipated effects of the Navy's training and testing activities on marine mammals are expected to be relatively similar in nature. Then, in the *Group and Species-Specific Analyses* section, we subdivide into discussions of Mysticetes and Odontocetes, as there are broad life history traits that support an overarching discussion of some factors considered within the analysis for those groups (*e.g.,* high-level differences in feeding strategies). Last, we break our analysis into species, or groups of species where relevant similarities exist, to provide more specific information related to the anticipated effects on individuals of that species or where there is information about the status or structure of any species that would lead to a differing assessment of the effects on the species. Organizing our analysis by grouping species that share common traits or that will respond similarly to effects of the Navy's activities and then providing species-specific information allows us to avoid duplication while assuring that we have analyzed the effects of the specified activities on each affected species.

Harassment

The Navy's harassment take request is based on its model, as well as the quantitative assessment of mitigation, which NMFS reviewed and concurs appropriately predict the maximum amount of harassment that is likely to occur. The model calculates sound energy propagation from sonar, other active acoustic sources, and explosives during naval activities; the sound or impulse received by animat dosimeters representing marine mammals distributed in the area around the modeled activity; and whether the sound or impulse energy received by a marine mammal exceeds the thresholds for effects. Assumptions in the Navy model intentionally err on the side of overestimation when there are unknowns. Naval activities are modeled as though they would occur regardless of proximity to marine mammals, meaning that no mitigation is considered (*e.g.,* no power down or shut down) and without any avoidance of the activity by the animal. The final step of the quantitative analysis of acoustic effects, which occurs after the modeling, is to consider the implementation of mitigation and the possibility that marine mammals would avoid continued or repeated sound exposures. NMFS provided input to, independently reviewed, and concurred with the Navy on this process and the Navy's analysis, which is described in detail in Section 6 of the Navy's rulemaking/LOA application, and was used to quantify harassment takes for this rule.

Generally speaking, the Navy and NMFS anticipate more severe effects from takes resulting from exposure to higher received levels (though this is in no way a strictly linear relationship for behavioral effects throughout species, individuals, or circumstances) and less severe effects from takes resulting from exposure to lower received levels. However, there is also growing evidence of the importance of distance in predicting marine mammal behavioral response to sound—*i.e.,* sounds of a similar level emanating from a more distant source have been shown to be less likely to evoke a response of equal magnitude (DeRuiter 2012, Falcone *et al.* 2017). The estimated number of Level A harassment and Level B harassment takes does not equate to the number of individual animals the Navy expects to harass (which is lower), but rather to the instances of take (*i.e.,* exposures above the Level A harassment and Level B harassment threshold) that are anticipated to occur annually and over the seven-year period. These instances may represent either brief exposures (seconds or minutes) or, in some cases, longer durations of exposure within a day. Some individuals may experience multiple instances of take (meaning over multiple days) over the course of the year, which means that the number of individuals taken is smaller than the total estimated takes. Generally speaking, the higher the number of takes as compared to the population abundance, the more repeated takes of individuals are likely, and the higher the actual percentage of individuals in the population that are likely taken at least once in a year. We look at this comparative metric to give us a relative sense of where a larger portion of a species is being taken by Navy activities, where there is a higher likelihood that the same individuals are being taken across multiple days, and where that number of days might be higher or more likely sequential. Where the number of instances of take is 100 percent or less of the abundance and there is no information to specifically suggest that a small subset of animals will be repeatedly taken over a high

number of sequential days, the overall magnitude is generally considered relatively low, as it could on one extreme mean that every individual taken will be taken on no more than one day (a very minimal impact) or, more likely, that some smaller portion of individuals are taken on one day annually, some are taken on a few not likely sequential days annually, and some are not taken at all.

In the ocean, the use of sonar and other active acoustic sources is often transient and is unlikely to repeatedly expose the same individual animals within a short period, for example within one specific exercise. However, for some individuals of some species repeated exposures across different activities could occur over the year, especially where events occur in generally the same area with more resident species. In short, for some species we expect that the total anticipated takes represent exposures of a smaller number of individuals of which some will be exposed multiple times, but based on the nature of the Navy activities and the movement patterns of marine mammals, it is unlikely that individuals from most species will be taken over more than a few non-sequential days. This means that even where repeated takes of individuals may occur, they are more likely to result from non-sequential exposures from different activities. As described elsewhere, the nature of the majority of the exposures is expected to be of a less severe nature and based on the numbers it is likely that any individual exposed multiple times is still only taken on a small percentage of the days of the year.

Physiological Stress Response

Some of the lower level physiological stress responses (*e.g.,* orientation or startle response, change in respiration, change in heart rate) discussed in the proposed rule would likely co-occur with the predicted harassments, although these responses are more difficult to detect and fewer data exist relating these responses to specific received levels of sound. Takes by Level B harassment, then, may have a stress-related physiological component as well; however, we would not expect the Navy's generally short-term, intermittent, and (typically in the case of sonar) transitory activities to create conditions of long-term, continuous noise leading to long-term physiological stress responses in marine mammals that could affect reproduction or survival.

Behavioral Response

The estimates calculated using the behavioral response function do not differentiate between the different types of behavioral responses that rise to the level of take by Level B harassment. As described in the Navy's application, the Navy identified (with NMFS' input) the types of behaviors that would be considered a take (moderate behavioral responses as characterized in Southall *et al.* (2007) (*e.g.,* altered migration paths or dive profiles, interrupted nursing, breeding or feeding, or avoidance) that also would be expected to continue for the duration of an exposure). The Navy then compiled the available data indicating at what received levels and distances those responses have occurred, and used the indicated literature to build biphasic behavioral response curves and cutoff distances that are used to predict how many instances of Level B harassment by behavioral disturbance occur in a day. Take estimates alone do not provide information regarding the potential fitness or other biological consequences of the reactions on the affected individuals. We therefore consider the available activity-specific, environmental, and species-specific information to determine the likely nature of the modeled behavioral responses and the potential fitness consequences for affected individuals.

Use of sonar and other transducers will typically be transient and temporary. The majority of acoustic effects to individual animals from sonar and other active sound sources during testing and training activities will be primarily from ASW events. It is important to note that although ASW is one of the warfare areas of focus during MTEs, there are significant periods when active ASW sonars are not in use. Nevertheless, behavioral reactions are assumed more likely to be significant during MTEs than during other ASW activities due to the duration (*i.e.,* multiple days), scale (*i.e.,* multiple sonar platforms), and use of high-power hull-mounted sonar in the MTEs. In other words, in the range of potential behavioral effects that might be expected to be part of a response that qualifies as an instance of Level B harassment by behavioral disturbance (which by nature of the way it is modeled/counted, occurs within one day), the less severe end might include exposure to comparatively lower levels of a sound, at a detectably greater distance from the animal, for a few or several minutes. A less severe exposure of this nature could result in a behavioral response such as avoiding an area that an animal would otherwise have chosen to move through or feed in for some amount of time or breaking off one or a few feeding bouts. More severe effects could occur when the animal gets close enough to the source to receive a comparatively higher level, is exposed continuously to one source for a longer time, or is exposed intermittently to different sources throughout a day. Such effects might result in an animal having a more severe flight response and leaving a larger area for a day or more or potentially losing feeding opportunities for a day. However, such severe behavioral effects are expected to occur infrequently.

To help assess this, for sonar (LFAS/MFAS/HFAS) used in the MITT Study Area, the Navy provided information estimating the percentage of animals that may be taken by Level B harassment under each behavioral response function that would occur within 6-dB increments (percentages discussed below in the *Group and Species-Specific Analyses* section). As mentioned above, all else being equal, an animal's exposure to a higher received level is more likely to result in a behavioral response that is more likely to lead to adverse effects, which could more likely accumulate to impacts on reproductive success or survivorship of the animal, but other contextual factors (such as distance) are important also. The majority of Level B harassment takes are expected to be in the form of milder responses *(i.e.,* lower-level exposures that still rise to the level of take) of a generally shorter duration. We anticipate more severe effects from takes when animals are exposed to higher received levels or at closer proximity to the source. However, depending on the context of an exposure *(e.g.,* depth, distance, if an animal is engaged in important behavior such as feeding), a behavioral response can vary between species and individuals within a species. Specifically, given a range of behavioral responses that may be classified as Level B harassment, to the degree that higher received levels are expected to result in more severe behavioral responses, only a smaller percentage of the anticipated Level B harassment from Navy activities might necessarily be expected to potentially result in more severe responses (see the *Group and Species-Specific Analyses* section below for more detailed information). To fully understand the likely impacts of the predicted/authorized take on an individual (*i.e.,* what is the likelihood or degree of fitness impacts), one must look closely at the available contextual information,

such as the duration of likely exposures and the likely severity of the exposures (*e.g.,* whether they will occur for a longer duration over sequential days or the comparative sound level that will be received). Ellison *et al.* (2012) and Moore and Barlow (2013), among others, emphasize the importance of context (*e.g.,* behavioral state of the animals, distance from the sound source) in evaluating behavioral responses of marine mammals to acoustic sources.

Diel Cycle

Many animals perform vital functions, such as feeding, resting, traveling, and socializing on a diel cycle (24-hour cycle). Behavioral reactions to noise exposure, when taking place in a biologically important context, such as disruption of critical life functions, displacement, or avoidance of important habitat, are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Henderson *et al.* (2016) found that ongoing smaller scale events had little to no impact on foraging dives for Blainville's beaked whale, while multi-day training events may decrease foraging behavior for Blainville's beaked whale (Manzano-Roth *et al.,* 2016). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). Note that there is a difference between multiple-day substantive behavioral reactions and multiple-day anthropogenic activities. For example, just because an at-sea exercise lasts for multiple days does not necessarily mean that individual animals are exposed to those exercises for multiple days or, further, exposed in a manner resulting in a sustained multiple day substantive behavioral response. Large multi-day Navy exercises such as ASW activities, typically include vessels that are continuously moving at speeds typically 10–15 kn, or higher, and likely cover large areas that are relatively far from shore (typically more than 3 nmi from shore) and in waters greater than 600 ft deep. Additionally marine mammals are moving as well, which will make it unlikely that the same animal could remain in the immediate vicinity of the ship for the entire duration of the exercise. Further, the Navy does not necessarily operate active sonar the entire time during an exercise. While it is certainly possible that these sorts of exercises could overlap with individual marine mammals multiple days in a row at levels above those anticipated to result in a take, because of the factors mentioned above, it is considered unlikely for the majority of takes. However, it is also worth noting that the Navy conducts many different types of noise-producing activities over the course of the year and it is likely that some marine mammals will be exposed to more than one and taken on multiple days, even if they are not sequential.

That said, the MITT Study Area is different than other Navy ranges where there can be a significant number of Navy surface ships with hull-mounted sonar homeported. In the MITT Study Area, there are no homeported surface ships with hull-mounted sonars permanently assigned. There is no local unit level training in the MITT Study Area for homeported ships such as the case for other ranges. Instead, Navy activities from visiting and transiting vessels are much more episodic in the MITT Study Area. Therefore, there could be long gaps between activities (*i.e.,* weeks, months) in the MITT Study Area.

Durations of Navy activities utilizing tactical sonar sources and explosives vary and are fully described in Appendix A (*Training and Testing Activity Descriptions*) of the 2020 MITT FSEIS/OEIS. Sonar used during ASW will impart the greatest amount of acoustic energy of any category of sonar and other transducers analyzed in the Navy's rulemaking/LOA application and include hull-mounted, towed, line array, sonobuoy, helicopter dipping, and torpedo sonars. Most ASW sonars are MFAS (1–10 kHz); however, some sources may use higher or lower frequencies. ASW training activities using hull-mounted sonar planned for the MITT Study Area generally last for only a few hours (see Table 3). Some ASW training and testing can generally last for 2–10 days, or a 10-day exercise is typical for an MTE-Large Integrated ASW (see Table 3). For these multi-day exercises there will typically be extended intervals of non-activity in between active sonar periods. Because of the need to train in a large variety of situations, the Navy does not typically conduct successive ASW exercises in the same locations. Given the average length of ASW exercises (times of sonar use) and typical vessel speed, combined with the fact that the majority of the cetaceans would not likely remain in proximity to the sound source, it is unlikely that an animal would be exposed to LFAS/MFAS/HFAS at levels or durations likely to result in a substantive response that would then be carried on for more than one day or on successive days.

Most planned explosive events are scheduled to occur over a short duration (1–8 hours); however, the explosive component of the activity only lasts for minutes (see Table 3). Although explosive exercises may sometimes be conducted in the same general areas repeatedly, because of their short duration and the fact that they are in the open ocean and animals can easily move away, it is similarly unlikely that animals would be exposed for long, continuous amounts of time, or demonstrate sustained behavioral responses. Although SINKEXs may last for up to 48 hrs (4–8 hrs, possibly 1–2 days), they are almost always completed in a single day and only one event is planned annually for the MITT training activities. They are stationary and conducted in deep, open water where fewer marine mammals would typically be expected to be encountered. They also have shutdown procedures and rigorous monitoring, *i.e.,* during the activity, the Navy conducts passive acoustic monitoring and visually observes for marine mammals 90 min prior to the first firing, during the event, and 2 hrs after sinking the vessel. All of these factors make it unlikely that individuals would be exposed to the exercise for extended periods or on consecutive days.

Assessing the Number of Individuals Taken and the Likelihood of Repeated Takes

As described previously, Navy modeling uses the best available science to predict the instances of exposure above certain acoustic thresholds, which are equated, as appropriate, to harassment takes (and, for PTS, further corrected to account for mitigation and avoidance). As further noted, for active acoustics it is more challenging to parse out the number of individuals taken by Level B harassment and the number of times those individuals are taken from this larger number of instances. One method that NMFS can use to help better understand the overall scope of the impacts is to compare these total instances of take against the abundance of that species (or stock if applicable). For example, if there are 100 estimated harassment takes in a population of 100, one can assume either that every individual will be exposed above acoustic thresholds in no more than one day, or that some smaller number will be exposed in one day but a few individuals will be exposed multiple days within a year and a few not exposed at all. Where the number of instances of take exceed the abundance of the population (*i.e.,* are over 100 percent), multiple takes of some individuals are predicted and expected to occur within a year. Generally

speaking, the higher the number of takes as compared to the population abundance, the more multiple takes of individuals are likely, and the higher the actual percentage of individuals in the population that are likely taken at least once in a year. We look at this comparative metric to give us a relative sense of where larger portions of the species or stocks are being taken by Navy activities and where there is a higher likelihood that the same individuals may be taken across multiple days and where that number of days might be higher. It also provides a relative picture of the scale of impacts to each species.

In the ocean, unlike a modeling simulation with static animals, the use of sonar and other active acoustic sources is often transient, and is unlikely to repeatedly expose the same individual animals within a short period, for example within one specific exercise. However, some repeated exposures across different activities could occur over the year with more resident species. Nonetheless, the episodic nature of Navy activities in the MITT Study Area would mean less frequent exposures as compared to some other ranges. While select offshore areas in the MITT Study Area are used more frequently for ASW and other activities, these are generally further offshore than where most island associated resident populations would occur and instead would be in areas with more transitory species. In short, we expect that the total anticipated takes represent exposures of a smaller number of individuals of which some could be exposed multiple times, but based on the nature of the Navy's activities and the movement patterns of marine mammals, it is unlikely that any particular subset would be taken over more than a few non-sequential days.

In using the relationship between predicted instances of take and the population abundance to help estimate the proportion of a population likely taken and the number of days over which some individuals may be taken, it is important to choose an appropriate population estimate against which to make the comparison. The SARs, where available, provide the official population estimate for a given species or stock in U.S. waters in a given year (and are typically based solely on the most recent survey data). When the stock is known to range outside of U.S. EEZ boundaries, population estimates based on surveys conducted only within the U.S. EEZ are known to be underestimates. The marine mammal populations in the MITT Study Area have not been assigned to specific stocks and there are no associated SARs. There is also no information on trends for any of these species. Nonetheless, the information used to estimate take included the best available survey abundance data to model density layers. Further, in calculating the percentage of takes versus abundance for each species in order to assist in understanding both the percentage of the species affected, as well as how many days across a year individuals could be taken, we used the data most appropriate for the situation. The survey data used to calculate abundance in the MITT Study Area is described in the report *Navy Marine Species Density Database Phase III for the Mariana Islands Training and Testing Study Area* (Navy 2018).

Temporary Threshold Shift

NMFS and the Navy have estimated that all species of marine mammals may sustain some level of TTS from active sonar. As discussed in the proposed rule in the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat,* in general, TTS can last from a few minutes to days, be of varying degree, and occur across various frequency bandwidths, all of which determine the severity of the impacts on the affected individual, which can range from minor to more severe. Tables 49–53 indicate the number of takes by TTS that may be incurred by different species from exposure to active sonar and explosives. The TTS sustained by an animal is primarily classified by three characteristics:

1. Frequency—Available data (of mid-frequency hearing specialists exposed to mid- or high-frequency sounds; Southall *et al.,* 2007) suggest that most TTS occurs in the frequency range of the source up to one octave higher than the source (with the maximum TTS at ½ octave above). The Navy's MF sources, which are the highest power and most numerous sources and the ones that cause the most take, utilize the 1–10 kHz frequency band, which suggests that if TTS were to be induced by any of these MF sources it would be in a frequency band somewhere between approximately 2 and 20 kHz, which is in the range of communication calls for many odontocetes, but below the range of the echolocation signals used for foraging. There are fewer hours of HF source use and the sounds would attenuate more quickly, plus they have lower source levels, but if an animal were to incur TTS from these sources, it would cover a higher frequency range (sources are between 10 and 100 kHz, which means that TTS could range up to 200 kHz), which could overlap with the range in which some odontocetes communicate or echolocate. However, HF systems are typically used less frequently and for shorter time periods than surface ship and aircraft MF systems, so TTS from these sources is unlikely. There are fewer LF sources and the majority are used in the more readily mitigated testing environment, but TTS from LF sources would most likely occur below 2 kHz, which is in the range where many mysticetes communicate and also where other non-communication auditory cues are located (waves, snapping shrimp, fish prey). Also of note, the majority of sonar sources from which TTS may be incurred occupy a narrow frequency band, which means that the TTS incurred would also be across a narrower band (*i.e.,* not affecting the majority of an animal's hearing range). This frequency provides information about the cues to which a marine mammal may be temporarily less sensitive, but not the degree or duration of sensitivity loss. TTS from explosives would be broadband.

2. Degree of the shift (*i.e.,* by how many dB the sensitivity of the hearing is reduced)—Generally, both the degree of TTS and the duration of TTS will be greater if the marine mammal is exposed to a higher level of energy (which would occur when the peak dB level is higher or the duration is longer). The threshold for the onset of TTS was discussed previously in this rule. An animal would have to approach closer to the source or remain in the vicinity of the sound source appreciably longer to increase the received SEL, which would be difficult considering the Lookouts and the nominal speed of an active sonar vessel (10–15 kn) and the relative motion between the sonar vessel and the animal. In the TTS studies discussed in the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat* section of the proposed rule, some using exposures of almost an hour in duration or up to 217 SEL, most of the TTS induced was 15 dB or less, though Finneran *et al.* (2007) induced 43 dB of TTS with a 64-second exposure to a 20 kHz source. However, since any hull-mounted sonar, such as the SQS–53, engaged in anti-submarine warfare training would be moving at between 10 and 15 knots and nominally pinging every 50 seconds, the vessel will have traveled a minimum distance of approximately 257 m during the time between those pings and, therefore, incurring those levels of TTS is highly unlikely. A scenario could occur where an animal does not leave the vicinity of a ship or travels a course parallel to the ship, however, the close distances

required make TTS exposure unlikely. For a Navy vessel moving at a nominal 10 knots, it is unlikely a marine mammal could maintain speed parallel to the ship and receive adequate energy over successive pings to suffer TTS.

In short, given the anticipated duration and levels of sound exposure, we would not expect marine mammals to incur more than relatively low levels of TTS (*i.e.,* single digits of sensitivity loss). To add context to this degree of TTS, individual marine mammals may regularly experience variations of 6 dB differences in hearing sensitivity across time (Finneran *et al.,* 2000, 2002; Schlundt *et al.,* 2000).

3. Duration of TTS (recovery time)—In the TTS laboratory studies (as discussed in the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat* section of the proposed rule), some using exposures of almost an hour in duration or up to 217 SEL, almost all individuals recovered within 1 day (or less, often in minutes), although in one study (Finneran *et al.,* 2007), recovery took 4 days.

Based on the range of degree and duration of TTS reportedly induced by exposures to non-pulse sounds of energy higher than that to which free-swimming marine mammals in the field are likely to be exposed during LFAS/MFAS/HFAS training and testing exercises in the MITT Study Area, it is unlikely that marine mammals would ever sustain a TTS from MFAS that alters their sensitivity by more than 20 dB for more than a few hours—and any incident of TTS would likely be far less severe due to the short duration of the majority of the events and the speed of a typical vessel, especially given the fact that the higher power sources resulting in TTS are predominantly intermittent, which have been shown to result in shorter durations of TTS. Also, for the same reasons discussed in the *Analysis and Negligible Impact Determination—Diel Cycle* section, and because of the short distance within which animals would need to approach the sound source, it is unlikely that animals would be exposed to the levels necessary to induce TTS in subsequent time periods such that their recovery is impeded. Additionally, though the frequency range of TTS that marine mammals might sustain would overlap with some of the frequency ranges of their vocalization types, the frequency range of TTS from MFAS would not usually span the entire frequency range of one vocalization type, much less span all types of vocalizations or other critical auditory cues for any given species.

Tables 47–51 indicate the number of incidental takes by TTS for each species that are likely to result from the Navy's activities. As a general point, the majority of these TTS takes are the result of exposure to hull-mounted MFAS (MF narrower band sources), with fewer from explosives (broad-band lower frequency sources), and even fewer from LFAS or HFAS sources (narrower band). As described above, we expect the majority of these takes to be in the form of mild (single-digit), short-term (minutes to hours), narrower band (only affecting a portion of the animal's hearing range) TTS. This means that for one to several times per year, for several minutes to maybe a few hours (high end) each, a taken individual will have slightly diminished hearing sensitivity (slightly more than natural variation, but nowhere near total deafness). More often than not, such an exposure would occur within a narrower mid- to higher frequency band that may overlap part (but not all) of a communication, echolocation, or predator range, but sometimes across a lower or broader bandwidth. The significance of TTS is also related to the auditory cues that are germane within the time period that the animal incurs the TTS. For example, if an odontocete has TTS at echolocation frequencies, but incurs it at night when it is resting and not feeding, for example, it is not impactful. In short, the expected results of any one of these small number of mild TTS occurrences could be that (1) it does not overlap signals that are pertinent to that animal in the given time period, (2) it overlaps parts of signals that are important to the animal, but not in a manner that impairs interpretation, or (3) it reduces detectability of an important signal to a small degree for a short amount of time—in which case the animal may be aware and be able to compensate (but there may be slight energetic cost), or the animal may have some reduced opportunities (*e.g.,* to detect prey) or reduced capabilities to react with maximum effectiveness (*e.g.,* to detect a predator or navigate optimally). However, given the small number of times that any individual might incur TTS, the low degree of TTS and the short anticipated duration, and the low likelihood that one of these instances would occur in a time period in which the specific TTS overlapped the entirety of a critical signal, it is unlikely that TTS of the nature expected to result from the Navy activities would result in behavioral changes or other impacts that would impact any individual's (of any hearing sensitivity) reproduction or survival.

Auditory Masking or Communication Impairment

The ultimate potential impacts of masking on an individual (if it were to occur) are similar to those discussed for TTS, but an important difference is that masking only occurs during the time of the signal, versus TTS, which continues beyond the duration of the signal. Fundamentally, masking is referred to as a chronic effect because one of the key potential harmful components of masking is its duration—the fact that an animal would have reduced ability to hear or interpret critical cues becomes much more likely to cause a problem the longer it is occurring. Also inherent in the concept of masking is the fact that the potential for the effect is only present during the times that the animal and the source are in close enough proximity for the effect to occur (and further, this time period would need to coincide with a time that the animal was utilizing sounds at the masked frequency). As our analysis has indicated, because of the relative movement of vessels and the sound sources primarily involved in this rule, we do not expect the exposures with the potential for masking to be of a long duration. Masking is fundamentally more of a concern at lower frequencies, because low frequency signals propagate significantly further than higher frequencies and because they are more likely to overlap both the narrower LF calls of mysticetes, as well as many non-communication cues such as fish and invertebrate prey, and geologic sounds that inform navigation. It should be noted that the Navy is only proposing authorization for a small subset of more narrow frequency LF sources and for less than 11 hours cumulatively annually. Masking is also more of a concern from continuous sources (versus intermittent sonar signals) where there is no quiet time between pulses within which auditory signals can be detected and interpreted. For these reasons, dense aggregations of, and long exposure to, continuous LF activity are much more of a concern for masking, whereas comparatively short-term exposure to the predominantly intermittent pulses of often narrow frequency range MFAS or HFAS, or explosions are not expected to result in a meaningful amount of masking. While the Navy occasionally uses LF and more continuous sources, it is not in the contemporaneous aggregate amounts that would accrue to a masking concern. Specifically, the nature of the activities and sound sources used by the Navy do

not support the likelihood of a level of masking accruing that would have the potential to affect reproductive success or survival. Additional detail is provided below.

Standard hull-mounted MFAS typically pings every 50 seconds. Some hull-mounted anti-submarine sonars can also be used in an object detection mode known as ''Kingfisher'' mode (*e.g.,* used on vessels when transiting to and from port) where pulse length is shorter but pings are much closer together in both time and space since the vessel goes slower when operating in this mode. Kingfisher mode is typically operated for relatively shorter durations. For the majority of other sources, the pulse length is significantly shorter than hull-mounted active sonar, on the order of several microseconds to tens of milliseconds. Some of the vocalizations that many marine mammals make are less than one second long, so, for example with hull-mounted sonar, there would be a 1 in 50 chance (only if the source was in close enough proximity for the sound to exceed the signal that is being detected) that a single vocalization might be masked by a ping. However, when vocalizations (or series of vocalizations) are longer than the one-second pulse of hull-mounted sonar, or when the pulses are only several microseconds long, the majority of most animals' vocalizations would not be masked.

Most ASW sonars and countermeasures use MF frequencies and a few use LF and HF frequencies. Most of these sonar signals are limited in the temporal, frequency, and spatial domains. The duration of most individual sounds is short, lasting up to a few seconds each. A few systems operate with higher duty cycles or nearly continuously, but they typically use lower power, which means that an animal would have to be closer, or in the vicinity for a longer time, to be masked to the same degree as by a higher level source. Nevertheless, masking could occasionally occur at closer ranges to these high-duty cycle and continuous active sonar systems, but as described previously, it would be expected to be of a short duration when the source and animal are in close proximity. While data are limited on behavioral responses of marine mammals to continuously active sonars, mysticete species are known to be able to habituate to novel and continuous sounds (Nowacek *et al.,* 2004), suggesting that they are likely to have similar responses to high-duty cycle sonars. Furthermore, most of these systems are hull-mounted on surface ships and ships are moving at least 10 kn, and it is unlikely that the ship and the marine mammal would continue to move in the same direction and the marine mammal subjected to the same exposure due to that movement. Most ASW activities are geographically dispersed and last for only a few hours, often with intermittent sonar use even within this period. Most ASW sonars also have a narrow frequency band (typically less than one-third octave). These factors reduce the likelihood of sources causing significant masking. HF signals (above 10 kHz) attenuate more rapidly in the water due to absorption than do lower frequency signals, thus producing only a very small zone of potential masking. If masking or communication impairment were to occur briefly, it would more likely be in the frequency range of MFAS (the more powerful source), which overlaps with some odontocete vocalizations (but few mysticete vocalizations); however, it would likely not mask the entirety of any particular vocalization, communication series, or other critical auditory cue, because the signal length, frequency, and duty cycle of the MFAS/HFAS signal does not perfectly resemble the characteristics of any single marine mammal species' vocalizations.

Other sources used in Navy training and testing that are not explicitly addressed above, many of either higher frequencies (meaning that the sounds generated attenuate even closer to the source) or lower amounts of operation, are similarly not expected to result in masking. For the reasons described here, any limited masking that could potentially occur would be minor and short-term.

In conclusion, masking is more likely to occur in the presence of broadband, relatively continuous noise sources such as from vessels, however, the duration of temporal and spatial overlap with any individual animal and the spatially separated sources that the Navy uses would not be expected to result in more than short-term, low impact masking that would not affect reproduction or survival.

Injury (Permanent Threshold Shift)

Tables 47 through 51 indicate the number of individuals of each species for which Level A harassment in the form of PTS resulting from exposure to active sonar and/or explosives is estimated to occur. The number of individuals to potentially incur PTS annually (from sonar and explosives) for each species ranges from 0 to 50 (50 is for Dwarf sperm whale), but is more typically 0 or 1. As described previously, no species are expected to incur tissue damage from explosives.

Data suggest that many marine mammals will deliberately avoid exposing themselves to the received levels of active sonar necessary to induce injury by moving away from or at least modifying their path to avoid a close approach. Additionally, in the unlikely event that an animal approaches the sonar-emitting vessel at a close distance, NMFS has determined that the mitigation measures (*i.e.,* shutdown/powerdown zones for active sonar) would typically ensure that animals would not be exposed to injurious levels of sound. As discussed previously, the Navy utilizes both aerial (when available) and passive acoustic monitoring (during ASW exercises, passive acoustic detections are used as a cue for Lookouts' visual observations when passive acoustic assets are already participating in an activity) in addition to Lookouts on vessels to detect marine mammals for mitigation implementation. As discussed previously, these Level A harassment take numbers represent the maximum number of instances in which marine mammals would be reasonably expected to incur PTS, and we have analyzed them accordingly.

If a marine mammal is able to approach a surface vessel within the distance necessary to incur PTS in spite of the mitigation measures, the likely speed of the vessel (nominally 10–15 kn) and relative motion of the vessel would make it very difficult for the animal to remain in range long enough to accumulate enough energy to result in more than a mild case of PTS. As discussed previously in relation to TTS, the likely consequences to the health of an individual that incurs PTS can range from mild to more serious depending upon the degree of PTS and the frequency band it is in. The majority of any PTS incurred as a result of exposure to Navy sources would be expected to be in the 2–20 kHz range (resulting from the most powerful hull-mounted sonar) and could overlap a small portion of the communication frequency range of many odontocetes, whereas other marine mammal groups have communication calls at lower frequencies. Regardless of the frequency band though, the more important point in this case is that any PTS accrued as a result of exposure to Navy activities would be expected to be of a small amount (single digits). Permanent loss of some degree of hearing is a normal occurrence for older animals, and many animals are able to compensate for the shift, both in old age or at younger ages as the result of stressor exposure. While a small loss of hearing sensitivity may

include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, at the expected scale it would be unlikely to impact behaviors, opportunities, or detection capabilities to a degree that would interfere with reproductive success or survival.

Group and Species-Specific Analyses

In this section, we build on the general analysis that applies to all marine mammals in the MITT Study Area and Transit Corridor from the previous section, and include first information and analysis that applies to mysticetes or, separately, odontocetes, and then within those two sections, more specific information that applies to smaller groups, where applicable, and the affected species. The specific authorized take numbers are also included in the analyses below, and so here we provide some additional context and discussion regarding how we consider the authorized take numbers in those analyses.

The maximum amount and type of incidental take of marine mammals reasonably likely to occur from exposures to sonar and other active acoustic sources and explosions and therefore authorized during the seven-year training and testing period are shown in Table 28. The vast majority of predicted exposures (greater than 99 percent) are expected to be Level B harassment (TTS and behavioral reactions) from acoustic and explosive sources during training and testing activities at relatively low received levels.

In the discussions below, the estimated takes by Level B harassment represent instances of take, not the number of individuals taken (the much lower and less frequent takes by Level A harassment are far more likely to be associated with separate individuals), and in some cases individuals may be taken more than one time. Below, we compare the total take numbers (including PTS, TTS, and behavioral disturbance) for species to their associated abundance estimates to evaluate the magnitude of impacts across the species and to individuals. Generally, when an abundance percentage comparison is below 100, it suggests the following: (1) That not all of the individuals will be taken; (2) that, barring specific circumstances suggesting repeated takes of individuals (such as in circumstances where all activities resulting in take are focused in one area and time where the same individual marine mammals are known to congregate, such as pinnipeds at a pupping beach), the average or expected number of days taken for those individuals taken is one per year; and (3) that we would not expect any individuals to be taken more than a few times in a year, or for those days to be sequential. There are no cases in this rule where the percentage of takes as compared to abundance is greater than 100, the highest being 93 percent (for fin whales) and the remaining species at 55 percent or less (most are 20 percent or under).

To assist in understanding what this analysis means, we clarify a few issues related to estimated takes and the analysis here. An individual that incurs a PTS or TTS take may sometimes, for example, also be subject to behavioral disturbance at the same time. As described above in this section, the degree of PTS, and the degree and duration of TTS, expected to be incurred from the Navy's activities are not expected to impact marine mammals such that their reproduction or survival could be affected. Similarly, data do not suggest that a single instance in which an animal incurs PTS or TTS and is also subject to behavioral disturbance would result in impacts to reproduction or survival. Alternately, we recognize that if an individual is subjected to behavioral disturbance repeatedly for a longer duration and on consecutive days, effects could accrue to the point that reproductive success is jeopardized, although those sorts of impacts are not expected to result from these activities. Accordingly, in analyzing the number of takes and the likelihood of repeated and sequential takes, we consider the total takes, not just the Level B harassment takes by behavioral disruption, so that individuals potentially exposed to both threshold shift and behavioral disruption are appropriately considered. The number of Level A harassment takes by PTS are so low (and zero in most cases) compared to abundance numbers that it is considered highly unlikely that any individual would be taken at those levels more than once.

Use of sonar and other transducers will typically be transient and temporary. The majority of acoustic effects to mysticetes from sonar and other active sound sources during testing and training activities will be primarily from ASW events. It is important to note that although ASW is one of the warfare areas of focus during MTEs, there are significant periods when active ASW sonars are not in use. Nevertheless, behavioral reactions are assumed more likely to be significant during MTEs than during other ASW activities due to the duration (*i.e.,* multiple days) and scale (*i.e.,* multiple sonar platforms) of the MTEs. On the less severe end, exposure to comparatively lower levels of sound at a detectably greater distance from the animal, for a few or several minutes, could result in a behavioral response such as avoiding an area that an animal would otherwise have moved through or fed in, or breaking off one or a few feeding bouts. More severe behavioral effects could occur when an animal gets close enough to the source to receive a comparatively higher level of sound, is exposed continuously to one source for a longer time, or is exposed intermittently to different sources throughout a day. Such effects might result in an animal having a more severe flight response and leaving a larger area for a day or more, or potentially losing feeding opportunities for a day. However, such severe behavioral effects are expected to occur infrequently.

Occasional, milder behavioral reactions are unlikely to cause long-term consequences for individual animals or populations, and even if some smaller subset of the takes are in the form of a longer (several hours or a day) and more severe responses, if they are not expected to be repeated over sequential days, impacts to individual fitness are not anticipated. Nearly all studies and experts agree that infrequent exposures of a single day or less are unlikely to impact an individual's overall energy budget (Farmer *et al.,* 2018; Harris *et al.,* 2017; King *et al.,* 2015; NAS 2017; New *et al.,* 2014; Southall *et al.,* 2007; Villegas-Amtmann *et al.,* 2015).

If impacts to individuals are of a magnitude or severity such that either repeated and sequential higher severity impacts occur (the probability of this goes up for an individual the higher total number of takes it has) or the total number of moderate to more severe impacts occurs across sequential days, then it becomes more likely that the aggregate effects could potentially interfere with feeding enough to reduce energy budgets in a manner that could impact reproductive success via longer cow-calf intervals, terminated pregnancies, or calf mortality. It is important to note that if these impacts occurred they would only accrue to females, which only comprise a portion of the population (typically approximately 50 percent). Based on energetic models, it takes energetic impacts of a significantly greater magnitude to cause the death of an adult marine mammal, and females will always terminate a pregnancy or stop lactating before allowing their health to deteriorate. Also, the death of an adult female has significantly more impact on population growth rates than reductions

in reproductive success, while the death of an adult male has very little effect on population growth rates. However, as will be explained further in the sections below, the severity and magnitude of takes expected to result from the MITT activities are such that energetic impacts of a scale that might affect reproductive success are not expected to occur at all.

The analyses below in some cases address species collectively if they occupy the same functional hearing group (*i.e.,* low, mid, and high-frequency cetaceans), share similar life history strategies, and/or are known to behaviorally respond similarly to acoustic stressors. Because some of these groups or species share characteristics that inform the impact analysis similarly, it would be duplicative to repeat the same analysis for each species. In addition, similar species typically have the same hearing capabilities and behaviorally respond in the same manner.

Thus, our analysis below considers the effects of the Navy's activities on each affected species even where discussion is organized by functional hearing group and/or information is evaluated at the group level. Where there are meaningful differences between species that would further differentiate the analysis, they are either described within the section or the discussion for those species is included as a separate subsection. Specifically below, we first give broad descriptions of the mysticete and odontocete groups and then differentiate into further groups and species as appropriate.

Mysticetes

This section builds on the broader discussion above and brings together the discussion of the different types and amounts of take that different species are likely to incur, the applicable mitigation, and the status of the species to support the negligible impact determinations for each species. We have described (above in the *General Negligible Impact Analysis* section) the unlikelihood of any masking having effects that would impact the reproduction or survival of any of the individual marine mammals affected by the Navy's activities. We also described in the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat* section of the proposed rule the unlikelihood of any habitat impacts having effects that would impact the reproduction or survival of any of the individual marine mammals affected by the Navy's activities. No new information has been received that affects that analysis and conclusion. There is no predicted tissue damage from explosives for any species, and one mother-calf pair of humpback whales could be taken by PTS by sonar exposure over the course of the seven-year rule. Much of the discussion below focuses on the behavioral effects and the mitigation measures that reduce the probability or severity of effects. Because there are species-specific considerations, at the end of the section we break out our findings on a species-specific basis.

In Table 47 below for mysticetes, we indicate for each species the total annual numbers of take by Level A and Level B harassment, and a number indicating the instances of total take as a percentage of abundance in the MITT Study Area alone, as well as the MITT Study Area plus the Transit Corridor, which was calculated separately. While the density used to calculate take is the same for these two areas, the takes were calculated separately for the two areas for all species in this rule, not just mysticetes, because the activity levels are higher in the MITT Study Area and it is helpful to understand the comparative impacts in the two areas. Note also that for mysticetes, the abundance within the MITT Study Area and Transit Corridor represents only a portion of the species abundance.

TABLE 47—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT AND LEVEL A HARASSMENT FOR MYSTICETES AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF ABUNDANCE WITHIN THE MITT STUDY AREA AND TRANSIT CORRIDOR

Species	Instances of indicated types of incidental take (not all takes represent separate individuals, especially for disturbance)					Abundance		Instances of total take as percentage of abundance	
	Level B harassment		Level A harassment	Total takes		MITT study area	MITT study area + transit corridor	MITT study area	MITT study area + transit corridor
	Behavioral disturbance	TTS	PTS	MITT study area	MITT study area + transit corridor				
Blue whale	4	20	0	24	24	134	150	18	16
Bryde's whale	40	258	0	296	298	1,470	1,596	20	19
Fin whale	5	20	0	25	25	27	46	93	54
Humpback whale	92	679	*2	768	771	2,393	2,673	~~20~~ 32	~~18~~ 29
Minke whale	10	85	0	95	95	403	450	23	21
Omura's whale	4	25	0	28	29	143	160	20	18
Sei whale	19	136	0	154	155	780	821	20	19

Note: Abundance was calculated using the following formulas: (1) Density from the Technical Report in animals/km^2 × spatial extent of the MITT Study Area transit corridor = Abundance in the transit corridor and (2) Density from the Technical Report in animals/km^2 × spatial extent of the MITT Study Area = Abundance in the MITT Study. Note that the total annual takes described here may be off by a digit due to rounding. This occurred here as the Level B harassment takes are broken down further into Behavioral Disturbance and TTS compared to the Level B harassment takes presented as one number in the *Estimated Take of Marine Mammals* section.

*There is one mother-calf pair of humpback whales estimated to be taken by Level A Harassment by PTS over the period of the rule. See the *Estimated Take of Marine Mammals* section for further details.

The majority of takes by harassment of mysticetes in the MITT Study Area will be caused by sources from the MF1 MFAS active sonar bin (which includes hull-mounted sonar) because they are high level, narrowband sources in the 1–10 kHz range, which intersect what is estimated to be the most sensitive area of hearing for mysticetes. They also are used in a large portion of exercises (see Tables 3 and 4). Most of the takes (66 percent) from the MF1 bin in the MITT Study Area would result from received levels between 154 and 172 dB SPL, while another 33 percent would result from exposure between 172 and 178 dB SPL. For the remaining active sonar bin types, the percentages are as follows: LF4 = 97 percent between 124 and 136 dB SPL, MF4 = 99 percent between 136 and 154 dB SPL, MF5 = 98 percent between 118 and 142 dB SPL, and HF4 = 98 percent between 100 and 148 dB SPL. For explosives, no blue whales or

fin whales will be taken by Level B harassment or Level A harassment (PTS). For other mysticetes, exposure to explosives will result in small numbers of take: 1–6 takes by Level B harassment by behavioral disturbance per species, and 0–3 TTS takes per species (0 for Omura's whales). Based on this information, the majority of the Level B harassment by behavioral disturbance is expected to be of low to sometimes moderate severity and of a relatively shorter duration. No tissue damage from training and testing activities is anticipated or authorized for any species.

Research and observations show that if mysticetes are exposed to sonar or other active acoustic sources they may react in a number of ways depending on the characteristics of the sound source, their experience with the sound source, and whether they are migrating or on seasonal feeding or breeding grounds. Behavioral reactions may include alerting, breaking off feeding dives and surfacing, diving or swimming away, or no response at all (DOD, 2017; Nowacek, 2007; Richardson, 1995; Southall *et al.,* 2007). Overall, mysticetes have been observed to be more reactive to acoustic disturbance when a noise source is located directly on their migration route. Mysticetes disturbed while migrating could pause their migration or route around the disturbance, while males en route to breeding grounds have been shown to be less responsive to disturbances. Although some may pause temporarily, they will resume migration shortly after the exposure ends. Animals disturbed while engaged in other activities such as feeding or reproductive behaviors may be more likely to ignore or tolerate the disturbance and continue their natural behavior patterns.

Alternately, adult female mysticetes with calves may be more responsive to stressors. An increase in the disturbance level from noise-generating human activities (such as, for example, sonar or vessel traffic) may increase the risk of mother–calf pair separation (reducing the time available for suckling) or require that louder contact calls are made which, in turn increases the possibility of detection. In either case, increased ambient noise could have negative consequences for calf fitness (Cartwright and Sullivan 2009; Craig *et al.,* 2014).

Lactating humpback whale females mainly rest while stationary at shallow depths within reach of the hull of commercial ships (although not expected from Navy vessels for the reasons discussed in the proposed rule and due to the effectiveness of mitigation measures), increasing the potential for ship strike collisions; and even moderate increases of noise from vessels can decrease the communication range (Bejder *et al.,* 2019). Videsen *et al.* (2017) reported that vocalizations between humpback whale mothers and calves, which included very weak tonal and grunting sounds, were produced more frequently during active dives than suckling dives, suggesting that mechanical stimuli rather than acoustic cues are used to initiate nursing. Their study suggests that the use of mechanical cues for initiating suckling and low level vocalizations with an active space of less than 100 m indicate a strong selection pressure for acoustic crypsis. Furthermore, such inconspicuous behavior likely reduces the risk of exposure to eavesdropping predators and male humpback whale escorts that may disrupt the high proportion of time spent nursing and resting, and hence ultimately compromise calf fitness. Parks *et al.* (2019) explored the potential for acoustic crypsis in North Atlantic right whale mother-calf pairs. Their results show that right whale mother-calf pairs have a strong shift in repertoire usage, significantly reducing the number of higher amplitude, long-distance communication signals they produced when compared with juvenile and pregnant whales in the same habitat. Similarly, Nielsen *et al.* (2019) concluded that acoustic crypsis in southern right whales and other baleen whales decreases the risk of alerting potential predators and hence jeopardizing a substantial energetic investment by the mother. These studies (*i.e.,* Videsen *et al.,* 2017; Parks *et al.,* 2019; and Nielsen *et al.,* 2019) suggest that the small active space of the weak calls between baleen whale mothers and calves is very sensitive to increases in ambient noise from human encroachment, thereby increasing the risk of mother-calf separation.

Few behavioral response studies have specifically looked at mother-calf pairs; most studies have targeted adult animals. In the few behavioral response studies where mothers with calves were targeted, their responses were not different from those in groups without calves. For example, humpback whales in a behavioral response experiment in Australia responded to a 2 kHz tone stimulus by changing their course during migration to move more offshore and surfaced more frequently, but otherwise did not respond (Dunlop *et al.,* 2013; Noad *et al.* 2013). Mother-calf pairs, either alone or with escorts, did not respond any differently to the tonal stimulus than groups without calves. Several humpback whales on breeding grounds have been observed during aerial or visual surveys during Navy training events involving sonar; no avoidance or other behavioral responses were ever noted, even when the whales were observed within 5 km of a vessel with active (or possibly active) sonar and maximum received levels were estimated to be between 135 and 161 dB re 1 µPa (Smultea *et al.,* 2009; Mobley *et al.* 2009; Mobley and Milette 2010; Mobley 2011; Mobley and Pacini 2012; Mobley *et al.,* 201; Smultea *et al.,* 2012).

As noted in the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat* section of the proposed rule, while there are multiple examples from behavioral response studies of odontocetes ceasing their feeding dives when exposed to sonar pulses at certain levels, alternately blue whales (mysticetes) were less likely to show a visible response to sonar exposures at certain levels when feeding than when traveling. However, Goldbogen *et al.* (2013) indicated some horizontal displacement of deep foraging blue whales in response to simulated MFAS. Southall *et al.* (2019b) observed that after exposure to simulated and operational mid-frequency active sonar, more than 50 percent of blue whales in deep-diving states responded to the sonar, while no behavioral response was observed in shallow-feeding blue whales. Southall *et al.* (2019b) noted that the behavioral responses they observed were generally brief, of low to moderate severity, and highly dependent on exposure context (behavioral state, source-to-whale horizontal range, and prey availability). Most Level B harassment by behavioral disturbance of mysticetes is likely to be short-term and of low to sometimes moderate severity, with no anticipated effect on reproduction or survival.

Richardson *et al.* (1995) noted that avoidance (temporary displacement of an individual from an area) reactions are the most obvious manifestations of disturbance in marine mammals. Avoidance is qualitatively different from the startle or flight response, but also differs in the magnitude of the response (*i.e.,* directed movement, rate of travel, etc.). Oftentimes avoidance is temporary, and animals return to the area once the noise has ceased. Some mysticetes may avoid larger activities such as a MTE as they move through an area, although these activities do not typically use the same training locations day-after-day during multi-day activities, except periodically in instrumented ranges, which do not occur within the MITT Study Area.

Therefore, displaced animals could return quickly after a large activity or MTE is completed. Due to the limited number and geographic scope of MTEs, it is unlikely that most mysticetes would encounter an MTE more than once per year and additionally, total hull-mounted sonar hours would be limited in several areas that are important to mysticetes (described below). In the ocean, the use of Navy sonar and other active acoustic sources is transient and is unlikely to expose the same population of animals repeatedly over a short period of time, especially given the broader-scale movements of mysticetes.

The implementation of procedural mitigation and the sightability of mysticetes (especially given their large size) further reduces the potential for a significant behavioral reaction or a threshold shift to occur (*i.e.,* shutdowns are expected to be successfully implemented), which is reflected in the amount and type of incidental take that is anticipated to occur and authorized.

As noted previously, when an animal incurs a threshold shift, it occurs in the frequency from that of the source up to one octave above. This means that the vast majority of threshold shifts caused by Navy sonar sources will typically occur in the range of 2–20 kHz (from the 1–10 kHz MF1 bin, though in a specific narrow band within this range as the sources are narrowband), and if resulting from hull-mounted sonar, will be in the range of 3.5–7 kHz. The majority of mysticete vocalizations occur in frequencies below 1 kHz, which means that TTS incurred by mysticetes will not interfere with conspecific communication. Additionally, many of the other critical sounds that serve as cues for navigation and prey (*e.g.,* waves, fish, invertebrates) occur below a few kHz, which means that detection of these signals will not be inhibited by most threshold shift either. When we look in ocean areas where the Navy has been intensively training and testing with sonar and other active acoustic sources for decades, there is no data suggesting any long-term consequences to reproduction or survival rates of mysticetes from exposure to sonar and other active acoustic sources.

All the mysticete species discussed in this section will benefit from the procedural mitigation measures described earlier in the *Mitigation Measures* section. Additionally, the Navy will limit activities and employ other measures in mitigation areas that will avoid or reduce impacts to humpback whales (discussed in detail below). Below we compile and summarize the information that supports our determination that the Navy's activities will not adversely affect any species through effects on annual rates of recruitment or survival for any of the affected mysticete species.

Humpback whale—As noted in the *Description of Marine Mammals and Their Habitat in the Area of the Specified Activities* section, humpback whales in the Mariana Islands are considered most likely part of the ESA-endangered WNP DPS and the Mariana Archipelago is an established breeding ground. No ESA Critical Habitat has been proposed in the MITT Study Area. However, the areas of Marpi and Chalan Kanoa Reefs (out to the 400-m isobath) are known specifically to be used by mother/calf pairs of humpback whales (Hill *et al.,* 2016, 2017, 2018, 2020). Currently, no other areas have been identified for mother/calf pairs of humpback whales in the Mariana Islands. The current population trend for the WPN DPS of humpback whales show the SPLASH abundance estimate for Asia represents a 6.7 percent annual rate of increase over the 1991 to 1993 abundance estimate (Calambokidis *et al.,* 2008). However, the 1991 to 1993 estimate was for Ogasawara and Okinawa only, whereas the SPLASH estimate includes the Philippines, so the annual rate of increase is unknown. The population trend for WNP DPS of humpback is unknown (NMFS 2019).

Regarding the consideration of how Navy activities may affect humpback whales in these important areas with calves, as described previously, this final rule includes the Chalan Kanoa Reef and Marpi Reef Geographic Mitigation Areas, which encompass the area of observed calf detections and include water depths of 400 m or less, with significant parts of the mitigation areas less than 200 m, which is where most humpback whale sightings have been made. The Navy will not use explosives in the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas year-round. These two geographic mitigation areas also will require a 20-hour annual cap (for both areas combined) from December 1 through April 30 on MF1 MFAS use to minimize sonar exposure and reduce take by Level B harassment of humpback whales in these important reproductive areas.

The Navy expects current and future use of these two Geographic Mitigation Areas to remain low, but the 20-hour cap allows for the Navy to engage in a small amount of necessary training, most likely such as a Small Coordinated ASW Exercise or TRACKEX event(s), which could, for example, occur up to five days, but no more than four hours per day (or similar configuration totaling no more than 20 hours annually). As described in the *Humpback Whales Around Saipan* subsection of the *Estimated Take of Marine Mammals* section, our updated analysis indicates that given the maximum of 20 hrs of MF1 MFAS, a maximum annual total of 305 instances of Level B harassment may be incurred by 61 humpback whales, including 17 calves, in these areas during these months in the Geographic Mitigation Areas. One mother-calf pair of humpback whales may be taken by Level A harassment in the form of PTS over the course of the seven years of activities in these areas. Because of the higher density of humpback whales in this area, these individuals could potentially be taken on up to five, most likely non-sequential days. However, the reduction in exposure of humpback whales to sonar and explosive detonations in the Geographic Mitigation Areas and at this time (*i.e.,* the short overall and daily exposure) will reduce the likelihood of impacts that could affect reproduction or survival, by minimizing impacts on calves during this sensitive life stage, avoiding the additional energetic costs to mothers of avoiding the area during explosive exercises, and minimizing the chances that important breeding behaviors are interrupted to the point that reproduction is inhibited or abandoned for the year, or otherwise interfered with. Finally, the Navy will also implement the Marpi Reef and Chalan Kanoa Reef Awareness Notification Message Area that will help alert Navy vessels operating in these areas to the possible presence of increased concentrations of humpback whales from December 1 through April 30 to avoid interactions with large whales that may be vulnerable to vessel strikes.

To be clear about the temporal and spatial distribution of the estimated take, all take of humpback whales is expected to occur from December through April (the months when humpback whales are located in the MITT Study Area), with the number noted in the previous paragraph occurring in the two mitigation areas, and the remainder occurring throughout the MITT Study Area and Transit Corridor. Regarding the magnitude of takes by Level B harassment (TTS and behavioral disruption), the number of estimated total instances of take compared to the abundance (measured against both the MITT Study Area abundance and the MITT Study Area plus the transit corridor abundance

combined) is 32 and 29 percent, respectively (Table 47). Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a portion up to 178 dB (*i.e.,* of a moderate or lower level, less likely to evoke a severe response). While impacts to cow-calf pairs are of particular concern, we have also explained how the restrictions and limitations on explosive and sonar use in the geographic mitigation areas will minimize impacts. Regarding the severity of takes by TTS, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with communication or other important low-frequency cues. Therefore the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival.

Altogether, the WNP DPS of humpback whales is endangered and while there is not enough information to identify a population trend, the Mariana Archipelago has been identified as a breeding area for the WNP DPS of humpback whales. In consideration of the MITT Study Area as a whole, only a small portion of the total individuals within the MITT Study Area will be taken and disturbed at a low-moderate level, with most of those individuals likely not disturbed on more than a few non-sequential days in a year. As described above for the mitigation areas specifically, if the Navy conducts the maximum five 4-hour exercises in these areas, cow-calf pairs could be taken on up to five likely non-sequential days. However, takes in these mitigation areas would be as a result of brief exposure to one shorter-duration exercise (as discussed earlier, the duration of an exercise does not indicate the duration of exposure to the exercises, which would be significantly shorter given the speed of Navy vessels), and the impacts would not be expected to accrue to the degree that would interfere with important mother-calf communications in a manner leading to cow-calf separation, interfere with social communications in a manner that would impede breeding, or impact humpback cow behaviors in a manner that would have adverse impacts on their energy budget and lactation success. One mother-calf pair could be taken by a small amount of PTS over the course of these seven-year regulations, of likely low severity as described previously. A small permanent loss of hearing sensitivity (PTS) may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities for the individual. However, given the smaller degree of PTS, and higher frequency of the hearing loss anticipated to result from MF1 sonar exposure (which is above the frequencies used to communicate with conspecifics and, specifically, calves), the PTS incurred by one mother-calf pair of humpback whales in a given year is unlikely to impact its behaviors, opportunities, or detection capabilities to a degree that will interfere with reproductive success or survival of the individual, let alone affect annual rates of recruitment or survival.

Even considering the potential impacts to cow-calf pairs, given the historic low use in the shallow waters of Marpi and Chalan Kanoa Reefs for Navy's activities as well as the restriction on explosive use and a 20-hr cap on MFAS, as well as the low magnitude and severity of anticipated harassment effects, the authorized takes are not expected to result in impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival. Therefore, the total take will not adversely affect this species through impacts on annual rates of recruitment or survival. No mortality is anticipated or authorized. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on humpback whales.

Blue whale—Blue whales are listed as endangered under the ESA throughout their range, with no ESA-designated critical habitat or known biologically important areas identified for this species in the MITT Study Area. There have been no stock(s) specified for the blue whales found in the MITT Study Area and Transit Corridor, and there is no associated SAR. There is also no information on trends for this species within the MITT Study Area. Blue whales are however considered stable generally throughout their range (NMFS 2019). Blue whales would be most likely to occur in the MITT Study Area during the winter and are expected to be few in number. There are no recent sighting records for blue whales in the MITT Study Area (Fulling *et al.,* 2011; Hill *et al.,* 2017a; Uyeyama, 2014). However, some acoustic detections from passive monitoring devices deployed at Saipan and Tinian have recorded the presence of blue whales over short periods of time (a few days) (Oleson *et al.,* 2015). Since blue whale calls can travel very long distances (up to 621 mi (1,000 km)), it is unknown whether the animals were within the MITT Study Area.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disruption), the number of estimated total instances of take compared to the abundance (measured against both the MITT Study Area abundance and the MITT Study Area plus the transit corridor combined) is 18 and 16 percent, respectively (Table 47). Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a portion up to 178 dB (*i.e.,* of a moderate or lower level, less likely to evoke a severe response). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with communication or other important low-frequency cues. Therefore the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival.

Altogether, blue whales are listed as endangered, there are no known population trends, and blue whales have a very large range and a low abundance in the MITT Study Area. Our analysis suggests that a small portion of the individuals in the MITT Study Area and Transit Corridor (which represent only a small portion of the total abundance of the species) will be taken and disturbed at a low-moderate level, with those individuals disturbed on likely one day within a year. No mortality or Level A harassment is anticipated or authorized. This low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals and, therefore, the total take will not adversely affect this species through impacts on annual rates of recruitment or survival, let alone have impacts on annual rates of recruitment or survival. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on blue whales.

Fin whale—Fin whales are listed as endangered under the ESA throughout their range, with no ESA designated critical habitat or known biologically important areas identified for this species in the MITT Study Area. There have been no stock(s) specified for fin

whales found in the MITT Study Area and Transit Corridor, and there is no associated SAR. There is also no information on trends for this species within the MITT Study Area or in other parts of their range (NMFS 2019). There are no sighting records for fin whales in the MITT Study Area (Fulling *et al.,* 2011; Hill *et al.,* 2017a; Oleson *et al.,* 2015; Uyeyama, 2014). However, based on acoustic detections, fin whales are expected to be present in the MITT Study Area, although few in number.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disruption), the number of estimated total instances of take compared to the abundance (measured against both the MITT Study Area abundance and the MITT Study Area plus the transit corridor combined) is 93 and 54 percent, respectively (Table 47). Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a portion up to 178 dB (*i.e.,* of a moderate or lower level, less likely to evoke a severe response). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with communication or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival.

Altogether, fin whales are listed as endangered, there are no known population trends, and they have a low abundance in the MITT Study Area. Our analysis suggests that up to half or more of the individuals in the MITT Study Area and Transit Corridor (which represent a small portion of the species abundance) will be taken and disturbed at a low-moderate level, with those individuals likely not disturbed on more than a few non-sequential days a year. No mortality or Level A harassment is anticipated or authorized. This low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival, and therefore the total take will not adversely affect this species through impacts on annual rates of recruitment or survival. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on fin whales.

Sei whale—Sei whales are listed as endangered under the ESA throughout their range, with no ESA-designated critical habitat or known biologically important areas identified for this species in the MITT Study Area. There have been no stock(s) specified for sei whales found in the MITT Study Area and Transit Corridor, and there are no associated SARs. There is also no information on population trends for this species within the MITT Study Area or in other parts of their range (NMFS 2019).

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disruption), the number of estimated total instances of take compared to the abundance (measured against both the MITT Study Area abundance and the MITT Study Area plus the transit corridor combined) is 20 and 19 percent, respectively (Table 47). Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a portion up to 178 dB (*i.e.,* of a moderate or lower level, less likely to evoke a severe response). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with communication or other important low-frequency cues. Therefore the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival.

Altogether sei whales are listed as endangered, there are no known population trends. Our analysis suggests that a small portion of individuals within the MITT Study Area and Transit Corridor (which is a small portion of the species abundance) will be taken and disturbed at a low-moderate level, with those individuals disturbed on likely one day within a year. No mortality or Level A harassment is anticipated or authorized. This low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival. Therefore, the total take will not adversely affect this species through impacts on annual rates of recruitment or survival. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on sei whales.

Bryde's whale, Minke whale, and Omura's whale—None of these species of whales are listed as endangered or threatened under the ESA and there are no known biologically important areas identified for these species in the MITT Study Area. There have been no specific stock(s) specified for these populations found in the MITT Study Area and Transit Corridor, and there are no associated SARs. There is also no information on population trends for these species within the MITT Study Area.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance (measured against both the MITT Study Area abundance and the MITT Study Area plus the transit corridor combined) is 20 and 19 percent (Bryde's whale), 23 and 21 percent (Minke whale), and 20 and 18 (Omura's whale) percent, respectively (Table 47). Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB with a portion up to 178 dB (*i.e.,* of a moderate or lower level, less likely to evoke a severe response). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with communication or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival.

Altogether, these three species of whales are not listed under the ESA and there are no known population trends. The abundance of Bryde's whales, minke whales, and Omura's whales in the MITT Study Area is thought to be low, and our analysis suggests that a small portion of individuals within the MITT Study Area and Transit Corridor will be taken and disturbed at a low-moderate level, with those individuals disturbed only once. No mortality or Level A harassment is anticipated or authorized. This low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival. Therefore, the total take will not adversely affect these species through impacts on annual rates of recruitment

or survival. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on Bryde's whales, minke whales, and Omura's whales.

Odontocetes

This section builds on the broader discussion above and brings together the discussion of the different types and amounts of take that different species are likely to incur, the applicable mitigation for each species, and the status of the species to support the negligible impact determinations for each species. We have described (above in the *General Negligible Impact Analysis* section) the unlikelihood of any masking having effects that would impact the reproduction or survival of any of the individual marine mammals affected by the Navy's activities. We also described in the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat* section of the proposed rule the unlikelihood of any habitat impacts having effects that would impact the reproduction or survival of any of the individual marine mammals affected by the Navy's activities. No new information has been received that affects the analysis and conclusion. There is no predicted PTS from sonar or explosives for most odontocetes, with the exception of a few species which is discussed below. There is no predicted tissue damage from explosives for any species. Much of the discussion below focuses on the behavioral effects and the mitigation measures that reduce the probability or severity of effects. Here, we include information that applies to all of the odontocete species, which are then further divided and discussed in more detail in the following subsections: Dwarf sperm whales and pygmy sperm whales; sperm whales; beaked whales; and dolphins and small whales. These subsections include more specific information about the groups, as well as conclusions for each species represented.

The majority of takes by harassment of odontocetes in the MITT Study Area will be caused by sources from the MFAS bin (which includes hull-mounted sonar) because they are high level, typically narrowband sources at a frequency (in the 1–10 kHz range) that overlaps a more sensitive portion (though not the most sensitive) of the MF hearing range and they are used in a large portion of exercises (see Table 3). For odontocetes other than beaked whales (for which these percentages are indicated separately in that section), most of the takes (98 percent) from the MF1 bin in the MITT Study Area would result from received levels between 154 and 172 dB SPL. For the remaining active sonar bin types, the percentages are as follows: LF4 = 97 percent between 124 and 136 dB SPL, MF4 = 99 percent between 136 and 160 dB SPL, MF5 = 97 percent between 118 and 142 dB SPL, and HF4 = 88.6 percent between 100 and 130 dB SPL. Based on this information, the majority of the takes by Level B harassment by behavioral disturbance are expected to be low to sometimes moderate in nature, but still of a generally shorter duration.

For all odontocetes, takes from explosives (Level B harassment by behavioral disturbance or TTS, or PTS) comprise a very small fraction (and low number) of those caused by exposure to active sonar. For the following odontocetes, zero takes from explosives are expected to occur: Blainville's beaked whales, Cuvier's beaked whales, bottlenose dolphins, false killer whales, killer whales, sperm whales, rough-toothed dolphins, and pygmy killer whales. For Level B harassment by behavioral disturbance from explosives, 1 to 4 takes are expected to occur for all but two of the remaining odontocetes, 25 and 64 takes for pygmy and dwarf sperm whales, respectively. Similarly, the instances of PTS and TTS from explosives are expected to be low. The instances of TTS expected to occur from explosives are 0 to 5 per species and the instances of PTS expected to occur from explosives are 0 to 1 per species, except for pygmy and dwarf sperm whales. Because of the lower TTS and PTS thresholds for HF odontocetes, pygmy and dwarf sperm whales are expected to have 25 and 64 takes by Level B harassment disturbance and 37 and 100 takes by TTS, and 8 and 21 takes by PTS from explosives, respectively.

Because the majority of harassment takes of odontocetes result from the sources in the MFAS bin, the vast majority of threshold shift would occur at a single frequency within the 1–10 kHz range and, therefore, the vast majority of threshold shift caused by Navy sonar sources would be at a single frequency within the range of 2–20 kHz. The frequency range within which any of the anticipated narrowband threshold shift would occur would fall directly within the range of most odontocete vocalizations (2–20 kHz). For example, the most commonly used hull-mounted sonar has a frequency around 3.5 kHz, and any associated threshold shift would be expected to be at around 7 kHz. However, individual odontocete vocalizations typically span a much wider range than this, and alternately, threshold shift from active sonar will often be in a narrower band (reflecting the narrower band source that caused it), which means that TTS incurred by odontocetes would typically only interfere with communication within a portion of their range (if it occurred during a time when communication with conspecifics was occurring) and, as discussed earlier, it would only be expected to be of a short duration and relatively small degree. Odontocete echolocation occurs predominantly at frequencies significantly higher than 20 kHz, though there may be some small overlap at the lower part of their echolocating range for some species, which means that there is little likelihood that threshold shift, either temporary or permanent would interfere with feeding behaviors. Many of the other critical sounds that serve as cues for navigation and prey (*e.g.,* waves, fish, invertebrates) occur below a few kHz, which means that detection of these signals will not be inhibited by most threshold shift either. The low number of takes by threshold shift that might be incurred by individuals exposed to explosives would likely be lower frequency (5 kHz or less) and spanning a wider frequency range, which could slightly lower an individual's sensitivity to navigational or prey cues, or a small portion of communication calls, for several minutes to hours (if temporary) or permanently. There is no reason to think that any of the individual odontocetes taken by TTS would incur these types of takes over more than one day, or over a few days at most, and therefore they are unlikely to incur impacts on reproduction or survival. The number of PTS takes from these activities are very low (0 annually for most, 1 for a few species, and 19 and 50 for pygmy and dwarf sperm whales, respectively), and as discussed previously because of the low degree of PTS (*i.e.,* low amount of hearing sensitivity loss), as well as the narrower frequency range in which the majority of the PTS would occur, it is unlikely to affect reproduction or survival of any individuals..

The range of potential behavioral effects of sound exposure on marine mammals generally, and odontocetes specifically, has been discussed in detail previously. There are behavioral patterns that differentiate the likely impacts on odontocetes as compared to mysticetes. First, odontocetes echolocate to find prey, which means that they actively send out sounds to detect their prey. While there are many strategies for hunting, one common

pattern, especially for deeper diving species, is many repeated deep dives within a bout, and multiple bouts within a day, to find and catch prey. As discussed above, studies demonstrate that odontocetes may cease their foraging dives in response to sound exposure. If enough foraging interruptions occur over multiple sequential days, and the individual either does not take in the necessary food, or must exert significant effort to find necessary food elsewhere, energy budget deficits can occur that could potentially result in impacts to reproductive success, such as increased cow/calf intervals (the time between successive calving). Second, while many mysticetes rely on seasonal migratory patterns that position them in a geographic location at a specific time of the year to take advantage of ephemeral large abundances of prey (*i.e.,* invertebrates or small fish, which they eat by the thousands), odontocetes forage more homogeneously on one fish or squid at a time. Therefore, if odontocetes are interrupted while feeding, it is often possible to find more prey relatively nearby.

Dwarf Sperm Whales and Pygmy Sperm Whales (Kogia species)—This section builds on the broader odontocete discussion above and brings together the discussion of the different types and amounts of take that these two species are likely to incur, the applicable mitigation, and the status of the species to support the negligible impact determinations for each species. Some Level A harassment by PTS is anticipated annually (50 and 19 takes for Dwarf and pygmy whale, respectively, see Table 48).

In Table 48 below for dwarf sperm whales and pygmy sperm whales, we indicate for each species the total annual numbers of take by Level A and Level B harassment, and a number indicating the instances of total take as a percentage of the abundance within the MITT Study Area alone, as well as the MITT Study Area plus the Transit Corridor, which was calculated separately. While the density used to calculate take is the same for these two areas, the takes were calculated separately for the two areas for dwarf and pygmy sperm whales because the activity levels are higher in the MITT Study Area and it is helpful to understand the comparative impacts in the two areas. Note also that for dwarf and pygmy sperm whales (and all odontocetes), the abundance within the MITT Study Area and Transit Corridor represents only a portion of the species abundance.

TABLE 48—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT AND LEVEL A HARASSMENT FOR DWARF SPERM WHALES AND PYGMY SPERM WHALES AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF ABUNDANCE WITHIN THE MITT STUDY AREA AND TRANSIT CORRIDOR

Species	Instances of indicated types of incidental take (not all takes represent separate individuals, especially for disturbance)					Abundance		Instances of total take as percentage of abundance	
	Level B harassment		Level A harassment	Total takes		MITT study area	MITT study area + transit corridor	MITT study area	MITT study area + transit corridor
	Behavioral disturbance	TTS	PTS	MITT study area	MITT study area + transit corridor				
Dwarf sperm whale	1,353	7,146	50	8,502	8,549	25,594	27,395	33	31
Pygmy sperm whale	533	2,877	19	3,412	3,429	10,431	11,168	33	31

Note: Abundance was calculated using the following formulas: (1) Density from the Technical Report in animals/km^2 × spatial extent of the MITT Study Area transit corridor = Abundance in the transit corridor and (2) Density from the Technical Report in animals/km^2 × spatial extent of the MITT Study Area = Abundance in the MITT Study. Note that the total annual takes described here may be off by a digit due to rounding. This occurred here as the Level B harassment takes are broken down further into Behavioral Disturbance and TTS compared to the Level B harassment takes presented as one number in the *Estimated Take of Marine Mammals* section.

As discussed above, the majority of takes by Level B harassment by behavioral disturbance of odontocetes, and thereby dwarf and pygmy sperm whales, is expected to be in the form of low to occasionally moderate severity of a generally shorter duration. As discussed earlier in this section, we anticipate more severe effects from takes when animals are exposed to higher received levels or for longer durations. Occasional milder Level B harassment by behavioral disturbance, as is expected here, is unlikely to cause long-term consequences for either individual animals or populations, even if some smaller subset of the takes are in the form of a longer (several hours or a day) and more moderate response.

We note that dwarf and pygmy sperm whales, as HF-sensitive species, have a lower PTS threshold than all other groups and therefore are generally likely to experience larger amounts of TTS and PTS, and NMFS accordingly has evaluated and authorized higher numbers. Also, however, regarding PTS from sonar exposure, *Kogia* whales are still likely to avoid sound levels that would cause higher levels of TTS (greater than 20 dB) or PTS. Therefore, even though the number of TTS and PTS takes are higher than for other odontocetes, any PTS is expected to be at a lower level and for all of the reasons described above, TTS and PTS takes are not expected to impact reproduction or survival of any individual.

Neither pygmy sperm whales nor dwarf sperm whales are listed under the ESA, and there are no known biologically important areas identified for these species in the MITT Study Area and Transit Corridor. There have been no stock(s) specified for pygmy sperm whales and dwarf sperm whales found in the MITT Study Area and Transit Corridor, and there is no associated SAR. There is also no information on trends for these species within the MITT Study Area. Both pygmy and dwarf sperm whales will benefit from the procedural mitigation measures described earlier in the *Mitigation Measures* section.

Regarding the magnitude of Level B harassment takes (TTS and behavioral disruption), the number of estimated total instances of take compared to the abundance is 33 percent for both dwarf and pygmy sperm whales in the MITT Study Area and 31 percent in the MITT Study Area and the transit corridor combined (Table 48). Regarding the severity of those individual Level B harassment takes by behavioral disruption, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB (*i.e.,* of a lower, to occasionally moderate, level

and less likely to evoke a severe response). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with dwarf or pygmy sperm whale communication or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival. Dwarf sperm whales and pygmy sperm whales could be taken by a small amount of PTS annually, of likely low severity as described previously. A small permanent loss of hearing sensitivity (PTS) may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, but at the expected degree the estimated takes by Level A harassment takes by PTS for dwarf sperm whales and pygmy sperm whales are unlikely to impact behaviors, opportunities, or detection capabilities to a degree that will interfere with reproductive success or survival of any individuals, let alone affect annual rates of recruitment or survival.

Altogether, dwarf and pygmy sperm whales are not listed under the ESA and there are no known population trends. Our analysis suggests that fewer than half of the individuals in the MITT Study Area and Transit Corridor will be taken, and disturbed at a low-moderate level, with those individuals likely not disturbed on more than a few non-sequential days a year. No mortality is anticipated or authorized. The low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival, therefore, the total take will not adversely affect this species through impacts on annual rates of recruitment or survival. Some individuals are estimated to be taken by PTS of likely low severity. A small permanent loss of hearing sensitivity (PTS) may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, but at the expected scale the estimated takes by Level A harassment by PTS are unlikely to impact behaviors, opportunities, or detection capabilities to a degree that would interfere with reproductive success or survival of any individuals, let alone affect annual rates of recruitment or survival. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on both dwarf and pygmy sperm whales.

Sperm whale—This section brings together the broader discussion above with the discussion of the different types and amounts of take that sperm whales could potentially incur, the applicable mitigation, and the status of the species to support the negligible impact determination.

In Table 49 below for sperm whales, we indicate the total annual numbers of take by Level A and Level B harassment, and a number indicating the instances of total take as a percentage of the abundance within the MITT Study Area alone, as well as the MITT Study Area plus the Transit Corridor, which was calculated separately. While the density used to calculate take is the same for these two areas, the takes were calculated separately for the two areas for sperm whales, because the activity levels are higher in the MITT Study Area and it is helpful to understand the comparative impacts in the two areas. Note also that for sperm whales, the abundance within the MITT Study Area and Transit Corridor represents only a portion of the species abundance.

TABLE 49—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT AND LEVEL A HARASSMENT FOR SPERM WHALES AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF ABUNDANCE WITHIN THE MITT STUDY AREA AND TRANSIT CORRIDOR

Species	Instances of indicated types of incidental take (not all takes represent separate individuals, especially for disturbance)					Abundance		Instances of total take as percentage of abundance	
	Level B harassment		Level A harassment	Total takes		MITT study area	MITT study area + transit corridor	MITT study area	MITT study area + transit corridor
	Behavioral disturbance	TTS	PTS	MITT study area	MITT study area + transit corridor				
Sperm whale	192	11	0	189	203	4,216	5,146	4	4

Note: Abundance was calculated using the following formulas: (1) Density from the Technical Report in animals/km^2 x spatial extent of the MITT Study Area transit corridor = Abundance in the transit corridor and (2) Density from the Technical Report in animals/km^2 x spatial extent of the MITT Study Area = Abundance in the MITT Study. Not that the total annual takes described here may be off by a digit due to rounding. This occurred here as the Level B harassment takes are broken down further into Behavioral Disturbance and TTS compared to the Level B harassment takes presented as one number in the *Estimated Take of Marine Mammals* section.

As discussed above, the majority of takes by Level B harassment by behavioral disturbance of odontocetes, and thereby sperm whales, is expected to be in the form of low to moderate severity of a generally shorter duration. As mentioned earlier in this section, we anticipate more severe effects from takes when animals are exposed to higher received levels or for longer durations. Occasional milder Level B harassment by behavioral disturbance, as is expected here, is unlikely to cause long-term consequences for either individual animals or populations.

Sperm whales are listed as endangered under the ESA throughout their range, but there is no ESA designated critical habitat, or known biologically important areas identified for this species within the MITT Study Area. There have been no stock(s) specified for sperm whales found in the MITT Study Area and Transit Corridor, and there is no associated SAR. There is also no information on trends for this species within the MITT Study Area or in other parts of their range (NMFS 2019).

Sperm whales have been routinely sighted in the MITT Study Area and detected in acoustic monitoring records. Sperm whales will benefit from the procedural mitigation measures described earlier in the *Mitigation Measures* section.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disruption), the number of estimated total instances of take compared to the abundance is 4 percent in the MITT Study Area and 4 percent in the MITT Study Area and transit corridor combined (Table 49). Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the

duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB (*i.e.,* of a lower, to occasionally moderate level and less likely to evoke a severe response). Regarding the severity of TTS takes, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with important low-frequency cues. While the narrowband/single frequency threshold shift incurred may overlap with parts of the frequency range that sperm whales use for communication, any associated lost opportunities and capabilities would not be at a level that will impact reproduction or survival.

Altogether, sperm whales are listed as endangered under the ESA and there are no known population trends. Our analysis suggests that a very small portion of the individuals within the MITT Study Area and Transit Corridor will be taken and disturbed at a low-moderate level, with those individuals disturbed on likely one day within a year. No mortality or Level A harassment is anticipated or authorized. This low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival, and therefore the total take will not adversely affect this species through impacts on annual rates of recruitment or survival. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on sperm whales.

Beaked Whales—This section builds on the broader odontocete discussion above (*i.e.,* that information applies to beaked whales as well), except where we offer alternative information about the received levels for beaked whale for Level B harassment by behavioral disturbance, and brings together the discussion of the different types and amounts of take that different beaked whale species will incur, the applicable mitigation, and the status of each species to support the negligible impact determination for each species. For beaked whales, there is no Level A harassment or mortality anticipated or authorized.

In Table 50 below for beaked whales, we indicate the total annual numbers of take by Level A and Level B harassment for the four species, and a number indicating the instances of total take as a percentage of the abundance in the MITT Study Area alone, as well as the MITT Study Area plus the Transit Corridor, which was calculated separately. While the density used to calculate take is the same for these two areas, the takes were calculated separately for the two areas for beaked whales, because the activity levels are higher in the MITT Study Area and it is helpful to understand the comparative impacts in the two areas. Note also that for beaked whales, the abundance within the MITT Study Area and Transit Corridor represents only a portion of the species abundance.

TABLE 50—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT AND LEVEL A HARASSMENT FOR BEAKED WHALES AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF ABUNDANCE IN THE MITT STUDY AREA AND TRANSIT CORRIDOR

Species	Instances of indicated types of incidental take (not all takes represent separate individuals, especially for disturbance)					Abundance		Instances of total take as percentage of abundance	
	Level B harassment		Level A harassment	Total takes		MITT study area	MITT study area + transit corridor	MITT study area	MITT study area + transit corridor
	Behavioral disturbance	TTS	PTS	MITT study area	MITT study area + transit corridor				
Blainville's beaked whale	1,691	27	0	1,698	1,718	3,083	3,376	55	51
Cuvier's beaked whale	642	4	0	534	646	1,075	2,642	50	24
Ginkgo-toothed beaked whale	3,660	66	0	3,662	3,726	6,775	7,567	54	49
Longman's beaked whale	5,959	107	0	6,056	6,066	11,148	11,253	54	54

Note: Abundance was calculated using the following formulas: (1) Density from the Technical Report in animals/km^2 x spatial extent of the MITT Study Area transit corridor = Abundance in the transit corridor and (2) Density from the Technical Report in animals/km^2 x spatial extent of the MITT Study Area = Abundance in the MITT Study. Note that the total annual takes described here may be off by a digit due to rounding. This occurred here as the Level B harassment takes are broken down further into Behavioral Disturbance and TTS compared to the Level B harassment takes presented as one number in the *Estimated Take of Marine Mammals* section.

As discussed above, the majority of takes by Level B harassment by behavioral disturbance of odontocetes, and thereby beaked whales, is expected to be in the form of low to moderate severity of a generally shorter duration. The majority of takes by harassment of beaked whales in the MITT Study Area are caused by sources from the MFAS active sonar bin (which includes hull-mounted sonar) because they are high level narrowband sources that fall within the 1–10 kHz range, which overlap a more sensitive portion (though not the most sensitive) of the MF hearing range. Also, of the sources expected to result in take, they are used in a large portion of exercises (see Table 3). Most of the takes (96 percent) from the MF1 bin in the MITT Study Area would result from received levels between 148 and 160 dB SPL. For the remaining active sonar bin types, the percentages are as follows: LF4 = 99 percent between 124 and 136 dB SPL, MF4 = 98 percent between 130 and 148 dB SPL, MF5 = 97 percent between 100 and 142 dB SPL, and HF4 = 95 percent between 100 and 148 dB SPL. Given the levels they are exposed to and their sensitivity, some responses would be of a lower severity, but many would likely be considered moderate.

Research has shown that beaked whales are especially sensitive to the presence of human activity (Pirotta *et al.,* 2012; Tyack *et al.,* 2011) and therefore have been assigned a lower harassment threshold, with lower received levels resulting in a higher percentage of individuals being harassed and a more distant distance cutoff (50 km for high source level, 25 km for moderate source level). Beaked whales have also been found to respond to naval sonar, in certain circumstances, in a manner that can lead to stranding and in a few cases, globally, beaked whale strandings have been causally associated with active sonar operation. However, as discussed in the *Stranding* section of the *Potential Effects of Specified Activities on Marine Mammals and Their Habitat* section,

NMFS has determined that the activities included in this 7-year rule are not reasonably likely to result in the mortality of beaked whales.

Beaked whales have been documented to exhibit avoidance of human activity or respond to vessel presence (Pirotta *et al.,* 2012). Beaked whales were observed to react negatively to survey vessels or low altitude aircraft by quick diving and other avoidance maneuvers, and none were observed to approach vessels (Wursig *et al.,* 1998). Research and observations show that if beaked whales are exposed to sonar or other active acoustic sources, they may startle, break off feeding dives, and avoid the area of the sound source to levels of 157 dB re 1 µPa, or below (McCarthy *et al.,* 2011). Acoustic monitoring during actual sonar exercises revealed some beaked whales continuing to forage at levels up to 157 dB re 1 µPa (Tyack *et al.,* 2011). Stimpert *et al.* (2014) tagged a Baird's beaked whale, which was subsequently exposed to simulated MFAS. Changes in the animal's dive behavior and locomotion were observed when received level reached 127 dB re 1 µPa. However, Manzano-Roth *et al.* (2013) found that for beaked whale dives that continued to occur during MFAS activity, differences from normal dive profiles and click rates were not detected with estimated received levels up to 137 dB re 1 µPa while the animals were at depth during their dives. In research done at the Navy's fixed tracking range in the Bahamas, animals were observed to leave the immediate area of the anti-submarine warfare training exercise (avoiding the sonar acoustic footprint at a distance where the received level was ''around 140 dB SPL'', according to Tyack *et al.* (2011)), but return within a few days after the event ended (Claridge and Durban, 2009; McCarthy *et al.,* 2011; Moretti *et al.,* 2009, 2010; Tyack *et al.,* 2010, 2011). Tyack *et al.* (2011) report that, in reaction to sonar playbacks, most beaked whales stopped echolocating, made long slow ascent to the surface, and moved away from the sound. A similar behavioral response study conducted in Southern California waters during the 2010–2011 field season found that Cuvier's beaked whales exposed to MFAS displayed behavior ranging from initial orientation changes to avoidance responses characterized by energetic fluking and swimming away from the source (DeRuiter *et al.,* 2013b). However, the authors did not detect similar responses to incidental exposure to distant naval sonar exercises at comparable received levels, indicating that context of the exposures (*e.g.,* source proximity, controlled source ramp-up) may have been a significant factor. The study itself found the results inconclusive and meriting further investigation. Cuvier's beaked whale responses suggested particular sensitivity to sound exposure consistent with results for Blainville's beaked whale.

Populations of beaked whales and other odontocetes in the Bahamas and other Navy fixed ranges that have been operating for decades appear to be stable. Behavioral reactions (avoidance of the area of Navy activity) seem likely in most cases if beaked whales are exposed to anti-submarine sonar within a few tens of kilometers, especially for prolonged periods (a few hours or more) since this is one of the most sensitive marine mammal groups to anthropogenic sound of any species or group studied to date and research indicates beaked whales will leave an area where anthropogenic sound is present (De Ruiter *et al.,* 2013; Manzano-Roth *et al.,* 2013; Moretti *et al.,* 2014; Tyack *et al.,* 2011). Research involving tagged Cuvier's beaked whales in the SOCAL Range Complex reported on by Falcone and Schorr (2012, 2014) indicates year-round prolonged use of the Navy's training and testing area by these beaked whales and has documented movements in excess of hundreds of kilometers by some of those animals. Given that some of these animals may routinely move hundreds of kilometers as part of their normal pattern, leaving an area where sonar or other anthropogenic sound is present may have little, if any, cost to such an animal. Photo identification studies in the SOCAL Range Complex, a Navy range that is utilized for training and testing, have identified approximately 100 Cuvier's beaked whale individuals with 40 percent having been seen in one or more prior years, with re-sightings up to seven years apart (Falcone and Schorr, 2014). These results indicate long-term residency by individuals in an intensively used Navy training and testing area, which may also suggest a lack of long-term consequences as a result of exposure to Navy training and testing activities. More than eight years of passive acoustic monitoring on the Navy's instrumented range west of San Clemente Island documented no significant changes in annual and monthly beaked whale echolocation clicks, with the exception of repeated fall declines likely driven by natural beaked whale life history functions (DiMarzio *et al.,* 2018). Finally, results from passive acoustic monitoring estimated that regional Cuvier's beaked whale densities were higher than indicated by NMFS' broad scale visual surveys for the U.S. West Coast (Hildebrand and McDonald, 2009).

These beaked whale species are not listed as endangered or threatened species under the ESA, and there are no known biologically important areas identified for these species in the MITT Study Area. There have been no stock(s) specified for beaked whales found in the MITT Study Area and Transit Corridor, and there are no associated SARs. There is also no information on trends for these species within the MITT Study Area. All of the beaked whales species discussed in this section will benefit from the procedural mitigation measures described earlier in the *Mitigation Measures* section.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disturbance), the number of estimated instances of take compared to the abundance is 50 to 55 percent in the MITT Study Area and 24 to 54 percent in the MITT Study Area and transit corridor combined (Table 50). Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained that the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 160 dB, though with beaked whales, which are considered somewhat more sensitive, this could mean that some individuals will leave preferred habitat for a day (*i.e.,* moderate level takes). However, while interrupted feeding bouts are a known response and concern for odontocetes, we also know that there are often viable alternative habitat options nearby. Regarding the severity of takes by TTS, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with beaked whale communication or other important low-frequency cues. Therefore, the associated lost opportunities and capabilities are not at a level that will impact reproduction or survival. As mentioned earlier in the odontocete overview, we anticipate more severe effects from takes when animals are exposed to higher received levels or sequential days of impacts.

Altogether, none of the four beaked whale species are listed under the ESA and there are no known population trends. Our analysis suggests that fewer than half of the individuals of each species in the MITT Study Area and Transit Corridor will be taken and disturbed at a low or moderate level, with those individuals likely not

disturbed on more than a few non-sequential days a year. No mortality or Level A harassment is anticipated or authorized. This low magnitude and low to moderate severity of harassment effects is not expected to result in impacts on individual reproduction or survival, let alone have impacts on annual rates of recruitment or survival and, therefore, the total take will not adversely affect this species through impacts on annual rates of recruitment or survival. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on these four beaked whale species.

Small Whales and Dolphins—This section builds on the broader discussion above and brings together the discussion of the different types and amounts of take that different small whale and dolphin species are likely to incur, the applicable mitigation, and the status of the species to support the negligible impact determinations for each species.

In Table 51 below for dolphins and small whales, we indicate for each species the total annual numbers of take by Level A and Level B harassment, and a number indicating the instances of total take as a percentage of abundance in the MITT Study Area alone, as well as the MITT Study Area plus the Transit Corridor, which was calculated separately. While the density used to calculate take is the same for these two areas, the takes were calculated separately for the two areas for dolphins and small whales, because the activity levels are higher in the MITT Study Area and it is helpful to understand the comparative impacts in the two areas. Note also that for dolphins and small whales, the abundance within the MITT Study Area and Transit Corridor represents only a portion of the species abundance.

TABLE 51—ANNUAL ESTIMATED TAKES BY LEVEL B HARASSMENT AND LEVEL A HARASSMENT FOR DOLPHINS AND SMALL WHALES AND NUMBER INDICATING THE INSTANCES OF TOTAL TAKE AS A PERCENTAGE OF ABUNDANCE IN THE MITT STUDY AREA AND TRANSIT CORRIDOR

Species	Instances of indicated types of incidental take (not all takes represent separate individuals, especially for disturbance)					Abundance		Instances of total take as percentage of abundance	
	Level B harassment		Level A harassment	Total takes		MITT study area	MITT study area + transit corridor	MITT study area	MITT study area + transit corridor
	Behavioral disturbance	TTS	PTS	MITT study area	MITT study area + transit corridor				
Bottlenose dolphin	116	21	0	132	137	753	1,076	17	13
False killer whale	641	121	0	759	762	3,979	4,218	19	18
Fraser's dolphin	11,326	1,952	1	13,261	13,279	75,420	76,476	18	17
Killer whale	36	8	0	44	44	215	253	20	17
Melon-headed whale	2,306	509	0	2,798	2,815	15,432	16,551	18	17
Pantropical spotted dolphin	12,078	2,818	1	14,820	14,897	81,013	85,755	18	17
Pygmy killer whale	87	17	0	103	104	502	527	21	20
Risso's dolphin	2,650	520	0	3,166	3,170	16,991	17,184	19	18
Rough-toothed dolphin	161	36	0	185	197	1,040	1,815	18	11
Short-finned pilot whale	987	176	0	1,150	1,163	5,700	6,583	20	18
Spinner dolphin	1,185	229	1	1,404	1,415	4,449	5,232	32	27
Striped dolphin	3,256	751	0	3,956	4,007	22,081	24,528	18	16

Note: Abundance was calculated using the following formulas: (1) Density from the Technical Report in animals/km^2 x spatial extent of the MITT Study Area transit corridor = Abundance in the transit corridor and (2) Density from the Technical Report in animals/km^2 x spatial extent of the MITT Study Area = Abundance in the MITT Study. Note that the total annual takes described here may be off by a digit due to rounding. This occurred here as the Level B harassment takes are broken down further into Behavioral Disturbance and TTS compared to the Level B harassment takes presented as one number in the *Estimated Take of Marine Mammals* section.

As discussed above, the majority of takes by Level B harassment by behavioral disturbance of odontocetes, and thereby dolphins and small whales, from hull-mounted sonar (MFAS) in the MITT Study Area would result from received levels between 154 and 172 dB SPL. Therefore, the majority of takes by Level B harassment are expected to be in the form of low to occasionally moderate severity of a generally shorter duration. As mentioned earlier in this section, we anticipate more severe effects from takes when animals are exposed to higher received levels or for longer durations. Occasional milder Level B harassment by behavioral disturbance, as is expected here, is unlikely to cause long-term consequences for either individual animals or populations that have any effect on reproduction or survival. One Level A harassment is anticipated and authorized for three species (Fraser's dolphin, pantropical spotted dolphin, and spinner dolphin).

Research and observations show that if delphinids are exposed to sonar or other active acoustic sources they may react in a number of ways depending on their experience with the sound source and what activity they are engaged in at the time of the acoustic exposure. Delphinids may not react at all until the sound source is approaching within a few hundred meters to within a few kilometers depending on the environmental conditions and species. Some dolphin species (the more surface-dwelling taxa—typically those with ''dolphin'' in the common name, such as bottlenose dolphins, spotted dolphins, spinner dolphins, rough-toothed dolphins, etc., but not Risso's dolphin), especially those residing in more industrialized or busy areas, have demonstrated more tolerance for disturbance and loud sounds and many of these species are known to approach vessels to bow-ride. These species are often considered generally less sensitive to disturbance. Dolphins and small whales that reside in deeper waters and generally have fewer interactions with human activities are more likely to demonstrate more typical avoidance reactions and foraging interruptions as described above in the odontocete overview.

All the dolphin and small whale species discussed in this section will benefit from the procedural mitigation measures described earlier in the *Mitigation Measures* section. Additionally, the Agat Bay Nearshore Geographic Mitigation Area will provide protection for spinner dolphins as the Navy will not use in-water explosives or

MF1 ship hull-mounted mid-frequency active sonar in this area. High use areas for spinner dolphins including Agat Bay are where animals congregate during the day to rest (Amesbury *et al.,* 2001; Eldredge, 1991). Behavioral disruptions during resting periods can adversely impact health and energetic budgets by not allowing animals to get the needed rest and/or by creating the need to travel and expend additional energy to find other suitable resting areas. Avoiding sonar and explosives in this area reduces the likelihood of impacts that would affect reproduction and survival.

None of the small whale and dolphin species are listed as endangered or threatened species under the ESA. As noted above, an important resting area has been identified for spinner dolphins, and mitigation has been included to reduce impacts in the area. There have been no stock(s) specified for small whales and dolphins found in the MITT Study Area and Transit Corridor, and there are no associated SARs. There is also no information on trends for these species within the MITT Study Area.

Regarding the magnitude of takes by Level B harassment (TTS and behavioral disturbance), the number of estimated total instances of take compared to the abundance is 32 percent for spinner dolphins and 17 to 21 percent for the remaining dolphins and small whales in the MITT Study Area. The number of estimated total instances of take compared to the abundance is 27 percent for spinner dolphins and 20 percent or less for the remaining dolphins and small whales in the MITT Study and transit corridor combined (Table 51).

Regarding the severity of those individual takes by Level B harassment by behavioral disturbance, we have explained the duration of any exposure is expected to be between minutes and hours (*i.e.,* relatively short) and the received sound levels largely below 172 dB (*i.e.,* of a lower, to occasionally moderate, level and less likely to evoke a severe response). Regarding the severity of takes by TTS, they are expected to be low-level, of short duration, and mostly not in a frequency band that would be expected to interfere with communication or other important low-frequency cues. The associated lost opportunities and capabilities are not at a level that will impact reproduction or survival. One individual each of three species (spinner dolphin, Fraser's dolphin, and pantropical spotted dolphin) is estimated to be taken by one PTS annually, of likely low severity as described previously. A small permanent loss of hearing sensitivity (PTS) may include some degree of energetic costs for compensating or may mean some small loss of opportunities or detection capabilities, but at the expected scale the estimated takes by Level A harassment by PTS for spinner dolphin, Fraser's dolphin, and pantropical spotted dolphin are unlikely to impact behaviors, opportunities, or detection capabilities to a degree that will interfere with reproductive success or survival of any individuals, let alone affect annual rates of recruitment or survival.

Altogether, none of the small whale or dolphin species are listed under the ESA and there are no known population trends. Our analysis suggests that only a small portion of the individuals of any of these species in the MITT Study Area or Transit Corridor will be taken and disturbed at a low-moderate level, with those individuals likely disturbed no more than a few non-sequential days a year. One take by PTS for three dolphin species is anticipated and authorized, but at the expected scale the estimated take by Level A harassment by PTS is unlikely to impact behaviors, opportunities, or detection capabilities to a degree that would interfere with reproductive success or survival of any individuals, let alone annual rates of recruitment or survival. This low magnitude and severity of harassment effects is not expected to result in impacts on the reproduction or survival of any individuals, let alone have impacts on annual rates of recruitment or survival and, therefore, the total take will not adversely affect these species through impacts on annual rates of recruitment or survival. For these reasons, we have determined, in consideration of all of the effects of the Navy's activities combined, that the authorized take will have a negligible impact on all twelve of these species of small whales and dolphins.

Determination

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS finds that the total marine mammal take from the Specified Activities will have a negligible impact on all affected marine mammal species.

Subsistence Harvest of Marine Mammals

There are no subsistence uses or harvest of marine mammals in the geographic area affected by the specified activities. Therefore, NMFS has determined that the total taking affecting species will not have an unmitigable adverse impact on the availability of the species for taking for subsistence purposes.

Classification

Endangered Species Act

There are five marine mammal species under NMFS jurisdiction that are listed as endangered or threatened under the ESA with confirmed or possible occurrence in the MITT Study Area: Blue whale, fin whale, humpback whale, sei whale, and sperm whale. There is no ESA-designated critical habitat for any species in the MITT Study Area. The Navy consulted with NMFS pursuant to section 7 of the ESA for MITT activities, and NMFS also consulted internally on the issuance of these regulations and LOA under section 101(a)(5)(A) of the MMPA. NMFS issued a Biological Opinion concluding that the issuance of the rule and subsequent LOA is not likely to jeopardize the continued existence of the threatened and endangered species under NMFS' jurisdiction and is not likely to result in the destruction or adverse modification of critical habitat in the MITT Study Area. The Biological Opinion for this action is available at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities.*

National Marine Sanctuaries Act

There are no national marine sanctuaries in the MITT Study Area. Therefore, no consultation under the National Marine Sanctuaries Act is required.

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 evaluate its proposed actions and alternatives with respect to potential impacts on the human environment. NMFS participated as a cooperating agency on the 2020 MITT FSEIS/OEIS, which was published on June 5, 2020, and is available at *http://www.MITT-eis.com.* In accordance with 40 CFR 1506.3, NMFS independently reviewed and evaluated the 2020 MITT FSEIS/OEIS and determined that it is adequate and sufficient to meet our responsibilities under NEPA for the issuance of this rule and associated LOA. NOAA therefore adopted the 2020 MITT FSEIS/OEIS. NMFS has prepared a separate Record of Decision. NMFS' Record of Decision for adoption of the 2020 MITT FSEIS/OEIS

and issuance of this final rule and subsequent LOA can be found at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities.*

Executive Order 12866

The Office of Management and Budget has determined that this rule is not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

Waiver of Delay in Effective Date

NMFS has determined that there is good cause under the Administrative Procedure Act (5 U.S.C. 553(d)(3)) to waive the 30-day delay in the effective date of this final rule. No individual or entity other than the Navy is affected by the provisions of these regulations. The Navy has requested that this final rule take effect on or before July 31, 2020, to accommodate the Navy's LOA expiring on August 3, 2020, so as to not cause a disruption in training and testing activities. NMFS was unable to accommodate the 30-day delay of effectiveness period due to the need to consider new information that became available in June 2020, as well as a revised humpback whale analysis that arose through the ESA section 7 consultation. The waiver of the 30-day delay of the effective date of the final rule will ensure that the MMPA final rule and LOA are in place by the time the previous authorizations expire. Any delay in finalizing the rule would result in either: (1) A suspension of planned naval training and testing, which would disrupt vital training and testing essential to national security; or (2) the Navy's procedural non-compliance with the MMPA (should the Navy conduct training and testing without an LOA), thereby resulting in the potential for unauthorized takes of marine mammals. Moreover, the Navy is ready to implement the regulations immediately. For these reasons, NMFS finds good cause to waive the 30-day delay in the effective date. In addition, the rule authorizes incidental take of marine mammals that would otherwise be prohibited under the statute. Therefore, by granting an exception to the Navy, the rule will relieve restrictions under the MMPA, which provides a separate basis for waiving the 30-day effective date for the rule.

List of Subjects in 50 CFR Part 218

Exports, Fish, Imports, Incidental take, Indians, Labeling, Marine mammals, Navy, Penalties, Reporting and recordkeeping requirements, Seafood, Sonar, Transportation.

Dated: July 15, 2020.

Samuel D. Rauch III,

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

For reasons set forth in the preamble, 50 CFR part 218 is amended as follows:

PART 218—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 218 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.,* unless otherwise noted.

■ 2. Revise subpart J to read as follows:

Subpart J—Taking and Importing Marine Mammals; U.S. Navy's Mariana Islands Training and Testing (MITT)

Sec.

Subpart J—Taking and Importing Marine Mammals; U.S. Navy's Mariana Islands Training and Testing (MITT)

§ 218.90 Specified activity and geographical region.

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occurs in the area described in paragraph (b) of this section and that occurs incidental to the activities listed in paragraph (c) of this section.

(b) The taking of marine mammals by the Navy under this subpart may be authorized in a Letter of Authorization (LOA) only if it occurs within the Mariana Islands Training and Testing (MITT) Study Area. The MITT Study Area is comprised of three components: The Mariana Islands Range Complex (MIRC), additional areas on the high seas, and a transit corridor between the MIRC and the Hawaii Range Complex (HRC). The MIRC includes the waters south of Guam to north of Pagan (Commonwealth of the Northern Mariana Islands (CNMI)), and from the Pacific Ocean east of the Mariana Islands to the Philippine Sea to the west, encompassing 501,873 square nautical miles (nmi^2) of open ocean. The additional areas of the high seas include the area to the north of the MIRC that is within the U.S. Exclusive Economic Zone (EEZ) of the CNMI and the areas to the west of the MIRC. The transit corridor is outside the geographic boundaries of the MIRC and represents a great circle route (*i.e.,* the shortest distance) across the high seas for Navy ships transiting between the MIRC and the HRC. Additionally, the MITT Study Area includes pierside locations in the Apra Harbor Naval Complex.

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the Navy conducting training and testing activities, including:

(1) *Training.* (i) Amphibious warfare;

(ii) Anti-submarine warfare;

(iii) Mine warfare;

(vi) Surface warfare; and

(vii) Other training activities.

(2) *Testing.* (i) Naval Air Systems Command Testing Activities;

(ii) Naval Sea Systems Command Testing Activities; and

(iii) Office of Naval Research Testing Activities.

§ 218.91 Effective dates.

Regulations in this subpart are effective from July 31, 2020, to July 30, 2027.

§ 218.92 Permissible methods of taking.

(a) Under an LOA issued pursuant to §§ 216.106 of this section and 218.96, the Holder of the LOA (hereinafter ''Navy'') may incidentally, but not intentionally, take marine mammals within the area described in § 218.90(b) by Level A harassment and Level B harassment associated with the use of active sonar and other acoustic sources and explosives, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the applicable LOA.

(b) The incidental take of marine mammals by the activities listed in § 218.90(c) is limited to the species listed in Table 1 of this section.

TABLE 1 TO § 218.92(b)

Species	Scientific name
Blue whale	*Balaenoptera musculus*.
Bryde's whale	*Balaenoptera edeni*.
Fin whale	*Balaenoptera physalus*.
Humpback whale	*Megaptera novaeangliae*.
Minke whale	*Balaenoptera acutorostrata*.
Omura's whale	*Balaenoptera omurai*.
Sei whale	*Balaenoptera borealis*.
Blainville's beaked whale.	*Mesoplodon densirostris*.
Common bottlenose dolphin.	*Tursiops truncatus*.
Cuvier's beaked whale.	*Ziphius cavirostris*.
Dwarf sperm whale	*Kogia sima*.
False killer whale	*Pseudorca crassidens*.
Fraser's dolphin	*Lagenodelphis hosei*.
Ginkgo-toothed beaked whale.	*Mesoplodon ginkgodens*.
Killer whale	*Orcinus orca*.
Longman's beaked whale.	*Indopacetus pacificus*.
Melon-headed whale	*Peponocephala electra*.
Pantropical spotted dolphin.	*Stenella attenuata*.
Pygmy killer whale	*Feresa attenuata*.
Pygmy sperm whale	*Kogia breviceps*.
Risso's dolphin	*Grampus griseus*.
Rough-toothed dolphin.	*Steno bredanensis*.
Short-finned pilot whale.	*Globicephala macrorhynchus*.
Sperm whale	*Physeter macrocephalus*.
Spinner dolphin	*Stenella longirostris*.
Striped dolphin	*Stenella coeruleoalba*.

§ 218.93 Prohibitions.

Notwithstanding incidental takings contemplated in § 218.92(a) and authorized by an LOA issued under §§ 216.106 of this section and 218.96, no person in connection with the activities listed in § 218.90(c) may:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§ 216.106 of this section and 218.96;

(b) Take any marine mammal not specified in § 218.92(b);

(c) Take any marine mammal specified in § 218.92(b) in any manner other than as specified in the LOA issued under §§ 216.106 of this chapter and 218.96; or

(d) Take a marine mammal specified in § 218.92(b) if NMFS determines such taking results in more than a negligible impact on the species of such marine mammal.

§ 218.94 Mitigation requirements.

When conducting the activities identified in § 218.90(c), the mitigation measures contained in any LOA issued under §§ 216.106 of this section and 218.96 must be implemented. These mitigation measures include, but are not limited to:

(a) *Procedural mitigation.* Procedural mitigation is mitigation that the Navy must implement whenever and wherever an applicable training or testing activity takes place within the MITT Study Area for each applicable activity category or stressor category and includes acoustic stressors (*i.e.,* active sonar and other transducers, weapons firing noise), explosive stressors (*i.e.,* sonobuoys, torpedoes, medium-caliber and large-caliber projectiles, missiles and rockets, bombs, sinking exercises, mines, anti-swimmer grenades), and physical disturbance and strike stressors *(i.e.,* vessel movement; towed in-water devices; small-, medium-, and large-caliber non-explosive practice munitions; non-explosive missiles and rockets; and non-explosive bombs and mine shapes).

(1) *Environmental awareness and education.* Appropriate Navy personnel (including civilian personnel) involved in mitigation and training or testing reporting under the specified activities will complete one or more modules of the U.S. Navy Afloat Environmental Compliance Training Series, as identified in their career path training plan. Modules include: Introduction to the U.S. Navy Afloat Environmental Compliance Training Series, Marine Species Awareness Training; U.S. Navy Protective Measures Assessment Protocol; and U.S. Navy Sonar Positional Reporting System and Marine Mammal Incident Reporting.

(2) *Active sonar.* Active sonar includes low-frequency active sonar, mid-frequency active sonar, and high-frequency active sonar. For vessel-based activities, mitigation applies only to sources that are positively controlled and deployed from manned surface vessels (*e.g.,* sonar sources towed from manned surface platforms). For aircraft-based activities, mitigation applies only to sources that are positively controlled and deployed from manned aircraft that do not operate at high altitudes (*e.g.,* rotary-wing aircraft). Mitigation does not apply to active sonar sources deployed from unmanned aircraft or aircraft operating at high altitudes (*e.g.,* maritime patrol aircraft).

(i) *Number of Lookouts and observation platform*—(A) *Hull-mounted sources.* One Lookout must be positioned for platforms with space or manning restrictions while underway (at the forward part of a small boat or ship) and platforms using active sonar while moored or at anchor (including pierside); and two Lookouts must be positioned for platforms without space or manning restrictions while underway (at the forward part of the ship).

(B) *Sources that are not hull-mounted sources.* One Lookout must be positioned on the ship or aircraft conducting the activity.

(ii) *Mitigation zone and requirements.* The mitigation zones must be the zones as described in paragraphs (a)(2)(ii)(B) and (C) of this section.

(A) Prior to the initial start of the activity (*e.g.,* when maneuvering on station), Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of active sonar transmission.

(B) During the activity for low-frequency active sonar at or above 200 dB and hull-mounted mid-frequency active sonar, Navy personnel must observe the mitigation zone for marine mammals and power down active sonar transmission by 6 dB if marine mammals are observed within 1,000 yd of the sonar source; power down by an additional 4 dB (for a total of 10 dB) if marine mammals are observed within 500 yd of the sonar source; and cease transmission if marine mammals are observed within 200 yd of the sonar source.

(C) During the activity for low-frequency active sonar below 200 dB, mid-frequency active sonar sources that are not hull mounted, and high-frequency active sonar, Navy personnel must observe the mitigation zone for marine mammals and cease active sonar transmission if marine mammals are observed within 200 yd of the sonar source.

(D) Commencement/recommencement conditions after a marine mammal sighting before or during the activity. Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing or powering up active sonar transmission) until one of the following conditions has been met: The animal is observed exiting the mitigation zone; the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the sonar source; the mitigation zone has been clear from any additional sightings for 10 minutes (min) for aircraft-deployed sonar sources or 30 min for vessel-deployed sonar sources; for mobile activities, the active sonar

source has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting; or for activities using hull-mounted sonar where a dolphin(s) is observed in the mitigation zone, the Lookout concludes that the dolphin(s) is deliberately closing in on the ship to ride the ship's bow wave, and is therefore out of the main transmission axis of the sonar (and there are no other marine mammal sightings within the mitigation zone).

(3) *Weapons firing noise.* Weapons firing noise associated with large-caliber gunnery activities.

(i) *Number of Lookouts and observation platform.* One Lookout must be positioned on the ship conducting the firing. Depending on the activity, the Lookout could be the same as the one provided for under ''Explosive medium-caliber and large-caliber projectiles'' or under ''Small-, medium-, and large-caliber non-explosive practice munitions'' in paragraphs (a)(6)(i) and (a)(15)(i) of this section.

(ii) *Mitigation zone and requirements.* The mitigation zone must be thirty degrees on either side of the firing line out to 70 yd from the muzzle of the weapon being fired.

(A) Prior to the initial start of the activity, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of weapons firing.

(B) During the activity, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease weapons firing.

(C) Commencement/recommencement conditions after a marine mammal sighting before or during the activity. Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing weapons firing) until one of the following conditions has been met: The animal is observed exiting the mitigation zone; the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the firing ship; the mitigation zone has been clear from any additional sightings for 30 min; or for mobile activities, the firing ship has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(4) *Explosive sonobuoys*—(i) *Number of Lookouts and observation platform.* One Lookout must be positioned in an aircraft or on a small boat. If additional platforms are participating in the activity, Navy personnel positioned on those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements.* (A) The mitigation zone must be 600 yd around an explosive sonobuoy.

(B) Prior to the initial start of the activity (*e.g.,* during deployment of a sonobuoy pattern, which typically lasts 20–30 min), Navy personnel must conduct passive acoustic monitoring for marine mammals and use information from detections to assist visual observations. Navy personnel also must visually observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of sonobuoy or source/receiver pair detonations.

(C) During the activity, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease sonobuoy or source/receiver pair detonations.

(D) Commencement/recommencement conditions after a marine mammal sighting before or during the activity. Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing detonations) until one of the following conditions has been met: The animal is observed exiting the mitigation zone; the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the sonobuoy; or the mitigation zone has been clear from any additional sightings for 10 min when the activity involves aircraft that have fuel constraints (*e.g.,* helicopter), or 30 min when the activity involves aircraft that are not typically fuel constrained.

(E) After completion of the activity (*e.g.,* prior to maneuvering off station), when practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), Navy personnel must observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel on these assets must assist in the visual observation of the area where detonations occurred.

(5) *Explosive torpedoes*—(i) *Number of Lookouts and observation platform.* One Lookout must be positioned in an aircraft. If additional platforms are participating in the activity, Navy personnel positioned on those assets *(e.g.,* safety observers, evaluators) must support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements.* (A) The mitigation zone must be 2,100 yd around the intended impact location.

(B) Prior to the initial start of the activity (*e.g.,* during deployment of the target), Navy personnel must conduct passive acoustic monitoring for marine mammals and use the information from detections to assist visual observations. Navy personnel also must visually observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of firing.

(C) During the activity, Navy personnel must observe the mitigation zone for marine mammals. If marine mammals are observed, Navy personnel must cease firing.

(D) Commencement/recommencement conditions after a marine mammal sighting before or during the activity. Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met: The animal is observed exiting the mitigation zone; the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location; or the mitigation zone has been clear from any additional sightings for 10 min when the activity involves aircraft that have fuel constraints, or 30 min when the activity involves aircraft that are not typically fuel constrained.

(E) After completion of the activity (*e.g.,* prior to maneuvering off station), Navy personnel must when practical *(e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel on these assets must assist in the visual observation of the area where detonations occurred.

(6) *Explosive medium-caliber and large-caliber projectiles.* Gunnery activities using explosive medium-caliber and large-caliber projectiles. Mitigation applies to activities using a surface target.

(i) *Number of Lookouts and observation platform.* One Lookout must be on the vessel or aircraft conducting the activity. For activities using explosive large-caliber projectiles, depending on the activity, the Lookout could be the same as the one described in ''Weapons firing noise'' in paragraph (a)(3)(i) of this section. If additional platforms are participating in the activity, Navy personnel positioned on those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements.* (A) The mitigation zone must be 200 yd around the intended impact location for air-to-surface activities using explosive medium-caliber projectiles.

(B) The mitigation zone must be 600 yd around the intended impact location for surface-to-surface activities using explosive medium-caliber projectiles.

(C) The mitigation zone must be 1,000 yd around the intended impact location for surface-to-surface activities using explosive large-caliber projectiles.

(D) Prior to the initial start of the activity (*e.g.,* when maneuvering on station), Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of firing.

(E) During the activity, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease firing.

(F) Commencement/recommencement conditions after a marine mammal sighting before or during the activity. Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met: The animal is observed exiting the mitigation zone; the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location; the mitigation zone has been clear from any additional sightings for 10 min for aircraft-based firing or 30 min for vessel-based firing; or for activities using mobile targets, the intended impact location has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(G) After completion of the activity (*e.g.,* prior to maneuvering off station), Navy personnel must, when practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel on these assets must assist in the visual observation of the area where detonations occurred.

(7) *Explosive missiles and rockets.* Aircraft-deployed explosive missiles and rockets. Mitigation applies to activities using a surface target.

(i) *Number of Lookouts and observation platform.* One Lookout must be positioned in an aircraft. If additional platforms are participating in the activity, Navy personnel positioned on those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements.* (A) The mitigation zone must be 900 yd around the intended impact location for missiles or rockets with 0.6–20 lb net explosive weight.

(B) 2,000 yd around the intended impact location for missiles with 21–500 lb net explosive weight.

(C) Prior to the initial start of the activity (*e.g.,* during a fly-over of the mitigation zone), Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of firing.

(D) During the activity, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease firing.

(E) Commencement/recommencement conditions after a marine mammal sighting before or during the activity. Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met: The animal is observed exiting the mitigation zone; the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location; or the mitigation zone has been clear from any additional sightings for 10 min when the activity involves aircraft that have fuel constraints, or 30 min when the activity involves aircraft that are not typically fuel constrained.

(F) After completion of the activity (*e.g.,* prior to maneuvering off station), Navy personnel must, when practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel on these assets will assist in the visual observation of the area where detonations occurred.

(8) *Explosive bombs*—(i) *Number of Lookouts and observation platform.* One Lookout must be positioned in an aircraft conducting the activity. If additional platforms are participating in the activity, Navy personnel positioned on those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements.* (A) The mitigation zone must be 2,500 yd around the intended target.

(B) Prior to the initial start of the activity (*e.g.,* when arriving on station), Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of bomb deployment.

(C) During the activity (*e.g.,* during target approach), Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease bomb deployment.

(D) Commencement/recommencement conditions after a marine mammal sighting before or during the activity. Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing bomb deployment) until one of the following conditions has been met: The animal is observed exiting the mitigation zone; the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended target; the mitigation zone has been

clear from any additional sightings for 10 min; or for activities using mobile targets, the intended target has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(E) After completion of the activity (*e.g.,* prior to maneuvering off station), Navy personnel must, when practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel on these assets must assist in the visual observation of the area where detonations occurred.

(9) *Sinking exercises*—(i) *Number of Lookouts and observation platform.* Two Lookouts (one must be positioned in an aircraft and one must be positioned on a vessel). If additional platforms are participating in the activity, Navy personnel positioned on those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements.* (A) The mitigation zone must be 2.5 nmi around the target ship hulk.

(B) Prior to the initial start of the activity (90 min prior to the first firing), Navy personnel must conduct aerial observations of the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must delay the start of firing.

(C) During the activity, Navy personnel must conduct passive acoustic monitoring for marine mammals and use the information from detections to assist visual observations. Navy personnel must visually observe the mitigation zone for marine mammals from the vessel; if marine mammals are observed, Navy personnel must cease firing. Immediately after any planned or unplanned breaks in weapons firing of longer than two hours, Navy personnel must observe the mitigation zone for marine mammals from the aircraft and vessel; if marine mammals are observed, Navy personnel must delay recommencement of firing.

(D) Commencement/recommencement conditions after a marine mammal sighting before or during the activity. Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met: The animal is observed exiting the mitigation zone; the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the target ship hulk; or the mitigation zone has been clear from any additional sightings for 30 min.

(E) After completion of the activity (for two hours after sinking the vessel or until sunset, whichever comes first), Navy personnel must observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel on these assets will assist in the visual observation of the area where detonations occurred.

(10) *Explosive mine countermeasure and neutralization activities*—(i) *Number of Lookouts and observation platform.* (A) One Lookout must be positioned on a vessel or in an aircraft.

(B) If additional platforms are participating in the activity, Navy personnel positioned on those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements.* (A) The mitigation zone must be 600 yd around the detonation site.

(B) Prior to the initial start of the activity (*e.g.,* when maneuvering on station; typically 10 min when the activity involves aircraft that have fuel constraints, or 30 min when the activity involves aircraft that are not typically fuel constrained), Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of detonations.

(C) During the activity, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease detonations.

(D) Commencement/recommencement conditions after a marine mammal sighting before or during the activity. Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing detonations) until one of the following conditions has been met: The animal is observed exiting the mitigation zone; the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to detonation site; or the mitigation zone has been clear from any additional sightings for 10 min when the activity involves aircraft that have fuel constraints, or 30 min when the activity involves aircraft that are not typically fuel constrained.

(F) After completion of the activity (typically 10 min when the activity involves aircraft that have fuel constraints, or 30 min when the activity involves aircraft that are not typically fuel constrained), Navy personnel must observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel on these assets must assist in the visual observation of the area where detonations occurred.

(11) *Explosive mine neutralization activities involving Navy divers*—(i) *Number of Lookouts and observation platform.* (A) Two Lookouts (two small boats with one Lookout each, or one Lookout must be on a small boat and one must be in a rotary-wing aircraft) when implementing the smaller mitigation zone.

(B) Four Lookouts (two small boats with two Lookouts each), and a pilot or member of an aircrew which must serve as an additional Lookout if aircraft are used during the activity, must be used when implementing the larger mitigation zone.

(C) All divers placing the charges on mines will support the Lookouts while performing their regular duties and will report applicable sightings to their supporting small boat or Range Safety Officer.

(D) If additional platforms are participating in the activity, Navy personnel positioned on those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements.* (A) For Lookouts on small boats or aircraft, the mitigation zone must be 500 yd around the detonation site under positive control.

(B) For Lookouts on small boats or aircraft, the mitigation zone must be 1,000 yd around the detonation site during all activities using time-delay fuses.

(C) For divers, the mitigation zone must be the underwater detonation

location, which is defined as the sea space within the divers' range of visibility but no further than the mitigation zone specified for Lookouts on small boats or aircraft (500 yd or 1,000 yd depending on the charge type).

(D) Prior to the initial start of the activity (when maneuvering on station for activities under positive control; 30 min for activities using time-delay firing devices), Navy Lookouts on small boats or aircraft, must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of detonations or fuse initiation.

(E) During the activity, Navy Lookouts on small boats or aircraft, must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease detonations or fuse initiation. While performing their normal duties during the activity, divers must observe the underwater detonation location for marine mammals. Divers must notify their supporting small boat or Range Safety Officer of marine mammal sightings at the underwater detonation location; if observed, the Navy must cease detonations or fuse initiation. To the maximum extent practicable depending on mission requirements, safety, and environmental conditions, Navy personnel must position boats near the mid-point of the mitigation zone radius (but outside of the detonation plume and human safety zone), must position themselves on opposite sides of the detonation location (when two boats are used), and must travel in a circular pattern around the detonation location with one Lookout observing inward toward the detonation site and the other observing outward toward the perimeter of the mitigation zone. If used, Navy aircraft must travel in a circular pattern around the detonation location to the maximum extent practicable. Navy personnel must not set time-delay firing devices to exceed 10 min.

(F) Commencement/recommencement conditions after a marine mammal sighting before or during the activity. Navy personnel must allow a sighted marine mammal to leave the underwater detonation location or mitigation zone (as applicable) prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing detonations or fuse initiation) until one of the following conditions has been met: The animal is observed exiting the 500 yd or 1,000 yd mitigation zone; the animal is thought to have exited the 500 yd or 1,000 yd mitigation zone based on a determination of its course, speed, and movement relative to the detonation site; or the 500 yd or 1,000 yd mitigation zones (for Lookouts on small boats or aircraft) and the underwater detonation location (for divers) has been clear from any additional sightings for 10 min during activities under positive control with aircraft that have fuel constraints, or 30 min during activities under positive control with aircraft that are not typically fuel constrained and during activities using time-delay firing devices.

(G) After completion of an activity, the Navy must observe for marine mammals for 30 min. Navy personnel must observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel on these assets must assist in the visual observation of the area where detonations occurred.

(12) *Maritime security operations—anti-swimmer grenades*—(i) *Number of Lookouts and observation platform.* One Lookout must be positioned on the small boat conducting the activity. If additional platforms are participating in the activity, Navy personnel positioned on those assets (*e.g.,* safety observers, evaluators) must support observing the mitigation zone for marine mammals and other applicable biological resources while performing their regular duties.

(ii) *Mitigation zone and requirements.* (A) The mitigation zone must be 200 yd around the intended detonation location.

(B) Prior to the initial start of the activity (*e.g.,* when maneuvering on station), Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of detonations.

(C) During the activity, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease detonations.

(D) Commencement/recommencement conditions after a marine mammal sighting before or during the activity. Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing detonations) until one of the following conditions has been met: The animal is observed exiting the mitigation zone; the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended detonation location; the mitigation zone has been clear from any additional sightings for 30 min; or the intended detonation location has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(E) After completion of the activity (*e.g.,* prior to maneuvering off station), Navy personnel must, when practical (*e.g.,* when platforms are not constrained by fuel restrictions or mission-essential follow-on commitments), observe for marine mammals in the vicinity of where detonations occurred; if any injured or dead marine mammals are observed, Navy personnel must follow established incident reporting procedures. If additional platforms are supporting this activity (*e.g.,* providing range clearance), Navy personnel on these assets will assist in the visual observation of the area where detonations occurred.

(13) *Vessel movement.* The mitigation will not be applied if: The vessel's safety is threatened; the vessel is restricted in its ability to maneuver (*e.g.,* during launching and recovery of aircraft or landing craft, during towing activities, when mooring); the vessel is submerged or operated autonomously; or if impracticable based on mission requirements (*e.g.,* during Amphibious Assault and Amphibious Raid exercises).

(i) *Number of Lookouts and observation platform.* One Lookout must be on the vessel that is underway.

(ii) *Mitigation zone and requirements.* (A) The mitigation zone must be 500 yd around whales.

(B) The mitigation zone must be 200 yd around all other marine mammals (except bow-riding dolphins).

(C) During the activity. When underway Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must maneuver to maintain distance.

(iii) *Reporting.* If a marine mammal vessel strike occurs, Navy personnel must follow the established incident reporting procedures.

(14) *Towed in-water devices.* Mitigation applies to devices that are towed from a manned surface platform or manned aircraft. The mitigation will not be applied if the safety of the towing platform or in-water device is threatened.

(i) *Number of Lookouts and observation platform.* One Lookout must be positioned on a manned towing platform.

(ii) *Mitigation zone and requirements.* (A) The mitigation zone must be 250 yd around marine mammals.

(B) During the activity (*i.e.,* when towing an in-water device), Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must maneuver to maintain distance.

(15) *Small-, medium-, and large-caliber non-explosive practice munitions.* Mitigation applies to activities using a surface target.

(i) *Number of Lookouts and observation platform.* One Lookout must be positioned on the platform conducting the activity. Depending on the activity, the Lookout could be the same as the one described for ''Weapons firing noise'' in paragraph (a)(3)(i) of this section.

(ii) *Mitigation zone and requirements.* (A) The mitigation zone must be 200 yd around the intended impact location.

(B) Prior to the initial start of the activity (*e.g.,* when maneuvering on station), Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of firing.

(C) During the activity, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease firing.

(D) Commencement/recommencement conditions after a marine mammal sighting before or during the activity. Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met: The animal is observed exiting the mitigation zone; the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location; the mitigation zone has been clear from any additional sightings for 10 min for aircraft-based firing or 30 min for vessel-based firing; or for activities using a mobile target, the intended impact location has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(16) *Non-explosive missiles and rockets.* Aircraft-deployed non-explosive missiles and rockets. Mitigation applies to activities using a surface target.

(i) *Number of Lookouts and observation platform.* One Lookout must be positioned in an aircraft.

(ii) *Mitigation zone and requirements.* (A) The mitigation zone must be 900 yd around the intended impact location.

(B) Prior to the initial start of the activity (*e.g.,* during a fly-over of the mitigation zone), Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of firing.

(C) During the activity, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must cease firing.

(D) Commencement/recommencement conditions after a marine mammal sighting prior to or during the activity. Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing firing) until one of the following conditions has been met: The animal is observed exiting the mitigation zone; the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended impact location; or the mitigation zone has been clear from any additional sightings for 10 min when the activity involves aircraft that have fuel constraints, or 30 min when the activity involves aircraft that are not typically fuel constrained.

(17) *Non-explosive bombs and mine shapes.* Non-explosive bombs and non-explosive mine shapes during mine laying activities.

(i) *Number of Lookouts and observation platform.* One Lookout must be positioned in an aircraft.

(ii) *Mitigation zone and requirements.* (A) The mitigation zone must be 1,000 yd around the intended target.

(B) Prior to the initial start of the activity (*e.g.,* when arriving on station), Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must relocate or delay the start of bomb deployment or mine laying.

(C) During the activity (*e.g.,* during approach of the target or intended minefield location), Navy personnel must observe the mitigation zone for marine mammals and, if marine mammals are observed, Navy personnel must cease bomb deployment or mine laying.

(D) Commencement/recommencement conditions after a marine mammal sighting prior to or during the activity. Navy personnel must allow a sighted marine mammal to leave the mitigation zone prior to the initial start of the activity (by delaying the start) or during the activity (by not recommencing bomb deployment or mine laying) until one of the following conditions has been met: The animal is observed exiting the mitigation zone; the animal is thought to have exited the mitigation zone based on a determination of its course, speed, and movement relative to the intended target or minefield location; the mitigation zone has been clear from any additional sightings for 10 min; or for activities using mobile targets, the intended target has transited a distance equal to double that of the mitigation zone size beyond the location of the last sighting.

(b) *Mitigation areas.* In addition to procedural mitigation, Navy personnel must implement mitigation measures within mitigation areas to avoid or reduce potential impacts on marine mammals.

(1) *Mitigation areas for marine mammals off Saipan in MITT Study Area for sonar, explosives, and vessel strikes*—(i) *Mitigation area requirements*—(A) *Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas.* (*1*) Navy personnel will conduct a maximum combined total of 20 hours annually from December 1 through April 30 of surface ship hull-mounted MF1 mid-frequency active sonar during training and testing within the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas.

(*2*) Navy personnel will not use in-water explosives.

(*3*) Navy personnel must report the total hours of all active sonar use (all bins, by bin) from December 1 through April 30 in these geographic mitigation areas in the annual training and testing exercise report submitted to NMFS.

(*4*) Should national security present a requirement to conduct training or testing prohibited by the mitigation requirements in this paragraph (b)(1)(i)(A), Navy personnel must obtain permission from the appropriate designated Command authority prior to commencement of the activity. Navy personnel must provide NMFS with advance notification and include relevant information (*e.g.,* sonar hours, explosives use) in its annual activity reports submitted to NMFS.

(B) *Marpi Reef and Chalan Kanoa Reef Awareness Notification Message Area.* (*1*) Navy personnel must issue a seasonal awareness notification message to alert Navy ships and aircraft operating in the Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas to the possible presence of increased concentrations of humpback whales from December 1 through April 30.

(*2*) To maintain safety of navigation and to avoid interactions with large whales during transits, Navy personnel must instruct vessels to remain vigilant to the presence of humpback whales that when concentrated seasonally, may become vulnerable to vessel strikes.

(*3*) Navy personnel must use the information from the awareness notification message to assist their visual observation of applicable geographic mitigation zones during training and testing activities and to aid in the implementation of procedural mitigation.

(ii) [Reserved]

(2) *Mitigation areas for marine mammals off Guam of the MITT Study Area for sonar and explosives*—(i) *Mitigation area requirements*—(A) *Agat Bay Nearshore Geographic Mitigation Area.* (*1*) Navy personnel will not conduct MF1 surface ship hull-mounted mid-frequency active sonar year-round.

(*2*) Navy personnel will not use in-water explosives year-round.

(*3*) Should national security require the use of MF1 surface ship hull-mounted mid-frequency active sonar or explosives within the Agat Bay Nearshore Geographic Mitigation Area, Navy personnel must obtain permission from the appropriate designated Command authority prior to commencement of the activity. Navy personnel must provide NMFS with advance notification and include the information (*e.g.,* sonar hours, explosives usage) in its annual activity reports submitted to NMFS.

(B) [Reserved]

§ 218.95 Requirements for monitoring and reporting.

(a) *Unauthorized take.* Navy personnel must notify NMFS immediately (or as soon as operational security considerations allow) if the specified activity identified in § 218.90 is thought to have resulted in the serious injury or mortality of any marine mammals, or in any Level A harassment or Level B harassment of marine mammals not identified in this subpart.

(b) *Monitoring and reporting under the LOA.* The Navy must conduct all monitoring and reporting required under the LOA, including abiding by the U.S. Navy's Marine Species Monitoring Program for the MITT Study Area. Details on program goals, objectives, project selection process, and current projects are available at *www.navymarinespeciesmonitoring.us.*

(c) *Notification of injured, live stranded, or dead marine mammals.* Navy personnel must consult the Notification and Reporting Plan, which sets out notification, reporting, and other requirements when dead, injured, or live stranded marine mammals are detected. The Notification and Reporting Plan is available at *https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-mariana-islands-training-and-testing-mitt.*

(d) *Annual MITT Study Area marine species monitoring report.* The Navy must submit an annual report to NMFS of the MITT Study Area monitoring which will be included in a Pacific-wide monitoring report including results specific to the MITT Study Area describing the implementation and results from the previous calendar year. Data collection methods will be standardized across Pacific Range Complexes including the MITT, HSTT, NWTT, and Gulf of Alaska (GOA) Study Areas to the best extent practicable, to allow for comparison in different geographic locations. The report must be submitted to the Director, Office of Protected Resources, NMFS, either within three months after the end of the calendar year, or within three months after the conclusion of the monitoring year, to be determined by the Adaptive Management process. NMFS will submit comments or questions on the draft monitoring report, if any, within three months of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or three months after the submittal of the draft if NMFS does not provide comments on the draft report. Such a report will describe progress of knowledge made with respect to monitoring study questions across multiple Navy ranges associated with the ICMP. Similar study questions must be treated together so that progress on each topic can be summarized across multiple Navy ranges. The report need not include analyses and content that does not provide direct assessment of cumulative progress on the monitoring study question. This will continue to allow the Navy to provide a cohesive monitoring report covering multiple ranges (as per ICMP goals), rather than entirely separate reports for the MITT, Hawaii-Southern California, Gulf of Alaska, and Northwest Training and Testing Study Areas.

(e) *Annual MITT Study Area Training and Testing Exercise Report.* Each year, the Navy must submit a preliminary report (Quick Look Report) detailing the status of authorized sound sources within 21 days after the anniversary of the date of issuance of the LOA to the Director, Office of Protected Resources, NMFS. The Navy must also submit a detailed report (MITT Annual Training and Testing Exercise Report) to the Director, Office of Protected Resources, NMFS, within three months after the one-year anniversary of the date of issuance of the LOA. The MITT Annual Training and Testing Exercise Report can be consolidated with other exercise reports from other range complexes in the Pacific Ocean for a single Pacific Exercise Report, if desired. NMFS will submit comments or questions on the report, if any, within one month of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or one month after submittal of the draft if NMFS does not provide comments on the draft report. The annual will contain information on major training exercises (MTEs), Sinking Exercise (SINKEX) events, and a summary of all sound sources used (total hours or quantity of each bin of sonar or other non-impulsive source; total annual number of each type of explosive exercises; and total annual expended/detonated rounds (missiles, bombs, sonobuoys, etc.) for each explosive bin). The annual report will also contain information on sound sources used including within specific mitigation reporting areas as described in paragraph (e)(4) of this section. The annual report will also contain both the current year's data as well as cumulative sonar and explosive use quantity from previous years' reports. Additionally, if there were any changes to the sound source allowance in a given year, or cumulatively, the report will include a discussion of why the change was made and include analysis to support how the change did or did not affect the analysis in the 2020 MITT FSEIS/OEIS and MMPA final rule. The annual report will also include the details regarding specific requirements associated with specific mitigation areas. The final annual/close-out report at the conclusion of the authorization period (year seven) will serve as the comprehensive close-out report and include both the final year annual use compared to annual authorization as well as a cumulative seven-year annual use compared to seven-year authorization. The detailed reports must contain the information identified in paragraphs (e)(1) through (6) of this section.

(1) *MTEs.* This section of the report must contain the following information for MTEs conducted in the MITT Study Area.

(i) Exercise information for each MTE.

(A) Exercise designator.

(B) Date that exercise began and ended.

(C) Location.

(D) Number and types of active sonar sources used in exercise.

(E) Number and types of passive acoustic sources used in exercise.

(F) Number and types of vessels, aircraft, and other platforms participating in exercise.

(G) Total hours of all active sonar source operation.

(H) Total hours of each active sonar source bin.

(I) Wave height (high, low, and average) during exercise.

(ii) Individual marine mammal sighting information for each sighting in each exercise where mitigation was implemented.

(A) Date/Time/Location of sighting.

(B) Species (if not possible, indication of whale or dolphin).

(C) Number of individuals.

(D) Initial Detection Sensor (*e.g.,* sonar, Lookout).

(E) Indication of specific type of platform observation was made from (including, for example, what type of surface vessel or testing platform).

(F) Length of time observers maintained visual contact with marine mammal.

(G) Sea state.

(H) Visibility.

(I) Sound source in use at the time of sighting.

(J) Indication of whether the animal was less than 200 yd, 200 to 500 yd, 500 to 1,000 yd, 1,000 to 2,000 yd, or greater than 2,000 yd from sonar source.

(K) Whether operation of sonar sensor was delayed, or sonar was powered or shut down, and how long the delay.

(L) If source in use was hull-mounted, true bearing of animal from the vessel, true direction of vessel's travel, and estimation of animal's motion relative to vessel (opening, closing, parallel).

(M) Lookouts must report, in plain language and without trying to categorize in any way, the observed behavior of the animal(s) (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming, etc.) and if any calves were present.

(iii) An evaluation (based on data gathered during all of the MTEs) of the effectiveness of mitigation measures designed to minimize the received level to which marine mammals may be exposed. This evaluation must identify the specific observations that support any conclusions the Navy reaches about the effectiveness of the mitigation.

(2) *SINKEXs.* This section of the report must include the following information for each SINKEX completed that year.

(i) Exercise information gathered for each SINKEX.

(A) Location.

(B) Date and time exercise began and ended.

(C) Total hours of observation by Lookouts before, during, and after exercise.

(D) Total number and types of explosive source bins detonated.

(E) Number and types of passive acoustic sources used in exercise.

(F) Total hours of passive acoustic search time.

(G) Number and types of vessels, aircraft, and other platforms, participating in exercise.

(H) Wave height in feet (high, low, and average) during exercise.

(I) Narrative description of sensors and platforms utilized for marine mammal detection and timeline illustrating how marine mammal detection was conducted.

(ii) Individual marine mammal observation (by Navy Lookouts) information for each sighting where mitigation was implemented.

(A) Date/Time/Location of sighting.

(B) Species (if not possible, indicate whale or dolphin).

(C) Number of individuals.

(D) Initial detection sensor (*e.g.,* sonar or Lookout).

(E) Length of time observers maintained visual contact with marine mammal.

(F) Sea state.

(G) Visibility.

(H) Whether sighting was before, during, or after detonations/exercise, and how many minutes before or after.

(I) Distance of marine mammal from actual detonations (or target spot if not yet detonated): Less than 200 yd, 200 to 500 yd, 500 to 1,000 yd, 1,000 to 2,000 yd, or greater than 2,000 yd.

(J) Lookouts must report, in plain language and without trying to categorize in any way, the observed behavior of the animal(s) (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming etc.), including speed and direction and if any calves were present.

(K) The report must indicate whether explosive detonations were delayed, ceased, modified, or not modified due to marine mammal presence and for how long.

(L) If observation occurred while explosives were detonating in the water, indicate munition type in use at time of marine mammal detection.

(3) *Summary of sources used.* This section of the report must include the following information summarized from the authorized sound sources used in all training and testing events:

(i) Total annual hours or quantity (per the LOA) of each bin of sonar or other transducers; and

(ii) Total annual expended/detonated ordnance (missiles, bombs, sonobuoys, etc.) for each explosive bin.

(4) *Marpi Reef and Chalan Kanoa Reef Geographic Mitigation Areas.* The Navy must report any active sonar use (all bins, by bin) between December 1 and April 30 that occurred as specifically described in these areas. Information included in the classified annual reports may be used to inform future adaptive management within the MITT Study Area.

(5) *Geographic information presentation.* The reports must present an annual (and seasonal, where practical) depiction of training and testing bin usage geographically across the MITT Study Area.

(6) *Sonar exercise notification.* The Navy must submit to NMFS (contact as specified in the LOA) an electronic report within fifteen calendar days after the completion of any MTE indicating:

(i) Location of the exercise;

(ii) Beginning and end dates of the exercise; and

(iii) Type of exercise.

(f) *Final Close-Out Report.* The final (year seven) draft annual/close-out report must be submitted within three months after the expiration of this subpart to the Director, Office of Protected Resources, NMFS. NMFS must submit comments on the draft close-out report, if any, within three months of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or three months after the submittal of the draft if NMFS does not provide comments.

§ 218.96 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to the regulations in this subpart, the Navy must apply for and obtain an LOA in accordance with § 216.106 of this section.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed July 30, 2027.

(c) If an LOA expires prior to July 30, 2027, the Navy may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision of § 218.97(c)(1)) required by an LOA issued under this subpart, the Navy must apply for and obtain a modification of the LOA as described in § 218.97.

(e) Each LOA will set forth:

(1) Permissible methods of incidental taking;

(2) Geographic areas for incidental taking;

(3) Means of effecting the least practicable adverse impact (*i.e.,*

mitigation) on the species of marine mammals and their habitat; and

(4) Requirements for monitoring and reporting.

(f) Issuance of the LOA(s) must be based on a determination that the level of taking is consistent with the findings made for the total taking allowable under the regulations in this subpart.

(g) Notice of issuance or denial of the LOA(s) will be published in the **Federal Register** within 30 days of a determination.

§ 218.97 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 of this section and 218.96 for the activity identified in § 218.90(c) may be renewed or modified upon request by the applicant, provided that:

(1) The planned specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for the regulations in this subpart (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA(s) were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or to the mitigation, monitoring, or reporting measures (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of planned LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 of this section and 218.96 may be modified by NMFS under the following circumstances:

(1) *Adaptive management.* After consulting with the Navy regarding the practicability of the modifications, NMFS may modify (including adding or removing measures) the existing mitigation, monitoring, or reporting measures if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA include:

(A) Results from the Navy's annual monitoring report and annual exercise report from the previous year(s);

(B) Results from other marine mammal and/or sound research or studies;

(C) Results from specific stranding investigations; or

(D) Any information that reveals marine mammals may have been taken in a manner, extent, or number not authorized by the regulations in this subpart or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of planned LOA in the **Federal Register** and solicit public comment.

(2) *Emergencies.* If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species of marine mammals specified in LOAs issued pursuant to §§ 216.106 of this section and 218.96, an LOA may be modified without prior notice or opportunity for public comment. Notice will be published in the **Federal Register** within thirty days of the action.

[FR Doc. 2020–15651 Filed 7–30–20; 8:45 am]

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Part IV

Department of the Treasury

Office of the Comptroller of the Currency

Federal Reserve System

Federal Deposit Insurance Corporation

Commodity Futures Trading Commission

Securities and Exchange Commission

12 CFR Parts 44, 248 and 351

17 CFR Parts 75 and 255

Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds; Final Rule

DEPARTMENT OF TREASURY

Office of the Comptroller of the Currency

12 CFR Part 44

[Docket No. OCC–2020–0002]

RIN 1557–AE67

FEDERAL RESERVE SYSTEM

12 CFR Part 248

[Docket No. R–1694]

RIN 7100–AF70

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 351

RIN 3064–AF17

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 75

RIN 3038–AE93

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 255

[Release No. BHCA–9; File No. S7–02–20]

RIN 3235–AM70

Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds

AGENCY: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Securities and Exchange Commission (SEC); and Commodity Futures Trading Commission (CFTC).

ACTION: Final rule.

SUMMARY: The OCC, Board, FDIC, SEC, and CFTC (together, the agencies) are adopting amendments to the regulations implementing section 13 of the Bank Holding Company Act (BHC Act). Section 13 contains certain restrictions on the ability of a banking entity or nonbank financial company supervised by the Board to engage in proprietary trading and have certain interests in, or relationships with, a hedge fund or private equity fund (covered funds). These final amendments are intended to improve and streamline the regulations implementing section 13 of the BHC Act by modifying and clarifying requirements related to the covered fund provisions of the rules.

DATES: *Effective date:* The final rule is effective October 1, 2020.

FOR FURTHER INFORMATION CONTACT:

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SEC: Juliet M. Han, Senior Counsel, William Miller, Senior Counsel, Benjamin A. Tecmire, Senior Counsel, or Jennifer Songer, Branch Chief at (202) 551–6787 or *IArules@sec.gov,* Investment Adviser Regulation Office, Division of Investment Management, and Katherine Hsu, Office Chief, or Benjamin Meeks, Special Counsel at (202) 551–3850, Office of Structured Finance, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

Section 13 of the BHC Act,[1] also known as the Volcker Rule, generally prohibits any banking entity from engaging in proprietary trading or from acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with a hedge fund or private equity fund (covered fund).[2] The statute expressly exempts from these prohibitions various activities, including, among other things:

- Underwriting and market making-related activities;
- Risk-mitigating hedging activities;
- Activities on behalf of customers;
- Activities for the general account of insurance companies; and
- Trading and covered fund activities and investments by non-U.S. banking entities solely outside the United States.[3]

In addition, section 13 of the BHC Act contains an exemption that permits banking entities to organize and offer, including sponsor, covered funds, subject to certain restrictions, including

[1] 12 U.S.C. 1851.

[2] *Id.*

[3] 12 U.S.C. 1851(d)(1).

that banking entities do not rescue investors in those funds from loss, and are not themselves exposed to significant losses due to investments in or other relationships with these funds.[4]

Authority under section 13 of the BHC Act for developing and adopting regulations to implement the prohibitions, restrictions, and exemptions of section 13 is shared among the Board, the FDIC, the OCC, the SEC, and the CFTC (individually, an agency, and collectively, the agencies).[5] The agencies originally issued a final rule implementing section 13 in December 2013 (the 2013 rule), and those provisions became effective on April 1, 2014.[6]

The agencies published a notice of proposed rulemaking in July 2018 (the 2018 proposal) that proposed several amendments to the 2013 rule.[7] These proposed revisions sought to provide greater clarity and certainty about what activities are prohibited under the 2013 rule—in particular, under the prohibition on proprietary trading—and to better tailor the compliance requirements based on the risk of a banking entity's trading activities. The agencies issued a final rule implementing amendments to the 2013 rule in November 2019 (the 2019 amendments), and those provisions became effective in January 2020.[8]

As part of the 2018 proposal, the agencies proposed targeted changes to the provisions of the 2013 rule relating to acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with a fund and sought comments on other aspects of the covered fund provisions beyond those changes for which specific rule text was proposed.[9] The 2019 amendments finalized those changes to the covered fund provisions for which specific rule text was proposed in the 2018 proposal.[10] The agencies indicated they would issue a separate proposal addressing and requesting comment on the covered fund provisions of the rule and other fund-related issues, and, in February 2020, the agencies issued a separate notice of proposed rulemaking that specifically addressed those areas (the 2020 proposal).[11]

II. Notice of Proposed Rulemaking

In the 2020 proposal, the agencies proposed revisions to a number of the provisions regarding covered fund investments and activities as well as to other provisions of the implementing regulations related to the treatment of funds. The proposed changes, which were based on comments received in response to the agencies' questions in the 2018 proposal and the agencies' experience with the implementing regulations, were intended to reduce the extraterritorial impact of the implementing regulations, improve and streamline the covered fund provisions, and provide clarity to banking entities regarding the provision of financial services and the conduct of permissible activities in a manner that is consistent with the requirements of section 13 of the BHC Act.

To better limit the extraterritorial impact of the implementing regulations, the 2020 proposal would have exempted the activities of certain funds that are organized outside of the United States and offered to foreign investors (qualifying foreign excluded funds) from the restrictions of the implementing regulations. Under the 2013 rule, in certain circumstances, some foreign funds that are not ''covered funds'' may be subject to the implementing regulations as ''banking entities,'' if they are controlled by a foreign banking entity, and thus could be subject to more onerous compliance obligations than are imposed on similarly-situated U.S. covered funds, even though the foreign funds have limited nexus to the United States. Accordingly, the 2020 proposal would have codified an existing policy statement by the Federal banking agencies (the OCC, Board, and FDIC) that addresses the potential issues related to a foreign banking entity controlling qualifying foreign excluded funds.

The 2020 proposal also would have made modifications to several existing exclusions from the covered fund provisions to provide clarity and simplify compliance with the requirements of the implementing regulations. First, the 2020 proposal would have revised certain restrictions in the foreign public funds exclusion to more closely align the provision with the exclusion for similarly-situated U.S. registered investment companies. Second, the 2020 proposal would have permitted loan securitizations excluded from the definition of covered fund to hold a small amount of non-loan assets, consistent with past industry practice, and would have codified existing staff-level guidance regarding this exclusion. In addition, the 2020 proposal would have revised the exclusion for small business investment companies to account for the life cycle of those companies and requested comment on whether to clarify the scope of the exclusion for public welfare and other investments to include rural business investment companies and qualified opportunity funds. Finally, the 2020 proposal would have addressed concerns about certain components of the preamble to the 2013 rule related to calculating a banking entity's ownership interests in covered funds.

The agencies also included in the 2020 proposal several new exclusions from the covered fund definition in order to more directly align the regulation with the purpose of the statute. For example, the agencies recognized that the implementing regulations have inhibited banking entities' ability to extend credit by restricting their relationships with credit funds, and the 2020 proposal would have created a new exclusion for such funds. Under the 2020 proposal, banking entities would have been able to invest in and have certain relationships with credit funds that extend the type of credit that a banking entity may provide directly, subject to certain safeguards. Relatedly, the 2020 proposal would have established an exclusion from the definition of covered fund for venture capital funds. This provision was intended to facilitate banking entities' abilities to engage in this important type of development and investment activity, which may facilitate capital formation and provide important financing for small

[4] 12 U.S.C. 1851(d)(1)(G). Other restrictions and requirements include: (1) The banking entity provides bona fide trust, fiduciary, or investment advisory services; (2) the fund is organized and offered only to customers in connection with the provision of such services; (3) the banking entity does not have an ownership interest in the fund, except for a *de minimis* investment; (4) the banking entity complies with certain marketing restrictions related to the fund; (5) no director or employee of the banking entity has an ownership interest in the fund, with certain exceptions; and (6) the banking entity discloses to investors that it does not guarantee the performance of the fund. *Id.*

[5] 12 U.S.C. 1851(b)(2).

[6] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds; Final Rule, 79 FR 5535 (Jan. 31, 2014).

[7] Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 83 FR 33432 (July 17, 2018).

[8] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 84 FR 61974 (Nov. 14, 2019). The regulations implementing section 13 of the BHC Act, as amended through June 1, 2020, are referred throughout as the ''implementing regulations.''

[9] 83 FR 33471–87.

[10] In response to the 2018 proposal, the agencies received numerous comments related to covered fund issues for which no specific rule text was proposed. However, in the preamble to the 2019 amendments, the agencies generally deferred public consideration of such comments to a future proposed rulemaking. 84 FR 62016.

[11] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 85 FR 12120 (Feb. 28, 2020).

businesses, particularly in areas where such financing may not be readily available. In addition, the agencies believed that excluding such activities would be consistent with the purpose of the statute, as it would exclude fund activities that do not present the risks that section 13 of the BHC Act was intended to address.

The 2020 proposal also would have allowed a banking entity to provide certain traditional financial services to its customers via a fund structure, subject to certain safeguards and limitations. First, the 2020 proposal would have excluded from the definition of covered fund an entity created and used to facilitate customer exposures to a transaction, investment strategy, or other service. Second, the 2020 proposal would have excluded from the covered fund definition wealth management vehicles that manage the investment portfolio of a family and certain other closely related persons. Both of these provisions were intended to allow a banking entity to provide such services in the manner best suited to its customers.

In addition, the 2020 proposal would have permitted a banking entity to engage in a limited set of covered transactions with a covered fund that the banking entity sponsors or advises or with which the banking entity has certain other relationships. The implementing regulations generally prohibit all covered transactions between a covered fund and its banking entity sponsor or investment adviser. The agencies, in the 2020 proposal, recognized that the existing restrictions have prevented banking entities from providing certain traditional banking services to covered funds, such as standard payment, clearing, and settlement services.

Lastly, the 2020 proposal would have clarified certain aspects of the definition of ownership interest. Currently, due to the broad definition of ownership interest, some loans by banking entities to covered funds could be deemed ownership interests. The 2020 proposal included a safe harbor for bona fide senior loans or senior debt instruments to make clear that an ''ownership interest'' in a fund would not include such credit interests in the fund. In addition, the 2020 proposal would have clarified the types of creditor rights that may attach to an interest without necessarily causing such an interest to fall within the scope of the definition of ownership interest. Finally, the 2020 proposal would have simplified compliance efforts by tailoring the calculation of a banking entity's compliance with the implementing regulations' aggregate fund limit and covered fund deduction and provided clarity to banking entities regarding their permissible investments made alongside covered funds.[12]

The agencies invited comment on all aspects of the 2020 proposal, including specific proposed revisions and questions posed by the agencies. The agencies received approximately 40 unique comments from banking entities and industry groups, public interest groups, and other organizations and individuals. In addition, the agencies received six letters related to the subject matter considered in the 2020 proposal prior to the formal comment period. The agencies are now finalizing the 2020 proposal, with certain changes based on public comments, as described in detail below.[13]

III. Overview of the Final Rule

Similar to the 2020 proposal, the final rule clarifies and simplifies compliance with the implementing regulations, refines the extraterritorial application of section 13 of the BHC Act, and permits additional fund activities that do not present the risks that section 13 was intended to address. The agencies received comments from a diverse set of commenters: Comments from banking entities and financial services industry trade groups were generally supportive of the 2020 proposal and recommended additional modifications, while several organizations and individuals were generally opposed to the 2020 proposal. As described further below, the agencies have adopted many of the proposed changes to the implementing regulations, with certain targeted adjustments.

To reduce the extraterritorial impact of the implementing regulations, the final rule, similar to the 2020 proposal, exempts the activities of certain funds that are organized outside of the United States and offered to foreign investors (qualifying foreign excluded funds) from certain restrictions of the implementing regulations. Specifically, the final rule codifies an existing policy statement by the Federal banking agencies that addresses the potential issues related to a foreign banking entity controlling a qualifying foreign excluded fund. The final rule contains some modifications to the proposed exemption—the anti-evasion provision and compliance program requirements—to address comments that the proposed exemption would have unintentionally continued to subject qualifying foreign excluded funds to these requirements.

The final rule also revises, as proposed, but with some modifications, several existing exclusions from the covered fund provisions, to provide clarity and simplify compliance with the requirements of the implementing regulations. First, the final rule revises certain restrictions in the foreign public funds exclusion to more closely align the provision with the exclusion for similarly situated U.S. registered investment companies. Second, the final rule permits loan securitizations excluded from the definition of covered fund to hold a small amount of debt securities, consistent with past industry practice, and codifies existing staff-level guidance regarding this exclusion. In addition, the final rule revises the exclusion for small business investment companies to account for the life cycle of those companies and clarifies the scope of the exclusion for public welfare and other investments to include rural business investment companies and qualified opportunity funds. Finally, the final rule clarifies the calculation of ownership interests in covered funds that are attributed to a banking entity.

The final rule adopts—as proposed, with some modifications—several new exclusions from the covered fund definition to more closely align the regulation with the purpose of the statute. First, the final rule establishes a new exclusion for funds that extend credit to permit the same credit-related activities that banking entities can engage in directly. In addition, the final rule creates an exclusion for venture capital funds to help ensure that banking entities can indirectly facilitate

[12] Separately, the agencies proposed various technical edits to the implementing regulations. *See infra* Section IV.G (Technical Amendments).

[13] Comments are generally discussed in the relevant sections, *infra.* The agencies also received several miscellaneous comments. One commenter suggested revising § ____.21 (Termination of activities or investments; penalties for violations) of the implementing regulations to provide for mandatory prison time for violations of the implementing regulations. Anonymous. The agencies believe that this comment is beyond the scope of the current rulemaking. Another commenter encouraged the agencies to exempt from the implementing regulations international banks with a small presence in the United States. Institute of International Bankers (IIB). The agencies believe that this comment is beyond the scope of the current rulemaking. A third commenter claimed that the 2020 proposal improperly assumed that the implementing regulations have certain burdens and that it did not adequately assess the costs and benefits of the proposed revisions to the implementing regulations. Occupy the SEC (Occupy). Contrary to the commenter's suggestions, the **Federal Register** notice for the 2020 proposal contained extensive discussion of the costs and benefits of the 2020 proposal. *See* 85 FR 12151–76. This final rule contains similar analyses. *See infra,* Section IV (Administrative Law Matters). Several commenters expressed support for the comment letters submitted by other organizations. *E.g.,* IIB; European Banking Federation (EBF); Goldman Sachs Group, Inc. (Goldman Sachs); and Canadian Bankers Association (CBA). Finally, one comment was not relevant. *See* Charity Colleen Crouse.

this important type of development and investment activity to the same degree that banking entities can do so directly. Finally, the final rule adopts two exclusions for family wealth management and customer facilitation vehicles to provide banking entities flexibility to provide advisory and other traditional banking services to customers through a fund structure.

In an effort to clarify and simplify compliance with the implementing regulations, the final rule adopts revisions to the provisions that govern the relationship between a banking entity and a fund and the definition of ownership interest. Specifically, the final rule permits established, codified categories of limited low-risk transactions between a banking entity and a related fund, including riskless principal transactions, and allows a banking entity to engage in certain transactions with a related fund in connection with payment, clearing, and settlement activities. In addition, the final rule would provide an express safe harbor for senior loans and senior debt and provide clarity about the types of creditor rights that would be considered within the scope of the definition of ownership interest. Finally, the agencies are adopting revisions, as proposed, to provide clarity regarding a banking entity's permissible investments in the same investments as a covered fund organized or offered by such banking entity.

Frequently Asked Questions

The staffs of the agencies have addressed several questions concerning the implementing regulations through a series of staff Frequently Asked Questions (FAQs).[14] In the 2020 proposal, the agencies indicated that the proposed rule would not modify or revoke any previously issued staff FAQs, unless otherwise specified.[15] Several commenters recommended codifying specific FAQs and making explicit that other FAQs would continue to be in effect, unmodified.[16] Consistent with the 2020 proposal and commenters' suggestions, the final rule does not modify or revoke any previously issued staff FAQs, unless otherwise specified.[17]

Comment Period

Since the issuance of the 2020 proposal, the COVID–19 global pandemic has substantially disrupted activity in the United States and in other countries. The effects of the COVID–19 disruptions have created many challenges for households and businesses, and the agencies received comments requesting that the agencies extend the comment period for the 2020 proposal or delay the rulemaking more generally.[18] In contrast, one commenter expressed support for the rapid approval of the 2020 proposal, to provide banking entities regulatory relief during a period of financial stress.[19] The agencies announced on April 2, 2020, that they would consider comments submitted before May 1, 2020.[20] The agencies, however, do not believe that further delay of the rule is warranted, given the volume, depth, and diversity of comments submitted. The agencies believe, as well, that the final rule may provide clarity to banking entities that will enable banking entities to engage in financial services and other permissible activities in a manner that both is consistent with the requirements of section 13 of the BHC Act and will facilitate capital formation and economic activity.

Effective and Compliance Dates

The **Federal Register** notice accompanying the finalization of the 2019 amendments provided for a rolling compliance system.[21] The effective date of the amendments was January 1, 2020, and firms are required to comply with the revisions by January 1, 2021. Until the mandatory compliance date, banking entities are required to comply with the 2013 rule, or alternatively, a banking entity may voluntarily comply, in whole or in part, with the 2019 amendments prior to the compliance date.

Several commenters on the 2020 proposal suggested that the agencies provide for voluntary early compliance with the final rule.[22] One commenter also suggested establishing a transition period of at least one year.[23]

The effective date for the final rule will be October 1, 2020, to accommodate the requirements of the Riegle Community Development and Regulatory Improvement Act.[24] The agencies do not believe an extended compliance or transition period is necessary because the final rule largely tailors the regulations implementing section 13 of the BHC Act rather than increases compliance burdens.

IV. Summary of the Final Rule

A. Qualifying Foreign Excluded Funds

Since the adoption of the 2013 rule, a number of foreign banking entities, foreign government officials, and other market participants have expressed concerns regarding instances in which certain funds offered and sold outside of the United States are excluded from the covered fund definition but still could be considered banking entities in certain circumstances (foreign excluded funds).[25] This situation may occur if a foreign banking entity controls the foreign fund. A foreign banking entity could be considered to control the fund based on common corporate governance structures abroad, such as where the fund's sponsor selects the majority of the fund's directors or trustees, or the foreign banking entity otherwise controls the fund for purposes of section 13 of the BHC Act. As a result, such a fund would be subject to the requirements of section 13 and the implementing regulations, including restrictions on proprietary trading, restrictions on investing in or sponsoring covered funds, and compliance obligations.

The Federal banking agencies released a policy statement on July 21, 2017 (the policy statement), to address concerns about the possible unintended consequences and extraterritorial impact of section 13 and the implementing regulations for foreign excluded funds.[26] The policy statement noted that the Federal banking agencies would not take action against a foreign banking entity[27] based on attribution of

[14] *See https://www.occ.treas.gov/topics/capitalmarkets/financial-markets/trading-volckerrule/volcker-rule-implementation-faqs.html* (OCC); *https://www.federalreserve.gov/bankinforeg/volcker-rule/faq.htm* (Board); *https://www.fdic.gov/regulations/reform/volcker/faq.html* (FDIC); *https://www.sec.gov/divisions/marketreg/faq-volcker-rule-section13.htm* (SEC); *https://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_28_VolckerRule/index.htm* (CFTC).

[15] 85 FR 12122–23.

[16] *E.g.,* Securities Industry and Financial Markets Association (SIFMA); Financial Services Forum (FSF); and IIB.

[17] 85 FR 12122–23.

[18] *E.g.,* Better Markets, Inc. (Better Markets) and Kathy Bowman.

[19] American Bankers Association (ABA).

[20] *https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200402a.htm.*

[21] 84 FR 61974.

[22] *E.g.,* SIFMA; FSF; Japanese Bankers Association (JBA); and ABA.

[23] JBA.

[24] *See infra,* Section V.D (Riegle Community Development and Regulatory Improvement Act).

[25] The implementing regulations generally exclude covered funds from the definition of ''banking entity.'' 2013 rule § ____.2(c)(2)(i). However, because foreign excluded funds are not covered funds, they can become banking entities through affiliation with other banking entities.

[26] Statement regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act (July 21, 2017), *available at https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20170721a1.pdf.*

[27] ''Foreign banking entity'' was defined for purposes of the policy statement to mean a banking

Continued

the activities and investments of a qualifying foreign excluded fund to a foreign banking entity, or against a qualifying foreign excluded fund as a banking entity, for a period of one year while staffs of the agencies considered alternative ways in which the implementing regulations could be amended, or other appropriate action could be taken, to address the issue. The policy statement has since been extended and is currently scheduled to expire on July 21, 2021.[28]

For purposes of the policy statement, a ''qualifying foreign excluded fund'' means, with respect to a foreign banking entity, an entity that:

(1) Is organized or established outside the United States and the ownership interests of which are offered and sold solely outside the United States;

(2) Would be a covered fund were the entity organized or established in the United States, or is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;

(3) Would not otherwise be a banking entity except by virtue of the foreign banking entity's acquisition or retention of an ownership interest in, or sponsorship of, the entity;

(4) Is established and operated as part of a bona fide asset management business; and

(5) Is not operated in a manner that enables the foreign banking entity to evade the requirements of section 13 or implementing regulations.

To be eligible for this relief, the foreign banking entity's acquisition or retention of any ownership interest in, or sponsorship of, the qualifying foreign excluded fund must meet the requirements for permitted covered fund activities and investments solely outside the United States, as provided in section 13(d)(1)(I) of the BHC Act and § ____.13(b) of the implementing regulations, as if the qualifying foreign excluded fund were a covered fund. To provide greater clarity and certainty to banking entities and qualifying foreign excluded funds, and to limit the extraterritoriality of the rule, the 2020 proposal included a permanent exemption from the section 13 restrictions on proprietary trading and investing in or sponsoring covered funds for the activities of qualifying foreign excluded funds. The proposed exemption generally included the same eligibility criteria from the policy statement, although it included a modified version of the anti-evasion provision such that, in order to qualify, a fund could not be operated in a manner that enables ''any other banking entity'' (rather than ''the foreign banking entity'') to evade the requirements of section 13 or the implementing regulations.

The agencies requested comment on all aspects of this exemption. Commenters were generally supportive of the 2020 proposal to exempt qualifying foreign excluded funds from certain requirements of the implementing regulations.[29] Two commenters expressed opposition to the proposed exemption.[30]

Some commenters requested that qualifying foreign excluded funds be excluded from the definition of banking entity.[31] One commenter expressed concern that the 2020 proposal would require qualifying foreign excluded funds to establish section 13 of the BHC Act compliance programs, imposing costs on qualifying foreign excluded funds.[32] This commenter noted that there may be situations under section 13 of the BHC Act where a foreign banking entity controls a qualifying foreign excluded fund, but under foreign law does not have the necessary authority to require it to adopt a section 13 compliance program. As such, this commenter advocated for either excluding this type of fund from the definition of banking entity or exempting this type of fund from the compliance program requirements under the rule.[33] One commenter expressed concern that a qualifying foreign excluded fund would still need to comply with various restrictions under section 13, including the provisions of § ____.14 of the implementing regulations (*i.e.,* Super 23A) and the compliance program requirements.[34]

Some commenters requested that the agencies change the anti-evasion provision of the qualifying foreign excluded funds definition so that it would only apply to the specific foreign banking entity, in a manner consistent with the policy statement.[35] One of these commenters suggested, as an alternative, revising the provision so that it would only apply to ''any affiliated banking entities.'' [36]

One commenter requested an anti-evasion safe harbor and changes to allow a fund to be a qualifying foreign excluded fund when a non-U.S. banking entity serves as a management company to the fund and is approved to provide fund management in accordance with local law.[37] This commenter also requested that the agencies limit the requirements in the proposed qualifying foreign excluded funds definition to only those set forth in § ____.13(b) of the rule for covered fund activities conducted by foreign banking entities solely outside the United States, and treat as qualifying foreign excluded funds those funds for which the foreign banking entity cannot exercise voting rights.

Pursuant to their authority under section 13(d)(1)(J) of the BHC Act, the agencies are adopting the exemption for the activities of qualifying foreign excluded funds substantially as proposed, but with modifications to the anti-evasion provision and compliance program requirements. Specifically, the agencies are exempting the activities of qualified foreign excluded funds from the restrictions on proprietary trading and investing in or sponsoring covered funds, if the acquisition or retention of the ownership interest in, or sponsorship of, the qualifying foreign excluded fund by the foreign banking entity meets the requirements for permitted covered fund activities and investments conducted solely outside the United States, as provided in § ____.13(b) of the rule.[38] Under the final rule, a qualifying foreign excluded fund has the same meaning as in the policy statement as described above and in the 2020 proposal, except for the modification to the anti-evasion provision, as described below.

Section 13(d)(1)(J) of the BHC Act gives the agencies rulemaking authority to exempt activities from the prohibitions of section 13, provided the agencies determine that the activity in question would promote and protect the safety and soundness of the banking entity and the financial stability of the

entity that is not, and is not controlled directly or indirectly by, a banking entity that is located in or organized under the laws of the United States or any State. *Id.*

[28] Statement regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act (July 17, 2019), *available at https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20190717a1.pdf.*

[29] SIFMA; Bank Policy Institute (BPI); Bundesverband Investment und Asset Management e.V. (BVI); American Investment Council (AIC); ABA; European Fund and Asset Management Association (EFAMA); Shareholder Advocacy Forum (SAF); IIB; JBA; CBA; and Credit Suisse.

[30] Occupy and Data Boiler Technologies LLC (Data Boiler).

[31] IIB; JBA; CBA; Credit Suisse; and EBF.

[32] JBA.

[33] JBA.

[34] Credit Suisse.

[35] IIB; JBA; Credit Suisse; and EBF.

[36] Credit Suisse.

[37] JBA.

[38] *See* final rule § ____.13(b).

United States.[39] For the reasons described below, the agencies have determined that exempting the activities of qualifying foreign excluded funds promotes and protects the safety and soundness of banking entities and U.S. financial stability.

This relief is expected to promote and protect the safety and soundness of such funds and their foreign banking entity sponsors by putting them on a level playing field with their foreign competitors that are not subject to the implementing regulations. If the activities of these foreign funds were subject to the restrictions applicable to banking entities, their asset management activities could be significantly disrupted, and their foreign banking entity sponsors may be at a competitive disadvantage to other foreign bank and non-bank market participants conducting asset management business outside of the United States. Exempting the activities of these foreign funds allows their foreign banking entity sponsors to continue to conduct their asset management business outside the United States as long as the foreign banking entity's acquisition of an ownership interest in or sponsorship of the fund meets the requirements in § ____.13(b) of the implementing regulations. Thus, the exemption is expected to have the effect of promoting the safety and soundness of these foreign funds and their sponsors, while at the same time limiting the extraterritorial impact of the implementing regulations, consistent with the purposes of sections 13(d)(1)(H) and (I) of the BHC Act.

The exemption is also expected to promote and protect U.S. financial stability. While qualifying foreign excluded funds have a very limited nexus to the U.S. financial system, the exemption would promote U.S. financial stability by providing additional capital and liquidity to U.S. capital markets without a concomitant increase in risk borne by U.S. entities. Because the exemption requires that the foreign banking entity's acquisition of an ownership interest in or sponsorship of the fund meets the requirements in § ____.13(b) of the final rule, the exemption will help ensure that the risks of investments made by these foreign funds will be booked at foreign entities in foreign jurisdictions, thus promoting and protecting U.S. financial stability. Additionally, subjecting such funds to the requirements of the implementing regulations could precipitate disruptions in foreign capital markets, which could generate spillover effects in the U.S. financial system.

In response to comments regarding the anti-evasion provision, the final rule specifies that the qualifying foreign excluded fund must not be operated in a manner that enables the banking entity that sponsors or controls the qualifying foreign excluded fund, or any other affiliated banking entity (other than a qualifying foreign excluded fund), to evade the requirements of section 13 of the BHC Act or the final rule. This change is meant to clarify the scope of the anti-evasion provision and provide certainty for banking entities that sponsor or control the qualifying foreign excluded fund.

Consistent with feedback from several commenters, the agencies also have modified compliance requirements with respect to qualifying foreign excluded funds. While, under the final rule, the activities of a qualifying foreign excluded fund are exempted from the proprietary trading restrictions of § ____.3(a) and the covered fund restrictions of § ____.10(a) of the final rule, the qualifying foreign excluded fund is still a banking entity. Absent any additional changes, the qualifying foreign excluded fund could become subject to the compliance requirements of § ____.20. However, since these qualifying foreign excluded funds are exempted from the proprietary trading requirements of § ____.3(a) and covered fund restrictions of § ____.10(a) of the final rule, the agencies believe that requiring a compliance program for the fund itself is overly burdensome and unnecessary. The requirements in § ____.20 are intended to ensure and monitor compliance with the proprietary trading and covered fund provisions, and there would be no benefit to applying these requirements to an entity that is exempt from those provisions. Therefore, under the final rule, qualifying foreign excluded funds are not required to have compliance programs or comply with the reporting and additional documentation requirements under § ____.20. However, any banking entity that owns or sponsors a qualifying foreign excluded fund will still be required to have in place appropriate compliance programs for itself and its other subsidiaries and provide reports and additional documentation as required by § ____.20.

The final rule does not amend the definition of ''banking entity'' as requested by several commenters. Because ''banking entity'' is specifically defined in section 13 of the BHC Act, the agencies find it appropriate to address concerns related to foreign excluded funds through their exemptive rulemaking authority.

The agencies are not making any change regarding the applicability of § ____.14 of the implementing regulations, which imposes limitations on relationships with covered funds, with respect to qualifying foreign excluded funds. The agencies believe it is appropriate to retain the application of § ____.14 to qualifying foreign excluded funds to limit risks that may be borne by banking entities located in the United States through transactions with such funds.[40] Further, given the limited set of circumstances in which § ____.14 would apply (*i.e.,* a transaction between a foreign excluded fund and a covered fund that is sponsored or advised by the same banking entity), the agencies do not believe that it is overly burdensome for a banking entity that sponsors or controls a qualifying foreign excluded fund to ensure that it is not in violation of § ____.14.

B. Modifications To Existing Covered Fund Exclusions

In the preamble to the 2013 rule, the agencies acknowledged that the covered fund definition was expansive.[41] To effectively tailor the covered fund provisions to the types of entities that section 13 of the BHC Act was intended to cover, the 2013 rule excluded various types of entities from the covered fund definition.[42] In response to comments received on the 2020 proposal, and based on experience implementing the rule, the agencies are modifying certain of the existing exclusions, as described below, to make them more appropriately structured to effectuate the intent of the statute and its implementing regulations.

1. Foreign Public Funds

2013 Rule

To provide consistent treatment for U.S. registered investment companies and their foreign equivalents, the implementing regulations exclude foreign public funds from the definition of covered fund.[43] A foreign public fund

[39] 12 U.S.C. 1851(d)(1)(J).

[40] A U.S. banking entity's exposure to a fund that would be a qualifying foreign excluded fund with respect to a foreign banking entity may still be a covered fund with respect to a U.S. banking entity under § ____.10(b)(1)(iii) of the implementing regulations. A U.S. banking entity's investment in and relationship with such a fund could therefore be subject to the entirety of the applicable prohibitions and restrictions of Subpart C of the implementing regulations.

[41] *See* 79 FR 5677.

[42] *See id.*

[43] In adopting the foreign public fund exclusion, the agencies' view was that it was appropriate to exclude these funds from the ''covered fund''

Continued

is generally defined under the 2013 rule as any issuer that is organized or established outside of the United States and the ownership interests of which are (1) authorized to be offered and sold to retail investors in the issuer's home jurisdiction and (2) sold predominantly through one or more public offerings outside of the United States.[44] The agencies stated in the preamble to the 2013 rule that they generally expect that an offering is made predominantly outside of the United States if 85 percent or more of the fund's interests are sold to investors that are not residents of the United States.[45] The 2013 rule defines ''public offering'' for purposes of this exclusion to mean a ''distribution,'' as defined in § ____.4(a)(3) of subpart B, of securities in any jurisdiction outside the United States to investors, including retail investors, provided that the distribution complies with all applicable requirements in the jurisdiction in which such distribution is being made; the distribution does not restrict availability to only investors with a minimum level of net worth or net investment assets; and the issuer has filed or submitted, with the appropriate regulatory authority in such jurisdiction, offering disclosure documents that are publicly available.[46]

The 2013 rule places an additional condition on a U.S. banking entity's ability to rely on the foreign public fund exclusion with respect to any foreign fund it sponsors.[47] The foreign public fund exclusion is only available to a U.S. banking entity with respect to a foreign fund sponsored by the U.S. banking entity if, in addition to the requirements discussed above, the fund's ownership interests are sold predominantly to persons other than the sponsoring banking entity, the issuer (or affiliates of the sponsoring banking entity or issuer), and employees and directors of such entities.[48] The agencies stated in the preamble to the 2013 rule that, consistent with the agencies' view concerning whether a foreign public fund has been sold predominantly outside of the United States, the agencies generally expect that a foreign public fund would satisfy this additional condition if 85 percent or more of the fund's interests are sold to persons other than the sponsoring U.S. banking entity and the specified persons connected to that banking entity.[49]

2020 Proposal

In the 2020 proposal, the agencies acknowledged that some of the conditions of the 2013 rule's foreign public fund exclusion may not be necessary to ensure consistent treatment of foreign public funds and U.S. registered investment companies. Moreover, some conditions may make it difficult for a non-U.S. fund to qualify for the exclusion or for a banking entity to validate whether a non-U.S. fund qualifies for the exclusion, resulting in certain non-U.S. funds that are similar to U.S. registered investment companies being treated as covered funds.

To address these concerns, the 2020 proposal would have made certain modifications to the foreign public fund exclusion. First, the agencies proposed to replace the requirement that the fund be authorized to be offered and sold to retail investors in the issuer's home jurisdiction (the home jurisdiction requirement) and the requirement that the fund interests be sold predominantly through one or more public offerings outside of the United States, with a requirement that the fund is authorized to offer and sell ownership interests, and such interests are offered and sold, through one or more public offerings outside of the United States. This change would have permitted foreign funds to qualify for the exclusion if they are organized in one jurisdiction but only authorized to be sold to retail investors in another jurisdiction, as this is a fairly common way for foreign retail funds to be organized. Also, no longer requiring a fund to be sold predominantly through one or more public offerings was intended to reduce the difficulty that banking entities have described in determining and monitoring the distribution history and patterns of a third-party sponsored fund or a sponsored fund whose interests are sold through third-party distributors.

The agencies also proposed modifying the definition of ''public offering'' from the implementing regulations to add a new requirement that the distribution be subject to substantive disclosure and retail investor protection laws or regulations, to help ensure that foreign funds qualifying for this exclusion are sufficiently similar to U.S. registered investment companies. Additionally, the 2020 proposal would have only applied the condition that the distribution comply with all applicable requirements in the jurisdiction where it is made to instances in which the banking entity acts as the investment manager, investment adviser, commodity trading advisor, commodity pool operator, or sponsor. This proposed change was intended to address the potential difficulty that a banking entity investing in a third-party sponsored fund may have in determining whether the distribution of such fund complied with all the requirements in the jurisdiction where it was made.

To simplify the requirements of the exclusion and address concerns described by banking entities with the difficulty in tracking the sale of ownership interests to employees and their immediate family members, the 2020 proposal would have eliminated the limitation on selling ownership interests of the issuer to employees (other than senior executive officers) of the sponsoring banking entity or the issuer (or affiliates of the banking entity or issuer). This change was intended to help align the treatment of foreign public funds with that of U.S. registered investment companies, as the exclusion for U.S. registered investment companies has no such limitation. The 2020 proposal would have continued to limit the sale of ownership interests to directors or senior executive officers of the sponsoring banking entity or the issuer (or their affiliates), as the agencies believed that such a requirement would be simpler for a banking entity to track.

Finally, the 2020 proposal requested comment on the appropriateness of the expectation stated in the preamble to the 2013 rule that, for a U.S. banking entity-sponsored foreign fund to satisfy the condition that it be ''predominantly'' sold to persons other than the sponsoring U.S. banking entity and certain persons connected to that banking entity, at least 85 percent of the ownership interests in the fund should be sold to such other persons.

Discussion of Comments and the Final Rule

The agencies are adopting all of the proposed changes and are making certain adjustments in response to comments received, as discussed below.

Commenters on the 2020 proposal generally supported the proposed changes to the foreign public funds

definition because they are sufficiently similar to U.S. registered investment companies. 79 FR 5678.

[44] 2013 rule § ____.10(c)(1); *see also* 79 FR 5678.

[45] 79 FR 5678.

[46] 2013 rule § ____.10(c)(1)(iii).

[47] Although the discussion of this condition generally refers to U.S. banking entities for ease of reading, the condition also applies to foreign subsidiaries of a U.S. banking entity. *See* 2013 rule § ____.10(c)(1)(ii) (applying this limitation ''[w]ith respect to a banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State and any issuer for which such banking entity acts as sponsor'').

[48] *See* 2013 rule § ____.10(c)(1)(ii).

[49] 79 FR 5678.

exclusion.[50] Specifically, commenters supported the elimination of the home jurisdiction requirement and the requirement that the fund be sold predominantly through one or more public offerings.[51] Commenters supported the proposed change to the ''public offering'' definition to include a requirement that a distribution be subject to substantive disclosure and retail investor protection laws or regulations,[52] but did not recommend further specifying what substantive disclosure and investor protection requirements should apply because they generally viewed it as unnecessary and overly prescriptive.[53] Commenters also supported eliminating the restriction on share ownership by employees (other than senior executives and directors) of the U.S. banking entity that sponsors the foreign public fund.[54] In response to a specific question in the 2020 proposal, one commenter indicated that the proposed changes to the foreign public funds exclusion would not increase the risk of evasion of the requirements of section 13 and the implementing regulations, and thus no additional anti-evasion measures were necessary.[55] Another commenter stated that the proposed changes were less than ideal but were acceptable after balancing compliance costs and benefits.[56]

Commenters also recommended additional changes to further align the treatment of foreign public funds with that of U.S. registered investment companies or to prevent evasion of the rule.[57] Specifically, some commenters recommended eliminating the requirement that a fund actually be sold through a public offering and, instead, only require that a fund be authorized to be sold through a public offering.[58] These commenters generally viewed this requirement as burdensome and difficult to administer and noted that U.S. registered investment companies are not required to be sold in public distributions. The agencies do not consider the fact that there is no requirement for U.S. registered investment companies to be actually sold through public offerings as a sufficient rationale for removing this requirement from the foreign public fund exclusion. Requiring foreign public funds to be sold through one or more public offerings is intended to ensure that such funds are in fact public funds and thus sufficiently similar to U.S. registered investment companies. While there may be certain limited scenarios where a U.S. registered investment company is not sold to retail investors, the agencies believe that the vast majority of U.S. registered investment companies are sold to retail investors. Furthermore, U.S. registered investment companies are subject to robust registration, reporting, and other requirements that are familiar to the agencies, whereas foreign public funds are subject to a differing array of requirements depending on the jurisdiction where they are authorized to be sold. These other jurisdictions may have less developed requirements for retail funds, which may increase the likelihood of a fund seeking authorization for public distribution in certain foreign jurisdictions solely as a means of avoiding the covered fund prohibition. The agencies believe that eliminating this requirement would increase the risk of evasion by permitting foreign funds that may be authorized for sale to retail investors in a foreign jurisdiction—but are only sold through private offerings where no substantive disclosure or retail investor protections exist—to qualify for the exclusion. Such funds would not be comparable to U.S. registered investment companies and would not be the type of fund that foreign public fund exclusion was intended to address. Accordingly, the agencies are not adopting this suggested modification.

One trade association commenter suggested eliminating a provision in the ''public offering'' requirement that prohibits a distribution from being limited to investors with a minimum net worth or net investment assets because some of its members distribute funds, including mutual funds, in offerings that do not meet this requirement but that are nonetheless subject to substantive disclosure and retail investor protection requirements. Similar to the reasons for retaining the requirement that a foreign public fund actually be sold through one or more public offerings, the agencies believe that retaining this requirement is necessary to ensure that funds qualifying for this exclusion are sufficiently similar to U.S. registered investment companies. In fact, one of the identifying characteristics of a covered fund is that its offerings are limited to investors with minimum net worth or net investment assets.[59] The agencies therefore believe that foreign funds that limit their offerings to investors with a minimum net worth or net investment assets are generally not sufficiently similar to U.S. registered investment companies, and thus the agencies are not adopting this suggested change to the ''public offering'' definition.

One commenter opposed the proposed elimination of the requirement in the ''public offering'' definition that a distribution comply with all applicable requirements in the jurisdiction in which such distribution is being made for a banking entity that does not serve as the fund's investment manager, investment adviser, commodity trading advisor, commodity pool operator, or sponsor.[60] The final rule adopts this modification as proposed, because the agencies believe the other eligibility criteria for a fund to qualify under the foreign public fund exclusion are sufficient to appropriately identify these funds. In addition, the agencies recognize that it may be difficult or impossible for a banking entity that invests in a third-party fund to know whether the fund's distribution complied with all applicable requirements in the jurisdiction where it was distributed.

One commenter recommended that the agencies require 85 percent of a foreign public fund's ownership interests be sold to and owned by ''bona fide'' retail investors in the fund's home jurisdiction.[61] However, for the same reasons that the agencies are eliminating the home jurisdiction requirement and the requirement that a fund be sold predominantly through public offerings,

[50] IIB; SIFMA; BPI; ABA; EBF; EFAMA; FSF; Investment Company Institute (ICI); BVI; CBA; Committee on Capital Markets Regulation (CCMR); Data Boiler; Goldman Sachs; Investment Adviser Association (IAA); JBA; SAF; and U.S. Chamber of Commerce Center for Capital Markets Competitiveness (CCMC).

[51] IIB; SIFMA; BPI; ABA; EBF; EFAMA; FSF; ICI; BVI; and CBA.

[52] IIB; EFAMA; FSF; ICI; and BVI.

[53] IIB; ICI; and CBA. One commenter supported this assertion by stating that 95 percent of the world's securities markets, including all major emerging markets, have substantive disclosure and retail investor protection rules that are guided by the International Organization of Securities Commissions' common principles for retail funds and the detailed policy work that informs those principles. ICI.

[54] FSF.

[55] SIFMA.

[56] Data Boiler.

[57] One commenter recommended that the agencies create an exclusion from the ''proprietary trading'' definition for the activities of regulated funds, including foreign public funds, under certain circumstances. ICI. The agencies note that such a change is not within the scope of this rulemaking.

[58] IIB; SIFMA; and EBF.

[59] Under the Investment Company Act, certain funds whose offerings are limited to investors with minimum net worth or net investment assets are exempt from registration as investment companies. *See* 15 U.S.C. 80a–3(c)(7). These funds are generally treated as covered funds under section 13 of the BHC Act and the implementing regulations. *See* 12 U.S.C. 1851(h)(2); implementing regulations § ____.10(b)(1)(i).

[60] Data Boiler.

[61] Oleh Zadorestskyy. This commenter also suggested that the agencies require proof that the investors were non-U.S. persons.

the agencies are not adopting this requirement.

Some commenters suggested that the agencies identify common foreign fund types that are presumed to qualify for the exclusion for foreign public funds for the purpose of improving efficiency and simplifying compliance with the rule.[62] Other commenters recommended that issuers listed on an internationally-recognized exchange and available in retail-level denominations should automatically qualify for the exclusion for similar reasons.[63] Although the agencies expect many such funds will qualify for the exclusion, the agencies decline to adopt either of these suggested changes, as both would require the agencies' review and on-going monitoring of foreign laws and regulations to ensure that the types of funds that would qualify under these provisions are sufficiently similar to U.S. registered investment companies and that their exclusion as foreign public funds would continue to be appropriate.

Some commenters recommended that the agencies entirely eliminate the restrictions on share ownership by parties affiliated with a U.S. banking entity sponsor of a foreign public fund.[64] Other commenters suggested that, if the restrictions on share ownership by banking entities affiliated with the sponsor were retained, the restrictions on share ownership by senior executives and directors should be removed.[65] The commenters generally viewed these requirements as unnecessary and burdensome to track and monitor. As discussed in the preamble to the 2013 rule, these requirements are intended to prevent evasion of section 13 of the BHC Act.[66] Additionally, the agencies note that U.S. banking entity sponsors of foreign public funds would need to track the ownership of such funds by their affiliates and management officials even if the requirements were eliminated in order to determine whether they control such funds for BHC Act purposes.[67] Thus, for a U.S. banking entity relying on this exclusion with respect to a fund that it sponsors, the agencies are retaining the requirement that the fund be sold predominantly to persons other than the U.S. banking entity sponsor, the fund, affiliates of such sponsoring banking entity or fund, and the directors and senior executive officers of such entities (collectively, ''U.S. banking entity sponsor and associated parties'').

Relatedly, some commenters recommended that the agencies modify their expectation of the level of ownership of a foreign public fund that would satisfy the requirement that a fund be ''predominantly'' sold to persons other than its U.S. banking entity sponsor and associated parties,[68] which, in the preamble to the 2013 rule, the agencies stated was 85 percent or more (which would permit the U.S. banking entity sponsor and associated parties to own the remaining 15 percent). These commenters asserted that the relevant ownership threshold for U.S. registered investment companies is 25 percent, and that, for foreign public funds, the threshold should be the same. The agencies agree that the permitted ownership level of a foreign public fund by a U.S. banking entity sponsor and associated parties should be aligned with the functionally equivalent threshold for banking entity investments in U.S. registered investment companies, which is 24.9 percent.[69] Accordingly, the agencies have amended this provision in the final rule to require that more than 75 percent of the fund's interests be sold to persons other than the U.S. banking entity sponsor and associated parties.[70]

One commenter recommended that, with respect to foreign public funds sponsored by U.S. affiliates of foreign banking entities, the agencies exclude the sponsoring U.S. banking entity's non-U.S. affiliates and their directors and employees from the restrictions on share ownership, provided that such non-U.S. affiliates are not controlled by a U.S. banking entity.[71] This commenter asserted that there is no U.S. financial stability or safety and soundness benefit to applying this restriction to such non-U.S. affiliates and their directors and employees, as the risks of any such investments are borne solely outside the United States. However, with the change described above, which permits a U.S. banking entity sponsor and associated parties to hold less than 25 percent of a foreign public fund, the agencies do not believe that this change is necessary. Even if the requirement were modified as the commenter suggested, the banking entity and its affiliates would still be limited to owning less than 25 percent of the fund without the fund becoming a banking entity.

One commenter requested that the agencies modify § ____.12(b)(1) of the implementing regulations, which governs attribution of ownership interests in covered funds to banking entities, to clarify that the banking entity ''or an affiliate'' can provide the advisory, administrative, or other services required in § ____.12(b)(1)(ii)(B) for the non-attribution rule to apply. The commenter requested this clarification because § ____.12(b)(1)(ii)(B) is cross-referenced by FAQ 14, which, as discussed above, states that a foreign public fund will not be treated as a banking entity if it complies with the test in § ____.12(b)(1)(ii) (*i.e.,* the banking entity holds less than 25 percent of the voting shares in the foreign public fund and provides advisory, administrative, or other services to the fund). The agencies confirm that the requested interpretation is correct and, accordingly, have amended § ____.12(b)(1)(ii) of the implementing regulations to clarify that the ownership limit applies to the banking entity and its affiliates, in the aggregate, and the requirement that the banking entity provide advisory or other services can be satisfied by the banking entity or its affiliates.

One commenter noted that FAQ 16, which relates to the seeding period for foreign public funds, uses 3 years as an example of the duration of such a seeding period, and requested that the agencies confirm that a foreign public fund's seeding period can be longer than

[62] IIB and EBF.

[63] IIB; SIFMA; BPI; ABA; FSF; and CBA.

[64] SIFMA and FSF.

[65] SIFMA; BPI; ICI; and CCMC.

[66] 79 FR 5678–79.

[67] *See* 12 CFR 225.2(e); 12 CFR 225.31(d)(2)(ii). If a foreign public fund is controlled by a banking entity for BHC Act purposes, such fund could also be being treated as a banking entity under section 13. *See* implementing regulations § ____.2(c); FAQ 14.

[68] BPI; FSF; ICI; and CCMC.

[69] Although the implementing regulations do not explicitly prohibit a banking entity from acquiring 25 percent or more of a U.S. registered investment company, a U.S. registered investment company would become a banking entity if it is affiliated with another banking entity (other than as described in § ____.12(b)(1)(ii) of the implementing regulations). *See* 79 FR 5732 (''[F]or purposes of section 13 of the BHC Act and the final rule, a registered investment company . . . will not be considered to be an affiliate of the banking entity if the banking entity owns, controls, or holds with the power to vote less than 25 percent of the voting shares of the company or fund, and provides investment advisory, commodity trading advisory, administrative, and other services to the company or fund only in a manner that complies with other limitations under applicable regulation, order, or other authority.'').

[70] For a U.S. banking entity that sponsors a foreign public fund, crossing the 24.9 percent ownership threshold (other than during a permitted seeding period) would cause the fund to be a covered fund (if no other exclusion applied), in which case the banking entity would be in violation of the 3 percent per-fund investment limit. *See* implementing regulations § ____.12(a)(2)(ii)(A). The agencies believe that such a strict prohibition against a U.S. banking entity acquiring 25 percent or more of a foreign public fund that it sponsors is appropriate because of the elevated risk of evasion by the sponsoring banking entity, which may be able to control the investments made by the fund.

[71] IIB.

3 years.[72] Another commenter requested that the agencies codify the 3-year seeding period in the implementing regulations.[73] The agencies believe that, depending on the facts and circumstances of a particular foreign public fund, the appropriate duration of its seeding period may vary and, under certain facts and circumstances, may exceed three years. The agencies believe that this flexibility is appropriate and thus decline to further specify such a limit. Another commenter requested that the agencies codify the foreign public fund seeding FAQ,[74] FAQ 14, and FAQ 16, both described above, in the implementing regulations.[75] The agencies decline to codify these FAQs at this time but note that the final rule does not modify or revoke any previously issued staff FAQs, unless otherwise specified.

In the final rule, the agencies are adopting the amendments to the foreign public funds exclusion as proposed, with the additional modifications described above. The agencies believe the revised requirements will make the foreign public fund exclusion more effective by expanding its availability, providing clarity, and simplifying compliance with its requirements, while continuing to ensure that the funds that qualify are sufficiently similar to U.S. registered investment companies.

2. Loan Securitizations

Section 13 of the BHC Act provides that ''[n]othing in this section shall be construed to limit or restrict the ability of a banking entity . . . to sell or securitize loans in a manner otherwise permitted by law.'' [76] To effectuate this statutory mandate, the 2013 rule excluded from the definition of covered fund loan securitizations that issue asset-backed securities and hold only loans, certain rights and assets that arise from the structure of the loan securitization or from the loans supporting a loan securitization, and a small set of other financial instruments (permissible assets).[77]

Since the adoption of the 2013 rule, several banking entities and other participants in the loan securitization industry have commented that the limited set of permissible assets has inappropriately restricted their ability to use the loan securitization exclusion. In the 2018 proposal, the agencies asked several questions regarding the efficacy and scope of the exclusion and the Loan Securitization Servicing FAQ.[78] Comments focused on permitting small amounts of non-loan assets and clarifying the treatment of leases and related assets.

In response to these concerns, the 2020 proposal would have codified the Loan Securitization Servicing FAQ and permitted loan securitizations to hold a small amount of non-loan assets. The agencies requested comment on all aspects of the proposed changes to the loan securitization exclusion, and comments were generally supportive of the proposed revisions.[79] Several commenters also suggested revisions to the 2020 proposal.[80] Comments are discussed in detail below.[81]

Servicing Assets

The implementing regulations permit loan securitizations to hold rights or other assets (servicing assets) that arise from the structure of the loan securitization or from the loans supporting a loan securitization.[82] Rights or other servicing assets are assets designed to facilitate the servicing of the underlying loans or the distribution of proceeds from those loans to holders of the asset-backed securities.[83] In response to confusion regarding the scope of the provisions permitting servicing assets and a separate provision limiting the types of permitted securities, the staffs of the agencies released the Loan Securitization Servicing FAQ. The FAQ clarified that a servicing asset may or may not be a security, but if the servicing asset is a security, it must be a permitted security under the rule.

The 2020 proposal would have codified the Loan Securitization Servicing FAQ in the implementing regulations to clarify the scope of the servicing asset provision.[84] Commenters generally supported the codification of the Loan Securitization Servicing FAQ, indicating that such a codification would promote transparency and ensure continued use of the loan securitization exclusion.[85] For the above reasons, the final rule adopts the codification of the Loan Securitization Servicing FAQ as proposed.

Cash Equivalents

The loan securitization exclusion permits issuers relying on the exclusion to hold certain types of contractual rights or assets related to the loans underlying the securitization, including cash equivalents. In response to questions about the scope of the cash equivalents provision, the Loan Securitization Servicing FAQ stated that ''cash equivalents'' means high quality, highly liquid investments whose maturity corresponds to the securitization's expected or potential need for funds and whose currency corresponds to either the underlying loans or the asset-backed securities.[86] To promote transparency and clarity, the 2020 proposal would have codified this additional language in the Loan Securitization Servicing FAQ regarding the meaning of ''cash equivalents.'' [87] The agencies did not propose requiring ''cash equivalents'' to be ''short term,'' because the agencies recognized that a loan securitization may need greater flexibility to match the maturity of high quality, highly liquid investments to its expected or potential need for funds. Commenters generally supported the codification of the definition of ''cash equivalents'' in the loan securitization

[72] IAA.

[73] CCMC.

[74] The foreign public fund seeding FAQ states that staffs of the agencies would not advise that a seeding vehicle that is operated pursuant to a written plan to become a foreign public fund and that meets certain conditions be treated as a covered fund during such seeding period.

[75] IIB.

[76] 12 U.S.C. 1851(g)(2).

[77] *See* 2013 rule § ____.10(c)(8). Loan is further defined as any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative. Implementing regulations § ____.2(t).

[78] 83 FR 33480–81.

[79] *E.g.,* SIFMA; BPI; Managed Funds Association (MFA); PNC Financial Services Group, Inc. (PNC); Goldman Sachs; Loan Syndications and Trading Association (LSTA); and Structured Finance Association (SFA).

[80] *E.g.,* SIFMA; CCMC; BPI; and IIB.

[81] One commenter suggested that some jurisdictions' risk retention rules may vary from the regulations implementing section 15G of the Exchange Act (15 U.S.C. 78o–11), which requires a banking entity to retain and maintain a certain minimum interest in certain asset-backed securities. *See* IIB. This commenter recommended allowing banking entities to hold certain investments in compliance with certain foreign laws (*e.g.,* European risk retention rules). The agencies understand that rules for risk retention vary across jurisdictions. However, the agencies believe that the requested action is outside the scope of the current rulemaking. In addition, another commenter requested that the agencies clarify the definition of asset-backed securities as used in the loan securitization exclusions. *See* Arnold & Porter Kaye Scholer LLP (Arnold & Porter). The agencies discuss the definition of asset-backed securities in Section IV.C.1.iii (Credit Funds), *infra*.

[82] §§ ____.2(t); ____.10(c)(8)(i)(D); ____.10(c)(8)(v).

[83] *See, e.g.,* FASB Statement No. 156: Accounting for Servicing of Financial Assets, ¶ 61 (FAS 156).

[84] The 2020 proposal also clarified that special units of beneficial interest and collateral certificates meeting the requirements of paragraph (c)(8)(v) of the exclusion that are securities need not meet the requirements of paragraph (c)(8)(iii) of the exclusion. *See* 2020 proposal § ____.10(c)(8)(i)(B). The agencies are adopting this revision, as proposed.

[85] *E.g.,* SIFMA; PNC; and SFA. One commenter indicated that the current Loan Securitization Servicing FAQ was sufficient and that codifying the FAQ was not necessary; however, the commenter did not elaborate on or justify this position. Data Boiler.

[86] *See supra,* n.14.

[87] 2020 proposed rule § ____.10(c)(8)(iii)(A).

exclusion.[88] The final rule adopts the codification of ''cash equivalents'' as proposed.

Limited Holdings of Certain Debt Securities

In the preamble to the 2013 rule, the agencies declined to permit loan securitizations to hold a certain amount of non-loan assets.[89] The agencies supported a narrow scope of permissible assets in loan securitizations, suggesting that such an approach would be consistent with the purpose of section 13 of the BHC Act.[90]

Several commenters on the 2018 proposal disagreed with the agencies' views and supported expanding the range of permissible assets in an excluded loan securitization. After considering the comments received on the 2018 proposal, the 2020 proposal would have allowed a loan securitization vehicle to hold up to five percent of the fund's total assets in non-loan assets. The agencies indicated that authorizing loan securitizations to hold small amounts of non-loan assets could, consistent with section 13 of the BHC Act, permit loan securitizations to respond to investor demand and reduce compliance costs associated with the securitization process without significantly increasing risk to banking entities and the financial system.[91] The agencies requested comment on, among other things, the maximum amount of permitted non-loan assets, the methodology for calculating the cap on non-loan assets, and whether the agencies should limit the type of assets that could be held under the non-loan asset provision. Specifically, the agencies requested comment on whether the non-loan asset provision should be limited to debt securities or should exclude certain financial instruments such as derivatives and collateralized debt obligations.

Commenters were generally supportive of allowing loan securitizations to hold a limited amount of non-loan assets.[92] These commenters indicated that the requirements for the current loan securitization exclusion are too restrictive and excessively limit use of the exclusion and prevent issuers from responding to investor demand, and suggested that a limited bucket of non-loan assets would not fundamentally alter the characteristics and risks of securitizations or otherwise increase risks in banking entities or the financial system.[93]

Several commenters recommended against limiting the type of assets that could be held per the non-loan asset provision.[94] For example, one commenter stated that allowing excluded loan securitizations to invest in any class of asset would allow those vehicles to achieve investment goals during periods of constrained loan supply, while another commenter indicated that such a restriction would be unnecessary given that the low limit on non-loan assets would constrain risks.[95] In contrast, one commenter suggested limiting the type of permissible assets to securities with risk characteristics similar to loans.[96]

Numerous commenters suggested raising the cap on non-loan assets from five percent of assets to ten percent of assets,[97] while one commenter indicated that a five percent cap would be sufficient.[98] Commenters that supported an elevated limit on non-loan assets generally argued that a ten percent limit would further reduce compliance burdens while not materially increasing risk.[99]

Several commenters also suggested a method for calculating the cap on non-loan assets: The par value of assets on the day they are acquired.[100] These commenters suggested that relying on par value is accepted practice in the loan securitization industry and would obviate concerns related to tracking amortization or prepayment of loans in a securitization portfolio.[101] One of these commenters further specified that the limit should be calculated (1) according to the par value of the acquired assets on the date of investment over the securitization's total collateral pool and (2) only at the time of investment.[102] Another commenter indicated that the cap should be calculated as the lower of the purchase price and par value of the non-qualifying assets over the issuer's aggregate capital commitments plus its subscription based credit facility.[103] A third commenter suggested having a separate valuation mechanism for equity securities, which the commenter suggested should be market value upon acquisition.[104]

Finally, two commenters opposed allowing excluded loan securitizations to hold non-loan assets and suggested that such a change would be contrary to the purpose of section 13 of the BHC Act or would result in loan securitizations with differing risk characteristics, potentially increasing monitoring costs on investors.[105] In addition, a commenter claimed that the 2020 proposal to allow excluded loan securitizations to hold non-loan assets would be contrary to section 13 of the BHC Act.[106] Specifically, this commenter suggested that the rule of construction in 12 U.S.C. 1851(g)(2) only permits the securitization or sale of loans and that legislative history supports this reading of the statute.

The agencies previously concluded and continue to believe they have legal authority to adopt the proposed allowance for a limited amount of non-loan assets.[107] Section 13(g)(2) of the BHC Act states, ''[n]othing in this section shall be construed to limit or restrict the ability of a banking entity or nonbank financial company supervised by the Board to sell or securitize loans in a manner otherwise permitted by law.'' [108] This rule of construction is permissive—it allows the agencies to design the regulations implementing section 13 in a way that accommodates and does not unduly ''limit or restrict'' the ability of banking entities to sell or securitize loans. Contrary to the commenter's argument, this provision does not mandate that any loan securitization exclusion only relate to loans. As discussed in this section and the preamble to the 2020 proposal,[109] the agencies believe that allowing excluded loan securitizations to hold limited amounts of non-loan assets would, in fact, promote the ability of

[88] *E.g.,* LSTA; PNC; and SIFMA. One commenter expressed opposition to this codification but did not elaborate or justify this position. *See* Data Boiler.

[89] 79 FR 5687–88.

[90] 79 FR 5687.

[91] 85 FR 12128–29.

[92] *E.g.,* SIFMA; CCMC; ABA; Credit Suisse; MFA; Goldman Sachs; LSTA; BPI; and SFA.

[93] *E.g.,* LSTA and Goldman Sachs.

[94] *E.g.,* MFA; LSTA; and SFA. One commenter also requested that the agencies make clear that the non-loan assets would not be subject to the other provisions of the loan securitization exclusion. LSTA.

[95] SFA and LSTA.

[96] JBA.

[97] SIFMA; CCMC; ABA; Credit Suisse; MFA; Goldman Sachs; LSTA; and SFA.

[98] PNC. Another commenter who generally supported the proposed modifications to the loan securitization exclusion did not urge the agencies to raise the cap on non-loan assets. *See* BPI.

[99] *E.g.,* LSTA; SIFMA; and Goldman Sachs.

[100] SIFMA; BPI; ABA; and LSTA.

[101] SIFMA and BPI.

[102] BPI.

[103] Goldman Sachs.

[104] SFA.

[105] JBA and Data Boiler.

[106] Occupy.

[107] *See* 79 FR 5688–92 (stating, for example, that ''[t]he [a]gencies also do not believe that they lack the statutory authority to permit a loan securitization relying on the loan securitization exclusion to use derivative[s,] as suggested by [Occupy]'' and that, more broadly, the agencies have the authority to allow excluded loan securitizations to hold non-loan assets).

[108] 12 U.S.C. 1851(g)(2).

[109] 85 FR 12128–29.

banking entities to sell or securitize loans.

After considering the foregoing comments, the agencies are revising the loan securitization exclusion to permit a loan securitization to hold a limited amount of debt securities. Loan securitizations provide an important mechanism for banking entities to fund lending programs. Allowing loan securitizations to hold a small amount of debt securities in response to customer and market demand may increase a banking entity's capacity to provide financing and lending. To minimize the potential for banking entities to use this exclusion to engage in impermissible activities or take on excessive risk, the final rule permits a loan securitization to hold debt securities (excluding asset-backed securities and convertible securities), as opposed to any non-loan assets, as the 2020 proposal would have allowed.[110]

Although several commenters supported allowing a loan securitization to hold any non-loan asset to provide flexibility and allow the issuer's investment manager to respond to changing market demands, the agencies believe that limiting the assets to debt securities is more consistent with the activities of an issuer focused on securitizing loans, rather than engaging in other activities. The agencies have determined, consistent with the views of another commenter, that non-loan assets with materially different risk characteristics from loans could change the character and complexity of an issuer and raise the type of concerns that section 13 of the BHC Act was intended to address. Moreover, as described further below, limiting the assets to those with risk characteristics that are similar to loans will allow for a simpler and more transparent calculation of the five percent limit, which will facilitate banking entities' compliance with the exclusion. For the same reasons, the final rule does not permit a loan securitization to hold asset-backed securities or convertible securities as part of its five percent allowance for debt securities. This helps to ensure that a loan securitization will not be exposed to complex financial instruments and will retain the general characteristic of a loan securitization issuer.

Similarly, to reduce potential risk-taking and to ensure that the fund is composed almost entirely of loans with minimal non-loan assets, the final rule retains the 2020 proposal's five percent limit on non-loan assets. Commenters differed on whether raising the limit on non-loan assets was appropriate or necessary to ensure flexibility, and it is not clear what benefit would accrue to issuers who could hold debt securities of, for example, seven or ten percent versus five percent. The amount of non-loan assets held by a fund should not be so significant that it fundamentally changes the character of the fund from one that is engaged in securitizing loans to one that is engaged in investing in other types of assets.

The agencies are also clarifying the methodology for calculating the five percent limit on non-convertible debt securities.[111] The 2020 proposal only provided that ''the aggregate value of any such other assets must not exceed five percent of the aggregate value of the issuing entity's assets'' and requested comment about how the agencies should calculate this limit.[112] As suggested by several commenters, the final rule specifies that the limit on non-convertible debt securities must be calculated at the most recent time of acquisition of such assets. Specifically, the aggregate value of debt securities held under § ____.10(c)(8)(i)(E) of the final rule may not exceed five percent of the aggregate value of loans held under § ____.10(c)(8)(i)(A), cash and cash equivalents held under § ____.10(c)(8)(iii)(A), and debt securities held under § ____.10(c)(8)(i)(E), where the value of the loans, cash and cash equivalents, and debt securities is calculated at par value at the time any such debt security is purchased.[113]

The agencies have chosen the most recent time of acquisition of non-convertible debt securities as the moment of calculation to simplify the manner in which the 5 percent cap applies. This would permit an issuer that, at some point in its life, held debt securities in excess of five percent of its assets to qualify for the exclusion if it came into compliance with the five percent limit prior to a banking entity relying on the exclusion with respect to such issuer. The agencies believe that a continuous monitoring obligation could impose significant burdens on excluded issuers and could cause an issuer to be disqualified from the loan securitization exclusion based on market events not under its control. It is also unnecessary to require this calculation at other intervals because limiting permissible assets to those that have similar characteristics as loans addresses the potential for evasion of the five percent limit that could arise if the issuer held more volatile assets.[114]

In the final rule, this measurement is based only on the value of the loans and debt securities held under §§ ____.10(c)(8)(i)(A) and (E) and the cash and cash equivalents held under § ____.10(c)(8)(iii)(A) rather than the aggregate value of all of the issuing entity's assets. The purpose of the five percent limit is to ensure the investment pool of a loan securitization is composed of loans. Therefore, the calculation takes into account the assets that should make up the issuing entity's investment pool and excludes the value of other rights or incidental assets, as well as derivatives held for risk management. This further simplifies the calculation methodology by excluding assets that may be more complex to value and that are ancillary to the loan securitization's investment activities. This straightforward calculation methodology will ensure that the loan securitization exclusion remains easy to use and will facilitate banking entities' compliance with the exclusion.

The agencies recognize that a loan securitization's transaction agreements may require that some categories of loans, cash equivalents, or debt securities be valued at fair market value for certain purposes. To accommodate such situations, the exclusion provides that the value of any loan, cash equivalent, or permissible debt security may be based on its fair market value if (1) the issuing entity is required to use the fair market value of such loan or debt security for purposes of calculating compliance with concentration limitations or other similar calculations under its transaction agreements and (2) the issuing entity's valuation methodology values similarly situated assets, for example non-performing loans, consistently. This provision is intended to provide issuers with the flexibility to leverage existing calculation methodologies while preventing issuers from using inconsistent methodologies in a manner to evade the requirements of the exclusion.

Leases

A commenter on the 2018 proposal suggested that the loan securitization exclusion be expanded to cover leases and related assets, including operating or capital leases.[115] In response, in the 2020 proposal the agencies stated that they were ''not proposing to separately

[110] Final rule § ____.10(c)(8)(i)(E).

[111] Final rule § ____.10(c)(8)(i)(E)(*1*)–(*2*).

[112] 2020 proposal § ____.10(c)(8)(i)(E); 85 FR 12129.

[113] Final rule § ____.10(c)(8)(i)(E)(*1*)–(*2*).

[114] The agencies also have authority to address acts that function as an evasion of the requirements of the exclusion. *See* implementing regulations § ____.21.

[115] *See* 85 FR 12128.

list leases within the loan securitization exclusion because leases are included in the definition of loan and thus are permitted assets for loan securitizations under the current exclusion.'' [116] That same commenter made a comment on the 2020 proposal urging the agencies to reconsider explicitly including operating leases and leased properties in the loan securitization exclusion.[117] This commenter asserted that unless the agencies specifically revise the definition of ''rights or other assets'' to explicitly include leased property, then securitization vehicles with operating leases that rely on the residual property value after expiration of the lease to support their asset-backed securities would not be able to qualify under the loan securitization exemption, despite the 2013 rule's provisions for special units of beneficial interest and collateral certificates.

Consistent with the 2020 proposal, the agencies are not separately listing leases within the loan securitization exclusion because leases are included in the definition of loan and thus are permitted assets for loan securitizations under the current exclusion. The agencies are also not modifying the definition of ''rights or other assets'' to explicitly include leased property, as any residual value of such leased property upon expiration of an operating lease should meet the requirements to constitute an asset that is related or incidental to purchasing or otherwise acquiring and holding loans.

3. Public Welfare and Small Business Funds

i. Public Welfare Funds

Section 13(d)(1)(E) of the BHC Act permits, among other things, a banking entity to make and retain investments that are designed primarily to promote the public welfare of the type permitted under 12 U.S.C. 24(Eleventh).[118] Consistent with the statute, the implementing regulations exclude from the definition of ''covered fund'' issuers that make investments that are designed primarily to promote the public welfare, of the type permitted under paragraph 11 of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs) (the public welfare investment exclusion).[119]

The 2020 proposal noted that the OCC's regulations implementing 12 U.S.C. 24(Eleventh) provide that investments that receive consideration as qualified investments under the regulations implementing the Community Reinvestment Act (CRA) are public welfare investments for national banks.[120] The 2020 proposal requested comment on whether any change should be made to clarify that all permissible public welfare investments, under any agency's regulation, are excluded from the covered fund restrictions.[121] The 2020 proposal specifically asked whether investments that would receive consideration as qualified investments under the CRA should be excluded from the definition of covered fund, either by incorporating these investments into the public welfare investment exclusion or by establishing a new exclusion for CRA-qualifying investments.[122]

In addition, the 2020 proposal requested comment on whether Rural Business Investment Companies (RBICs) are typically excluded from the definition of ''covered fund'' because of the public welfare investment exclusion or another exclusion and on whether the agencies should expressly exclude RBICs from the definition of covered fund.[123] RBICs are licensed under a program designed to promote economic development and job creation in rural communities by investing in companies involved in the production, processing, and supply of food and agriculture-related products.[124]

The Tax Cuts and Jobs Act established the ''opportunity zone'' program to provide tax incentives for long-term investing in designated economically distressed communities.[125] The program allows taxpayers to defer and reduce taxes on capital gains by reinvesting gains in ''qualified opportunity funds'' (QOF) that are required to have at least 90 percent of their assets in designated low-income zones.[126] The 2020 proposal requested comment on whether many or all QOFs would meet the terms of the public welfare investment exclusion and on whether the agencies should expressly exclude QOFs from the definition of covered fund.[127]

Commenters generally supported clarifying that funds that make investments that qualify for consideration under the CRA qualify for the public welfare investment exclusion.[128] Commenters noted that this clarification would be consistent with the OCC's regulations concerning public welfare investments and the CRA, provide greater certainty, and avoid unnecessarily chilling public welfare investment activities.[129] One commenter stated that some banking entities have been reluctant to invest in certain community development funds due to uncertainty as to whether these funds were covered funds.[130] This commenter stated that explicitly excluding funds that qualify for consideration under the CRA from the definition of covered fund would eliminate this uncertainty and would help support the type of community development efforts that the public welfare investment exclusion was designed to promote.[131] In addition, some commenters recommended excluding funds that qualify for the public welfare investment exclusion from the definition of ''banking entity.'' [132]

Commenters also generally favored explicitly excluding RBICs and QOFs from the definition of ''covered fund,'' either by adopting new exclusions, or by clarifying the scope of the public welfare investment exclusion.[133] Commenters stated that explicitly excluding these funds from the definition of ''covered fund'' would be consistent with the statutory provision permitting public welfare investments. Commenters stated that RBICs and QOFs must make investments that are clearly designed primarily to promote the public welfare because they are required to invest primarily in ways that promote job creation in rural communities (which may have significant low- and moderate-income populations or be economically disadvantaged and in need of revitalization or stabilization) and in economically distressed communities, respectively.[134] Commenters stated that

[116] *Id.*

[117] SFA.

[118] *See* 12 U.S.C. 1851(d)(1)(E).

[119] Implementing regulations § ____.10(c)(11)(ii)(A).

[120] *See* 85 FR 12130; 12 CFR 24.3.

[121] *See* 85 FR 12130 (noting that such a change could provide additional certainty regarding community development investments made through fund structures).

[122] *See id.*

[123] *See id.*

[124] *See id.*

[125] *See id.*

[126] *See id.*

[127] *See id.*

[128] *See* SIFMA; FSF; BPI; ABA; PNC; Community Development Venture Capital Alliance (CDVCA); IIB; and Data Boiler (stating that incorporating the CRA public welfare exemption may ease some challenges faced by communities during the current COVID pandemic, but all PWI should not be excluded).

[129] *See* SIFMA; FSF; and CDVCA.

[130] *See* CDVCA.

[131] *See id.*

[132] *See* SIFMA; BPI; ABA; and IIB.

[133] *See* SIFMA; FSF; ABA (addressing QOFs); and Small Business Investor Alliance (SBIA) (addressing RBICs).

[134] *See* SIFMA and FSF.

certain RBICs and QOFs qualify for the public welfare investment exclusion, but providing an express exclusion for these funds would reduce uncertainty and associated compliance burdens and would encourage banking entities to provide capital to projects that promote economic development in rural and low-income communities.[135] One commenter stated that RBICs and QOFs engage in investments that are substantively similar or identical to those of public welfare investment funds that are already excluded from the definition of covered fund and of the type that Congress recognized that section 13 of the BHC Act was not designed to prohibit.[136] Another commenter stated that explicitly excluding RBICs would result in the provision of valuable expertise and services to RBICs and provide funding and assistance to small businesses and low- and moderate-income communities.[137] One commenter expressed skepticism about providing a new exclusion for RBICs and QOFs but suggested that certain of these funds may currently qualify for the public welfare investment exclusion.[138] Another commenter stated that it is not necessary to expressly exclude QOFs from the definition of covered fund, noting that these funds should be of the type primarily intended to promote the public welfare of low- and moderate-income areas and should therefore qualify for the current public welfare investment exclusion.[139]

After carefully considering the comments received, the agencies are revising the public welfare investment exclusion to explicitly incorporate funds, the business of which is to make investments that qualify for consideration under the Federal banking agencies' regulations implementing the CRA.[140] Explicitly excluding these types of investments from the definition of covered fund clarifies and gives full effect to the statutory exemption for public welfare investments.[141] In addition, this clarification will reduce uncertainty and will facilitate public welfare investments by banking entities.

The agencies are also adopting explicit exclusions from the definition of covered fund for RBICs and QOFs in § ____.10(c)(11) of the final rule. These types of funds were created by Congress to promote development in rural and low-income communities, and, due to their similarity to SBICs and public welfare investments, the agencies believe that section 13 of the BHC Act was not intended to restrict the types of funds that engage in those activities. RBICs are companies licensed under the Rural Business Investment Program, a program designed to promote economic development and the creation of wealth and job opportunities among individuals living in rural areas and to help meet the equity capital investment needs primarily of smaller enterprises located in such areas.[142] Likewise, QOFs were developed as part of a program to promote long-term investing in designated economically distressed communities and are required to have at least 90 percent of their assets in designated low-income zones.[143] Congress created RBICs and QOFs to encourage investment in rural areas, small enterprises, and low-income areas. Providing an explicit exclusion for these funds in the implementing regulations gives effect to section 13 of the BHC Act's provision permitting public welfare investments and avoids chilling the activities of funds that were not the target of section 13 of the BHC Act.[144] Although many of these funds may already qualify for the public welfare investment exclusion, the agencies are explicitly excluding these funds from the definition of covered fund to reduce uncertainty and compliance burden. Thus, under the final rule, a covered fund does not include an issuer that has elected to be regulated or is regulated as a RBIC, as described in 15 U.S.C. 80b–3(b)(8)(A) or (B), or that has terminated its participation as a RBIC in accordance with 7 CFR 4290.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets) after such termination.[145] Likewise, under the final rule, a covered fund does not include an issuer that is a QOF, as defined in 26 U.S.C. 1400Z–2(d).[146]

The final rule does not exclude funds that qualify for the public welfare investment exclusion from the definition of ''banking entity'' as requested by some commenters.[147] The term ''banking entity'' is specifically defined in section 13 of the BHC Act.[148] In addition, the agencies do not believe that applying the definition of banking entity places an undue burden on banking entities' public welfare investments. The agencies believe that banking entities are able to design their permissible public welfare investments so as not to cause the investment fund to become a banking entity. For public welfare investment funds that are banking entities, the agencies believe that the burden-reducing amendments adopted in this final rule and the 2019 amendments should mitigate concerns about compliance burdens.

ii. Small Business Investment Companies

Consistent with section 13 of the BHC Act,[149] the implementing regulations exclude from the definition of ''covered fund'' SBICs and issuers that have received notice from the Small Business Administration to proceed to qualify for a license as an SBIC, which notice or license has not been revoked.[150] The agencies proposed revising the exclusion for SBICs to clarify how the exclusion would apply to SBICs that surrender their licenses during wind-down phases.[151] Specifically, the agencies proposed revising the exclusion for SBICs to apply explicitly to an issuer that has voluntarily surrendered its license to operate as an SBIC in accordance with 13 CFR 107.1900 and does not make new investments (other than investments in cash equivalents) after such voluntary

[135] *See* SIFMA and FSF.

[136] *See* SIFMA.

[137] *See* SBIA.

[138] *See* Data Boiler.

[139] *See* PNC.

[140] Final rule § ____.10(c)(11)(ii)(A).

[141] *See* 12 U.S.C. 1851(d)(1)(E). A banking entity must have independent authority to make a public welfare investment. For example, a banking entity that is a state member bank may make a public welfare investment to the extent permissible under 12 U.S.C. 338a and 12 CFR 208.22.

[142] *See, e.g.,* Rural Business Investment Company (RBIC) Program, 85 FR 16519, 16520 (Mar. 24, 2020).

[143] *See* 26 U.S.C. 1400Z–2(d).

[144] *See* 12 U.S.C. 1851(d)(1)(E); 156 Cong. Rec. S5896 (daily ed. July 15, 2010) (Statement of Sen. Merkley) (noting that Section 13(d)(1)(E) permits investments ''of the type'' permitted under 12 U.S.C. 24 (Eleventh), including ''a range of low-income community development and other projects,'' but ''is flexible enough to permit the [agencies] to include other similar low-risk investments with a public welfare purpose'').

[145] Final rule § ____.10(c)(11)(iii). As with SBICs, discussed below, the final rule contemplates that an issuer that ceases to be a RBIC during wind-down may continue to qualify for the exclusion from the definition of ''covered fund'' for RBICs if the issuer satisfies certain conditions designed to prevent abuse.

[146] Final rule § ____.10(c)(11)(iv). As with other types of issuers excluded from the covered fund definition, a banking entity must have independent authority to invest in a QOF.

[147] *See* SIFMA and BPI.

[148] 12 U.S.C. 1851(h)(1).

[149] *See* 12 U.S.C. 1851(d)(1)(E) (permitting investments in SBICs).

[150] *See* implementing regulations § ____.10(c)(11)(i).

[151] *See* 85 FR 12131.

surrender.[152] The agencies explained that applying the exclusion to an issuer that has surrendered its SBIC license is appropriate because of the statutory exemption for investments in SBICs and because banking entities may otherwise become discouraged from investing in SBICs due to concerns that an SBIC may become a covered fund during its wind-down phase.[153] The agencies further noted that the proposed revisions included a number of requirements designed to ensure that the exclusion would not be abused.[154] In particular, the exclusion would apply only to an issuer that voluntarily surrenders its license in accordance with 13 CFR 107.1900 and that does not make any new investments (other than investments in cash equivalents).[155]

Most commenters that directly addressed the 2020 proposal's revisions concerning SBICs supported the proposed revisions, stating that the proposed revisions would provide greater certainty to banking entities wishing to invest in SBICs and would increase investment in small businesses.[156] One commenter stated that revising the exclusion for SBICs would prevent a banking entity from being forced to sell an interest in an SBIC that became a covered fund for reasons outside of the banking entity's control.[157] Commenters further noted that the proposed revisions included sufficient safeguards against evasion and did not present safety or soundness concerns.[158] One commenter recommended against revising the exclusion from the definition of covered fund for SBICs. This commenter expressed concern about frequent buying and selling of SBICs and noted that section 13 of the BHC Act and its implementing regulations do not prohibit a banking entity from lending to small businesses.[159] The commenter further expressed concern that an SBIC that surrenders its license may be doing so because it has failed or no longer wishes to comply with the Small Business Administration's regulations.[160]

After carefully considering the comments received, the agencies are adopting the revisions to the exclusion from the definition of covered fund for SBICs, as proposed.[161] The revisions will provide greater certainty to banking entities, give full effect to the provision of section 13 of the BHC Act that permits investments in SBICs, and support capital formation for small businesses. In response to one commenter's concerns regarding the exclusion for SBICs,[162] the agencies note that a banking entity's investment in an SBIC must comply with all applicable laws and regulations, including the prohibition against proprietary trading under section 13 of the BHC Act and its implementing regulations. Furthermore, as noted above, the revised exclusion for SBICs includes safeguards designed to prevent abuse or evasion. In particular, the exclusion would only apply to an issuer that has voluntarily surrendered its license to operate as an SBIC in accordance with 13 CFR 107.1900 and that does not make new investments (other than investments in cash equivalents) after such voluntary surrender.

C. Additional Covered Fund Exclusions

In addition to modifying certain existing exclusions, the agencies are creating four new exclusions from the definition of ''covered fund'' to better tailor the provision to the types of entities that section 13 was intended to cover. These exclusions are for credit funds, venture capital funds, family wealth management vehicles, and customer facilitation vehicles.

General Comments

Many commenters were broadly supportive of the proposed new exclusions from the definition of ''covered fund.'' [163] Some commenters recommended adopting additional exclusions for an array of fund types and situations, including for tender bond vehicles,[164] ownership interests erroneously acquired or retained,[165] certain real estate funds,[166] and funds in their seeding period.[167] The agencies are declining to adopt these suggested exclusions because the requested actions are outside the scope of the current rulemaking. In addition, one commenter urged the agencies to redefine the definition of ''covered fund,'' to rely on a characteristics-based approach.[168] The agencies decline to revise the definition of ''covered fund'' for the reasons articulated in the preamble to the 2013 rule.[169]

1. Credit Funds

i. Background and 2020 Proposal

In the preamble to the 2013 rule, the agencies declined to establish an exclusion from the definition of covered fund for funds that make loans, invest in debt, or otherwise extend the type of credit that banking entities may provide directly under applicable banking law (credit funds).[170] The agencies cited concerns about whether credit funds could be distinguished from private equity funds and hedge funds and the possible evasion of the requirements of section 13 of the BHC Act through the availability of such an exclusion. In addition, the agencies suggested that some credit funds would be able to operate using other exclusions from the definition of covered fund in the 2013 rule, such as the exclusion for joint ventures or the exclusion for loan securitizations.[171]

However, commenters on the 2018 proposal noted that many credit funds have not been able to utilize the joint venture and loan securitization exclusions. In response, the agencies included in the 2020 proposal a specific exclusion for credit funds. Under the 2020 proposal, a credit fund would have been an issuer whose assets consist solely of:

- Loans;
- Debt instruments;
- Related rights and other assets that are related or incidental to acquiring, holding, servicing, or selling loans, or debt instruments; and
- Certain interest rate or foreign exchange derivatives.[172]

The proposed exclusion would have been subject to certain additional requirements to reduce evasion concerns and help ensure that banking entities invest in, sponsor, or advise credit funds in a safe and sound manner. For example, the proposed exclusion would have imposed (1) certain activity requirements on the credit fund, including a prohibition on proprietary trading; [173] (2) disclosure and safety and soundness requirements on banking entities that sponsor or serve as an advisor for a credit fund; [174] (3) safety and soundness requirements on all banking entities that invest in or have certain relationships with a credit

[152] *See id.*
[153] *See id.;* 12 U.S.C 1851(d)(1)(E).
[154] *See* 85 FR 12131.
[155] *See id.*
[156] *See* SIFMA; BPI; ABA; PNC; and SBIA.
[157] *See* SBIA.
[158] *See* SIFMA; BPI; and SBIA.
[159] *See* SIFMA; BPI; and SBIA.
[160] *See* Data Boiler.
[161] *See* final rule § ____10(c)(11)(i).
[162] *See* Data Boiler.
[163] *E.g.,* SIFMA; JBA; Credit Suisse; and SAF.
[164] SIFMA.
[165] SIFMA and BPI.
[166] IAA.
[167] ABA.
[168] JBA.
[169] *See* 79 FR 5671.
[170] *See* 79 FR 5705.
[171] *Id.*
[172] 2020 proposal § ____.10(c)(15)(i).
[173] 2020 proposal § ____.10(c)(15)(ii).
[174] 2020 proposal § ____.10(c)(15)(iii).

fund; [175] and (4) restrictions on the banking entity's investment in, and relationship with, a credit fund.[176] The proposed exclusion also would have permitted a credit fund to receive and hold a limited amount of equity securities (or rights to acquire equity securities) that were received on customary terms in connection with the credit fund's loans or debt instruments.[177]

ii. Comments

The agencies requested comment on all aspects of the proposed credit fund exclusion. In addition, the agencies solicited comment on specific provisions of the proposed exclusion, including the permissibility of certain assets and requirements related to the activities of the credit fund and the relationship between a banking entity and a credit fund.[178]

General

Commenters were generally supportive of adopting an exclusion for credit funds, and several commenters suggested specific revisions to the proposed exclusion.[179] Several commenters supportive of the 2020 proposal urged the agencies not to adopt any further limitations on the proposed exclusion and indicated that the proposed exclusion would not increase the risk of evasion of the requirements of section 13 of the BHC Act.[180] Two commenters expressed general opposition to or concern about the proposed credit fund exclusion.[181]

Asset Requirements

Commenters were generally supportive of allowing a credit fund to invest broadly in loans and debt instruments, certain related assets, and certain derivatives.[182] One commenter recommended against delineating between permissible and non-permissible types of loans and debt instruments, arguing that credit funds should be able to extend credit to the same degree as would be permitted for the banking entity to extend directly.[183] Another commenter encouraged the agencies to clarify and expand the definition of debt instrument and derivatives, to include all tranches of debt, collateralized loan and collateralized debt obligations, and any derivatives related to hedging credit risk, such as credit default swaps and total return swaps.[184] In addition, a commenter suggested clarifying that no specific credit standard applies to loans held by a credit fund.[185] One commenter also urged the agencies to establish a safe harbor to the permissible asset restrictions for banking entities that rely, in good faith, on a representation by the credit fund that the credit fund only invests in permissible assets.[186]

Two commenters recommended limiting permissible assets to only loans or debt instruments, and not equity.[187] In contrast, a range of commenters argued that allowing a credit fund to receive certain assets, like equity, related to an extension of credit would promote the sale of loans and extensions of credit.[188] Some of these commenters suggested that taking equity as partial consideration for extending credit is commonplace in the debt and loan markets and that such a provision could ensure that credit funds are able to facilitate loan and debt workouts and restructurings, a critical financial intermediation function.[189] Most commenters supportive of the 2020 proposal were generally opposed to a quantitative limit on the amount of equity securities (or rights to acquire an equity security) received on customary terms in connection with such loans or debt instruments that could be held by a credit fund, citing compliance costs and diminished flexibility,[190] but some commenters indicated that a limitation of 20 or 25 percent of total assets could be acceptable if the agencies were to impose a limit.[191]

Commenters supportive of allowing credit funds to hold certain related assets, such as equity, in connection with an extension of credit suggested that the provision would not raise significant safety and soundness or evasion concerns. For example, one commenter claimed that such a provision would not raise the risk of evasion, in part, because equity options received as consideration generally expire unexercised.[192] Other commenters argued that the activity requirements of the exclusion would prevent a credit fund from becoming actively involved in the purchase and sale of equity instruments.[193] Another commenter suggested that the agencies could impose a requirement that non-loan or non-debt assets be acquired on arms-length terms and adhere to bank safety and soundness standards.[194]

Separately, several commenters recommended allowing excluded credit funds to hold any type of asset, up to a certain percentage of aggregate assets, either 20 or 25 percent of a credit fund's total assets.[195] These commenters asserted that permitting a credit fund to own equity securities and other assets would help the fund more effectively provide credit, without altering the character of the credit fund, and would reduce compliance burdens associated with launching and operating a credit fund.[196] In addition, these commenters claimed that a limited bucket for non-loan and non-debt assets would be consistent with the ability of banking entities and some business development companies to invest in equity.[197]

Banking Entity and Issuer Requirements

Generally, commenters either agreed that certain restrictions to ensure that a credit fund is actually engaged in prudently providing credit and credit

[175] 2020 proposal § ____.10(c)(15)(iv).

[176] 2020 proposal § ____.10(c)(15)(v).

[177] 2020 proposal § ____.10(c)(15)(i)(C)(*1*)(*iii*).

[178] *See* 85 FR 12133.

[179] *E.g.,* CCMC; AIC; SIFMA; FSF; ABA; Arnold & Porter; and Goldman Sachs.

[180] *E.g.,* SIFMA; Credit Suisse; Goldman Sachs; and Arnold & Porter.

[181] Better Markets and Data Boiler. One of these commenters suggested that banking entities should instead rely on the exclusions for joint ventures and loan securitizations. Data Boiler.

[182] *E.g.,* SIFMA; Arnold & Porter; and ABA. One commenter also noted that the permissible holding period for debt previously contracted varies depending on applicable regulations and suggested that the agencies specify the holding period for debt previously contracted assets owned by a credit fund and provide for an extension process. Arnold & Porter.

[183] SIFMA. The same commenter also urged the agencies to permit credit funds to hold commodity forward contracts, which the commenter argued may be an appropriate hedge for extensions of credit to agricultural businesses. SIFMA.

[184] Credit Suisse. *See also* Arnold & Porter (recommending expanding the types of permissible derivatives, to allow for more effective hedging and easier disposal of portfolio assets).

[185] ABA.

[186] Arnold & Porter.

[187] Data Boiler and Better Markets. One of these commenters argued that the inclusion of non-loan instruments would be contrary to the purpose of section 13 of the BHC Act. Data Boiler. As indicated by the agencies in the preamble to the 2020 proposal, taking limited amounts of non-loan or debt assets as consideration for an extension of credit is common and is a permitted practice for insured depository institutions. Therefore, the agencies believe it would not be inconsistent with section 13 of the BHC Act to facilitate the sale of loans by establishing a credit fund exclusion that allows a credit fund to hold a limited amount of certain equity instruments related to extensions of credit. See also the discussion about permitting excluded loan securitizations to hold a small amount of non-loan assets, *supra* Section IV.B.2 (Loan Securitizations).

[188] *E.g.,* SIFMA; Credit Suisse; ABA; and Arnold & Porter.

[189] *E.g.,* SIFMA; Credit Suisse; and Arnold & Porter.

[190] SIFMA; FSF; CCMC; AIC; ABA; and Goldman Sachs.

[191] SIFMA and CCMC.

[192] Arnold & Porter.

[193] Goldman Sachs and FSF.

[194] ABA.

[195] SIFMA; FSF; Credit Suisse; ABA; and Goldman Sachs. One commenter also suggested a formula for determining the cap. Goldman Sachs.

[196] *E.g.,* SIFMA and Goldman Sachs.

[197] *Id.*

intermediation and is not operated for the purpose of evading the provisions of section 13 of the BHC Act were appropriate or did not object to the inclusion of these requirements.[198] Several commenters, however, offered revisions to the activities, sponsor or advisor, banking entity, or investment and relationship limit requirements. For example, several commenters requested clarification on the prohibition on proprietary trading by an excluded credit fund contained in § ____.10(c)(15)(ii)(A) of the 2020 proposal. One commenter suggested that the definition of proprietary trading for a credit fund should depend on the definition used by the banking entity.[199] Another commenter encouraged the agencies to incorporate the exclusions and exemptions from the prohibition on proprietary trading into the credit fund exclusion's prohibition on proprietary trading.[200] A third commenter recommended making explicit that exercising rights for certain related assets, such as an equity warrant, is not proprietary trading.[201]

Commenters also requested revisions to and clarification about the limits on a banking entity's investment in, and relationship with, a credit fund. One commenter argued that the imposition of § ____.14 of the implementing regulations (which imposes limitations on the relationship between a banking entity and a fund it sponsors or advises) would be duplicative of (1) the requirement that the banking entity not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the credit fund and (2) certain conflict of interest, high-risk, and safety and soundness restrictions.[202] Another commenter claimed that there was little benefit to imposing the requirements of § ____.14 (described above) and § ____.15 (which imposes certain material conflicts of interest, high-risk investments, and safety and soundness and financial stability requirements on permitted covered fund activities) of the implementing regulations in the context of credit funds and suggested that the partial application of § ____.14, in particular, could lead to unexpected and inappropriate outcomes, such as allowing a banking entity to invest in the equity of a credit fund, but not the debt instruments issued by that same credit fund.[203] That same commenter also recommended eliminating § ____.10(c)(15)(v)(B) of the 2020 proposal—which would have required that the banking entity's investment in, and relationship with, the credit fund be conducted in compliance with, and subject to, applicable banking laws and regulations—because applicable banking laws and regulations apply regardless of the banking entity's use of the credit fund exclusion.[204]

In addition, a commenter argued that banking entities that serve as investment advisers or commodity trading advisors to credit funds should not be subject to the disclosure and safety and soundness requirements of § ____.10(c)(15)(iii) of the 2020 proposal since investment advisers and commodity trading advisors who do not otherwise sponsor or invest in a fund are generally not subject to section 13 of the BHC Act. The commenter argued that § ____.10(c)(15)(iii) of the 2020 proposal would impose differing requirements on a credit fund depending on whether the investment adviser or commodity trading advisor was an insured depository institution or a bank holding company. That commenter also claimed that the portfolio requirements in § ____.10(c)(15)(iv)(B) of the 2020 proposal could require banking entities to establish complex compliance programs to assess credit fund compliance with state and foreign laws and that the agencies should limit the scope of the provision to only federal banking laws and regulations.[205]

Finally, one commenter contended that the application of certain requirements in the exclusion is contingent on the type of banking entity that invests in or sponsors a credit fund and urged the agencies to make explicit that only the identity of the sponsor of the credit fund, and not its affiliates or third-party investors, determines which portfolio quality and safety and soundness requirements apply to the credit fund.[206] More generally, this commenter asked the agencies to make explicit in the preamble to the final rule that the actions of unaffiliated, third-party banking entities do not affect whether a banking entity may invest in a fund.[207]

Other Comments

Commenters also submitted several miscellaneous comments about the proposed exclusion for credit funds. One commenter requested that the agencies clarify the definition of asset-backed securities as used in the proposed credit fund exclusion and the current loan securitization exclusion.[208] That same commenter also urged the agencies to revise the proposed credit fund exclusion to allow banking entities with more stringent credit requirements, such as insured depository institutions, to invest in credit funds that hold distressed debt.[209]

Finally, the 2020 proposal requested comment on whether to combine the proposed credit fund exclusion with the loan securitization exclusion. Commenters were generally opposed to combining the two exclusions, citing different classes of assets in which the two types of issuers invest and a fundamental difference in structure (loan securitizations issue asset-backed securities, while credit funds do not).[210] In addition, one commenter argued that while combining the two exclusions would increase the simplicity of the rule, such an amalgamated exclusion could result in increased compliance burdens for issuers who are accustomed to the lack of credit requirements in the current loan securitization exclusion.[211]

iii. Final Exclusion

After consideration of the comments, the agencies are adopting the credit fund exclusion as proposed, with certain modifications. The agencies believe that the credit fund exclusion in the final rule (1) addresses the application of the covered fund provisions to credit-related activities that certain banking entities are permitted to engage in directly and (2) is consistent with Congress's intent that section 13 of the BHC Act limit banking entities' investment in and relationships with hedge funds and private equity funds, but not limit or restrict banking entities' ability to extend credit.[212] The agencies also believe that the credit fund exclusion in the final rule, with the eligibility criteria described below, will address concerns the agencies expressed in the preamble to the 2013

[198] *E.g.,* SIFMA; Better Markets; FSF; and Goldman Sachs. One commenter also indicated that the disclosure requirement for banking entities that sponsor or advise funds is appropriate. Arnold & Porter.

[199] SIFMA. For example, the commenter suggested that a credit fund sponsored by a banking entity subject to the market risk rule should be permitted to use the definitions of proprietary trading and trading account in § ____.3(b)(1)(ii).

[200] FSF.

[201] Arnold & Porter.

[202] SIFMA.

[203] Arnold & Porter.

[204] Arnold & Porter.

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] SIFMA; FSF; CCMC; Credit Suisse; and Data Boiler.

[211] Arnold & Porter.

[212] *See* 12 U.S.C. 1851(g)(2), (h)(2). Paragraph (g)(2) of section 13 of the BHC Act makes clear that the Volcker rule is not intended to impede banking entities' ability to extend credit by, for example, selling loans or securitize loans. *See* 12 U.S.C. 1851(g)(2).

rule about the ability to administer an exclusion for credit funds and the potential evasion of section 13 of the BHC Act.[213] Banking entities already have experience using and complying with the loan securitization exclusion. Establishing an exclusion for credit funds based on the framework provided by the loan securitization exclusion allows banking entities to provide traditional extensions of credit regardless of the specific form, whether directly via a loan made by a banking entity, or indirectly through an investment in or relationship with a credit fund that transacts primarily in loans and certain debt instruments.

The credit fund exclusion limits the universe of potential funds that can rely on the exclusion by clearly specifying the types of activities in which those funds may engage. Excluded credit funds can transact in or hold only loans; debt instruments that would be permissible for the banking entity relying on the exclusion to hold directly; certain rights or assets that are related or incidental to the loans or debt instruments, including equity securities (or rights to acquire an equity security) received on customary terms in connection with such loans or debt instruments; and certain interest rate and foreign exchange derivatives. The credit fund exclusion, with these eligibility criteria, should not raise evasion concerns. Similarly, the agencies' expectations regarding the amount of permissible equity securities (or rights to acquire an equity security) held and the requirement that the credit fund not engage in activities that would constitute proprietary trading should help to ensure that the extensions of credit, whether directly originated or acquired from a third party, are held by the credit fund for the purpose of facilitating lending and not for the purpose of evading the requirements of section 13. Finally, the restrictions on guarantees and other limitations should eliminate the ability and incentive for either the banking entity sponsoring a credit fund or any affiliate to provide additional support beyond the ownership interest retained by the sponsor. Thus, the agencies expect that, together, the criteria for the credit fund exclusion will prevent a banking entity from having any incentive to bail out such funds in periods of financial stress or otherwise expose the banking entity to the types of risks that the covered fund provisions of section 13 were intended to address.

Consistent with commenters' suggestions, the agencies are keeping separate the credit fund exclusion and the loan securitization exclusion because the structures and purposes of those two types of issuers differ sufficiently to warrant different requirements. For example, loan securitizations and credit funds have different asset composition and different financing and legal structures. Therefore, the agencies are finalizing a credit fund exclusion separate from the loan securitization exclusion.

Asset Requirements

Under the final rule, a credit fund, for the purposes of the credit fund exclusion, is an issuer whose assets consist solely of:

- Loans;
- Debt instruments;
- Related rights and other assets that are related or incidental to acquiring, holding, servicing, or selling loans, or debt instruments; and
- Certain interest rate or foreign exchange derivatives.[214]

Several provisions of the exclusion are similar to and modeled on conditions in the loan securitization exclusion to ease compliance burdens. For example, any derivatives held by the credit fund must relate to loans, permissible debt instruments, or other rights or assets held and reduce the interest rate and/or foreign exchange risks related to these holdings.[215] In addition, any related rights or other assets held that are securities must be cash equivalents, securities received in lieu of debts previously contracted with respect to loans held or, unique to the credit fund exclusion, equity securities (or rights to acquire equity securities) received on customary terms in connection with the credit fund's loans or debt instruments.[216]

In the 2020 proposal, the agencies requested comment on whether to impose a limit on the amount of equity securities (or rights to acquire equity securities) that may be held by an excluded credit fund.[217] After a review of the comments and further deliberation, the agencies are not adopting a quantitative limit on the amount of equity securities (or rights to acquire equity securities) that may be held by an excluded credit fund. Any such equity securities or rights are limited by the requirements that they be (a) received on customary terms in connection with the fund's loans or debt instruments and (b) related or incidental to acquiring, holding, servicing, or selling those loans or debt instruments. The agencies generally expect that the equity securities or rights satisfying those criteria in connection with an investment in loans or debt instruments of a borrower (or affiliated borrowers) would not exceed five percent of the value of the fund's total investment in the borrower (or affiliated borrowers) at the time the investment is made. The agencies understand that the value of those equity securities or other rights may change over time for a variety of reasons, including as a result of market conditions and business performance, as well as more fundamental changes in the business and the credit fund's corresponding management of the investment (*e.g.,* exchanges of debt instruments for equity in connection with mergers and restructurings or a disposition of all portion of the credit investment without a corresponding disposition of the equity securities or rights due to differences in market conditions or other factors). Accordingly, the agencies can foresee various circumstances where the relative value of such equity securities or rights in a borrower (or affiliated borrowers) would over the life of the investment exceed five percent on a basis consistent with the requirements. Nonetheless, the agencies expect that the fund's exposure to equity securities (or other rights), individually and collectively and when viewed over time, would be managed on a basis consistent with the fund's overall purpose.

The agencies are also not imposing additional restrictions on the types of equity securities (or rights to acquire an equity security) that a credit fund may hold. The final rule prevents a banking entity from relying on the credit fund exclusion unless any debt instruments and equity securities (or rights to acquire an equity security) held by the credit fund and received on customary terms in connection with the credit fund's loans or debt instruments are permissible for the banking entity to acquire and hold directly and a sponsor of a credit fund must ensure that the credit fund complies with certain safety and soundness standards.[218] Combined with the prohibition on proprietary trading by a credit fund,[219] these limitations are expected to prevent evasion of section 13 of the BHC Act and should be sufficient to prevent

[213] *See* 79 FR 5705.

[214] Final rule § ____.10(c)(15)(i).

[215] Final rule § ____.10(c)(15)(i)(D).

[216] Final rule § ____.10(c)(15)(i)(C). In a minor change from the 2020 proposal, the agencies are making clear that rights or other assets held under paragraph (c)(15)(i)(C) of that section may not include any derivative, other than a derivative that meets the requirements of paragraph (c)(15)(i)(D) of that section.

[217] 85 FR 12133.

[218] Final rule § ____.10(c)(15)(iv)(B), (iii)(B).

[219] Final rule § ____.10(c)(15)(ii)(A).

banking entities from investing in or sponsoring credit funds that hold excessively risky equity securities (or rights to acquire an equity security).[220]

The agencies are, however, clarifying that the provision allowing related rights and other assets does not separately permit the holding of derivatives. The preamble to the 2020 proposal made clear that ''any derivatives held by the credit fund must relate to loans, permissible debt instruments, or other rights or assets held, and reduce the interest rate and/or foreign exchange risks related to these holdings.'' [221] The agencies suggested then and currently believe that allowing a credit fund issuer to hold derivatives not related to interest rate or foreign exchange hedging would not be necessary to facilitate the indirect extension of credit by banking entities and may pose the very risks that section 13 of the BHC Act was intended to reach. To ensure that the credit fund exclusions does not inadvertently allow the holding of certain derivatives unrelated to interest rate and/or foreign exchange risks, the final rule explicitly excludes derivatives from permissible related right and other assets.[222]

The agencies are not adopting a broad expansion of permissible assets, as recommended by several commenters. Contrary to commenters' suggestions, allowing credit funds to hold unlimited amounts of non-debt instruments or derivatives, such as credit default or total return swaps, could present evasion concerns and is not necessary for effectuating the rule of construction.[223] The agencies believe that only those instruments that facilitate the extension of credit and directly-related hedging activities should be permitted under the exclusion. For example, allowing the unlimited holding of credit default swaps by a majority owned or sponsored credit fund could raise the risks that section 13 of the BHC Act was intended to address. Moreover, permitting excluded credit funds to invest up to 25 percent of total assets in any type of asset could turn the exclusion for credit funds into an exclusion for the type of funds that section 13 of the BHC Act was intended to address. Such a result would be contrary to section 13 of the BHC Act.

There are several additional changes recommended by commenters that the agencies are not including in the final rule. Specifically, the final rule does not:

- Allow excluded credit funds to hold commodity forward contracts. Although these contracts have legitimate value as hedging instruments, the agencies do not believe this type of hedging activity is consistent with the purpose of the exclusion for credit funds, which is to allow banking entities to share the risks of their permissible lending activities or to engage in permissible lending activities indirectly through a fund structure.
- Permit banking entities that are insured depository institutions or their operating subsidiaries to invest in credit funds through a contribution to a credit fund of troubled loans and debt previously contracted assets from the banking entity's portfolio. The conditions in the final rule are intended to ensure that a credit fund generally engages in activities that the banking entity may engage in directly and that the banking entity's investment in and relationship with the fund are conducted in a safe and sound manner. The agencies decline to deviate from these standards for any particular type of credit fund because doing so could permit activities that raise the type of concerns that section 13 of the BHC Act was intended to address.
- Further specify the holding period for securities held in lieu of debts previously contracted held by a credit fund. Generally, a banking entity may not rely on this exclusion unless any debt instruments and equity securities (or rights to acquire equity securities) held by the fund would be permissible for the banking entity to acquire and hold directly under applicable federal banking laws and regulations. However, the requirement that a banking entity be able to hold a given asset directly does not apply to securities held in lieu of debts previously contracted under the final regulations. Because a banking entity's ability to invest in or sponsor an excluded credit fund is not contingent on how long the credit fund holds securities held in lieu of debts previously contracted, the agencies do not believe it is necessary to amend the regulations to impose a specific holding period on securities held by a credit fund in lieu of debts previously contracted.[224]
- Revise or expand on the definition of debt instrument. The agencies believe that the term debt instrument already has a general meaning that is used in the marketplace and by regulators and that a new definition is unnecessary given this widely understood meaning and could cause confusion.
- Adopt a safe harbor for banking entities that rely, in good faith, on a representation by the credit fund that it only invests in permissible assets. It is the responsibility of the banking entity to ensure that it complies with section 13 of the BHC Act and the implementing regulations, and such responsibility cannot be substituted solely with a representation from a credit fund.

Activity Requirements

The agencies are adopting the activity requirements for issuers in the 2020 proposal without revision. Under the final rule, a credit fund is not a covered fund, provided that:

- The fund does not engage in activities that would constitute proprietary trading, as defined in § ____.3(b)(1)(i) of the rule, as if the fund were a banking entity; [225] and

[220] One commenter suggested requiring that equity securities (or rights to acquire an equity security) be acquired via arms-length market transactions and adhere to bank safety and soundness standards. *See* ABA. Under the final rule, a banking entity may not rely on the credit fund exclusion unless any equity securities (or rights to acquire an equity security) held by the credit fund are permissible for the banking entity to acquire and hold directly under applicable federal banking laws and regulations. Final rule § ____.10(c)(15)(iv)(B). In addition, the final rule requires that equity securities (or rights to acquire an equity security) related or incidental to acquiring, holding, servicing, or selling such loans or debt instruments must be received on customary terms in connection with such loans or debt instruments. Final rule § ____.10(c)(15)(i)(C)(*1*)(*iii*). Finally, a banking entity's investment in, and relationship with, the issuer must comply with the limitations imposed in § ____.15, as if the issuer were a covered fund. Final rule § ____.10(c)(15)(v)(A).

[221] 85 FR 12132.

[222] Final rule § ____.10(c)(15)(i)(C)(*2*).

[223] The agencies' rationale, in the preamble to the 2013 rule, for limiting the permissible assets for the loan securitization exclusion is particularly relevant. *See* 79 FR 5691 (''Under the final rule as adopted, an excluded loan securitization would not be able to hold derivatives that would relate to risks to counterparties or issuers of the underlying assets referenced by these derivatives because the operation of derivatives, such as these, that expand potential exposures beyond the loans and other assets, would not in the Agencies' view be consistent with the limited exclusion contained in the rule of construction under section 13(g)(2) of the BHC Act, and could be used to circumvent the restrictions on proprietary trading and prohibitions in section 13(f) of the BHC Act. The Agencies believe that the use of derivatives by an issuing entity for asset-backed securities that is excluded from the definition of covered fund under the loan securitization exclusion should be narrowly tailored to hedging activities that reduce the interest rate and/or foreign exchange risks directly related to the asset-backed securities or the loans supporting the asset-backed securities because the use of derivatives for purposes other than reducing interest rate risk and foreign exchange risks would introduce credit risk without necessarily relating to or involving a reduction of interest rate risk or foreign exchange risk.'').

[224] The agencies note that banking entities must otherwise comply with applicable law. *See infra, Additional Banking Entity Requirements.*

[225] Final rule § ____.10(c)(15)(ii)(A).

• The fund does not issue asset-backed securities.[226]

The agencies decline to adopt changes recommended by commenters because the agencies believe the activity requirements are clear and appropriate. The first provision explicitly references the prohibition on proprietary trading by a banking entity in § ____.3 of the implementing regulations and, in particular, the short-term intent prong contained in § ____.3(b)(1)(i). For the avoidance of doubt, a credit fund would not be able to elect a different definition of proprietary trading or trading account. Varying the definition of proprietary trading depending on the type of banking entity that sponsors or invests in the credit fund, as suggested by a commenter, could result in conflicting requirements for credit funds with multiple banking entity investors and generally increase compliance burdens on credit funds. The agencies also note that activities permitted under § ____.10(c)(15) generally would not be considered proprietary trading, provided that an excluded credit fund does not purchase or sell one or more financial instruments principally for the purpose of short-term resale, benefit from actual or expected short-term price movements, realize short-term arbitrage profits, or hedge one or more of the positions resulting from the purchases or sales of financial instruments.

The agencies are not expressly incorporating the permitted activities in §§ ____.4, ____.5, and ____.6 of the implementing regulations into the text of the final credit fund exclusion. The exclusion for credit funds is intended to allow banking entities to share the risks of otherwise permissible lending activities. Accordingly, the agencies would not expect that a credit fund would be formed for the purpose of engaging, or in the ordinary course would be engaged, in the activities permitted under §§ ____.4, ____.5, and ____.6 of the implementing regulations. Nevertheless, to the extent that a credit fund seeks to engage in any of those activities as an exemption from the prohibition on engaging in proprietary trading, as defined in § ____.3(b)(1)(i) of the final rule, and does so in compliance with the requirements and conditions of the applicable exemption, then the final rule would not preclude such activities.[227] Similarly, with respect to the exclusions from the definition of proprietary trading contained in § ____.3(d) of the implementing regulations, the agencies note that the trading activities identified in § ____.3(d) are by definition not deemed to be proprietary trading, such that the performance by an excluded credit fund of those activities would not be inconsistent with the final credit fund exclusion.[228]

Finally, the agencies are not revising the definition of ''asset-backed security'' in the implementing regulations. The definition of ''asset-backed security'' in the implementing regulations specifically refers to the meaning specified in section 3(a)(79) of the Exchange Act (15 U.S.C. 78c(a)(79)).[229] This definition is used elsewhere in banking law,[230] and banking entities and others in the loan securitization industry have adapted their operations in reliance of the definition contained in the Exchange Act. Moreover, the 2013 rule included the requirement that the fund issue asset backed securities as part of the loan securitization criteria, and banking entities have become familiar with this definition, as they have implemented and utilized the exclusion.

Requirements for a Sponsor, Investment Adviser, or Commodity Trading Advisor

The agencies are adopting the proposed requirements for a sponsor, investment adviser, or commodity trading advisor to an excluded credit fund with one modification.

Investors in a credit fund that a banking entity sponsors or for which the banking entity serves as an investment adviser or commodity trading advisor may have expectations related to the performance of the credit fund that raise bailout concerns. To ensure that these investors are adequately informed of the banking entity's role in the credit fund, the final rule requires a banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an excluded credit fund to provide prospective and actual investors the disclosures specified in § ____.11(a)(8) of the implementing regulations.[231]

Second, a banking entity that acts as a sponsor, investment adviser, or commodity trading advisor must ensure that the activities of the credit fund are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly.[232] The agencies note, contrary to the suggestion of a commenter, that this provision does not apply to any investment adviser or commodity trading advisor to a credit fund who does not also sponsor or acquire an ownership interest in the credit fund. Rather, the requirements in § ____.10(c)(15) apply only to a sponsor, investment adviser, or commodity trading adviser that relies on the exclusion to sponsor or acquire an ownership interest in the credit fund. The covered fund provisions in § ____.10 of the implementing regulations only affect the operations of banking entities that, as principal, directly or indirectly, acquire or retain any ownership interest in or sponsor a covered fund.[233] Thus, the safety and soundness provision only applies to banking entities that sponsor an excluded credit fund or that have an ownership interest in an excluded credit fund and also serve as an investment adviser or commodity trading advisor to the fund.

More generally, to clarify an issue raised by some commenters, the agencies note that whether a specific banking entity may use the credit fund exclusion to make or have an otherwise impermissible investment in or relationship with a credit fund is contingent on the permissible activities of the banking entity. That is, the same fund may be a covered fund with respect to one banking entity and an excluded credit fund with respect to a different banking entity. A banking entity continues to be responsible for ensuring that its particular investment, sponsorship, or adviser activities comply with section 13 of the BHC Act and its implementing regulations. This principle applies to paragraphs (iii), (iv), and (v) of the credit fund exclusion.

[226] Final rule § ____.10(c)(15)(ii)(B).

[227] The agencies recognize, however, that compliance with certain requirements and conditions in §§ ____.4, ____.5, and ____.6 of the implementing regulations may be inapt and/or highly impractical in the context of a credit fund, particularly given the asset and activity restrictions contained in § ____.10(c)(15). For example, the exemptions for underwriting and market making-related activities in § ____.4 require that a banking entity relying on such exemptions, among other things, be licensed or registered to engage in the applicable activity in accordance with applicable law. Moreover, to the extent that a credit fund is a banking entity with significant trading assets and liabilities (*i.e.,* because it, together with its affiliates and subsidiaries, has trading assets and liabilities that equal or exceed $20 billion over the four previous calendar quarters), it also would be required to maintain a separate compliance program specific to those exemptions.

[228] Similarly, trading activity that satisfies the 60-day rebuttable presumption in § ____.3(b)(4) would be presumed not to be proprietary trading for these purposes.

[229] Implementing regulations § ____.10(d)(2).

[230] *See* 12 CFR 244 (Credit Risk Retention).

[231] Final rule § ____.10(c)(15)(iii)(A). These disclosures include, among other things, that losses are borne solely by investors and not the banking entity, that investors should examine fund documents, and that ownership interests are not insured by the FDIC or guaranteed. Final rule § ____.11(a)(8).

[232] Final rule § ____.10(c)(15)(iii)(B).

[233] Implementing regulations § ____.10(a)(1).

The final rule moves the requirement that the banking entity must comply with § ____.14 of the implementing regulations to § ____.10(c)(15)(iii). This organizational change is in response to commenters that requested the agencies confirm that that the § ____.14 limitations do not apply to a banking entity that merely invests in a credit fund, as opposed to a banking entity that sponsors or advises the fund. The agencies believe this change is appropriate because the limitations on banking entities' relationships with a covered fund in § ____.14 only apply when a banking entity serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund.[234] In addition, the agencies appreciate that mere investment by a banking entity in a credit fund does not raise the type of concerns Super 23A was intended to address, and thus the agencies are applying § ____.14 only when a banking entity acts as a sponsor, investment adviser, or commodity trading advisor to a credit fund, in each case as though the credit fund were a covered fund.[235] The limitations in § ____.15 of the implementing regulations regarding material conflicts of interest, high-risk investments, and safety and soundness and financial stability remain applicable to banking entities' investment in, and relationship with, excluded credit funds.

Additional Banking Entity Requirements

As provided in the 2020 proposal, a banking entity may not rely on the credit fund exclusion if it guarantees the performance of the fund.[236] In a revision to the 2020 proposal, under the final rule a banking entity may not rely on the credit fund exclusion if the fund holds any debt instruments or equities (or rights to acquire an equity security) received on customary terms in connection with loans or debt instruments held by the credit fund that the banking entity is not permitted to acquire and hold directly under applicable federal banking laws and regulations.[237] This change is to clarify, as suggested by a commenter, that this requirement is specific only to federal banking laws and regulations. Whether a credit fund's holdings are permissible for a banking entity to hold under state or foreign laws is not relevant to compliance with section 13 of the BHC Act. That said, the agencies note that banking entities must comply with the laws of the jurisdiction applicable to its activities and operations and should be cognizant of whether a credit fund it sponsors or in which it invests complies with the laws of the jurisdictions in which the credit fund operates.[238]

Investment and Relationship Limits

Finally, the agencies are adopting the proposed provisions related to a banking entity's investment in and relationship with a credit fund with one revision. Under the final rule, a banking entity's investment in, and relationship with, the issuer must comply with the limitations in § ____.15 of the implementing regulations regarding material conflicts of interest, high-risk investments, and safety and soundness and financial stability, in each case as though the credit fund were a covered fund.[239]

In addition, a banking entity's investment in, and relationship with, a credit fund must be conducted in compliance with, and subject to, applicable banking laws and regulations, including the safety and soundness standards applicable to the banking entity.[240] The agencies believe it is important to highlight that the requirements applicable to the banking entity also govern the ability of the banking entity to invest in a fund that relies on the credit fund exclusion as well as the types of transactions that a banking entity may conduct with such funds.[241] This means, for example, that a banking entity that invests in or has a relationship with a credit fund is subject to capital charges and other requirements under applicable banking law.[242]

2. Venture Capital Funds

i. Venture Capital Funds

2020 Proposal

The 2020 proposal included an exclusion for ''qualifying venture capital funds.'' [243] As described in the 2020 proposal, venture capital funds that provide capital to small and start-up businesses are covered funds unless they can rely on an exclusion other than section 3(c)(1) or 3(c)(7) to avoid registration under the Investment Company Act of 1940 (Investment Company Act) or qualify for an exclusion under the implementing regulations.

Under the 2020 proposal, the exclusion would have been available to ''qualifying venture capital funds,'' which the 2020 proposal defined as an issuer that meets the definition in 17 CFR 275.203(*l*)–1 (Rule 203(*l*)–1), as well as several additional criteria. Specifically, the agencies proposed to exclude from the definition of covered fund an issuer that:

- Is a venture capital fund as defined in Rule 203(*l*)–1; and
- Does not engage in any activity that would constitute proprietary trading, under § ____.3(b)(1)(i), as if it were a banking entity.

With respect to any banking entity that acts as sponsor, investment adviser, or commodity trading advisor to the issuer, and that relies on the exclusion to sponsor or acquire an ownership interest in the qualifying venture capital fund, the banking entity would have been required to:

- Provide in writing to any prospective and actual investor the disclosures required under § ____.11(a)(8), as if the issuer were a covered fund; and
- Ensure that the activities of the issuer are consistent with the safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly.

In addition, a banking entity that relied on the exclusion would not have been permitted, directly or indirectly, to guarantee, assume, or otherwise insure the obligations or performance of the issuer. Finally, the 2020 proposal would have required a banking entity's ownership interest in or relationship with a qualifying venture capital fund to:

- Comply with the limitations imposed in § ____.14 (except the banking entity may acquire and retain any ownership interest in the issuer) and § ____.15 of the implementing regulations, as if the issuer were a covered fund; and
- Be conducted in compliance with and subject to applicable banking laws and regulations, including applicable safety and soundness standards.

[234] Final rule § ____.14(a)(1).

[235] Final rule § ____.10(c)(15)(iii)(C).

[236] Final rule § ____.10(c)(15)(iv).

[237] Final rule § ____.10(c)(15)(iv)(B).

[238] For example, banking entities that are organized under state or foreign laws may, depending on the nature of the organization, need to comply with other laws.

[239] Final rule § ____.10(c)(15)(v)(A).

[240] Final rule § ____.10(c)(15)(v)(B).

[241] The agencies also note that § ____.10(c)(15)(v)(B) does not impose any additional burdens and should not generate confusion.

[242] For example, a banking entity's investment in or relationship with a credit fund could be subject to the regulatory capital adjustments and deductions relating to investments in financial subsidiaries or in the capital of unconsolidated financial institutions, if applicable. *See* 12 CFR 217.22.

[243] 2020 proposal § ____.10(c)(16).

Comments

Several commenters supported an exclusion for venture capital funds.[244] Some of these commenters argued the Volcker Rule has severely impacted investment in venture funds and businesses and that venture capital is a critical financing source for innovative businesses.[245] These commenters described their view of the positive economic impact of venture capital investment.[246] For example, these commenters said companies funded with venture capital promote research and development and job creation.[247] Similarly, several commenters argued that venture capital investments by banking entities can contribute to economic growth, innovation, and job creation.[248] At least one commenter said increased venture capital investment may increase employment by small employers.[249]

Several commenters said an exclusion for venture capital funds would benefit underserved regions where venture capital funding is not readily available currently.[250] One commenter said venture capital fund sizes are often too small for institutional investors, and banks have historically served an important source of investment for small and regional venture capital funds.[251] This commenter said the loss of banking entities as limited partners in venture capital funds has had a disproportionate impact on cities and regions with emerging entrepreneurial ecosystems areas outside of Silicon Valley and other traditional technology centers.[252] Two commenters noted that an exclusion for venture capital funds would promote investments in and financing to small businesses and start-ups in a broad range of geographic areas, industries, and sectors.[253]

Commenters said that an exclusion for venture capital funds would promote the safety and soundness of banking entities.[254] One commenter said the exclusion would allow banks to diversify and to compete with non-banking entities.[255] Commenters also said that the proposed exclusion allows banking entities to make investments indirectly through a fund structure that they could make directly[256] and incorporates criteria and activity restrictions that address any concerns about safety and soundness or evasion.[257]

Several commenters supported defining a qualifying venture capital fund by reference to Rule 203(*l*)–1 as proposed.[258] These commenters also said the rule should not incorporate additional criteria as discussed in the preamble to the 2020 proposal, such as additional limitations on revenues or qualifying investments.[259] These commenters said additional criteria are unnecessary to ensure that the fund is a bona fide venture capital fund and could unnecessarily limit the scope of qualifying venture capital funds.[260] On the other hand, one commenter said the rule should include additional criteria to ensure qualifying venture capital funds serve the public interest and do not cause the harms at which section 13 of the Bank Holding Company Act was directed.[261] One commenter argued defining venture capital fund by reference to Rule 203(*l*)–1 would be too narrow because it would exclude shares of emerging growth companies (EGCs) from being classified as qualifying investments and would not reflect certain companies that operate as venture investors and are exempt from having to register as an investment company but may not meet the technical definition of a venture capital fund under Rule 203(*l*)–1 (*e.g.,* startup incubators).[262]

While supporting an exclusion for qualifying venture capital funds generally, a few commenters recommended revisions to the proposed exclusion.[263] Some commenters proposed changes to the requirement that the fund not engage in any activity that would constitute proprietary trading, under § ____.3(b)(1)(i), as if it were a banking entity.[264] One of these commenters said qualifying venture capital funds should be permitted to engage in permitted proprietary trading consistent with §§ ____.4, ____.5, and ____.6 of the implementing regulations.[265] Another commenter said the definition of proprietary trading for funds should be the same as the definition that applies to the banking entity and that having two definitions is not reasonable or cost-effective.[266]

Commenters also supported changes to the requirement that the banking entity's investment in and relationship with qualifying venture capital funds must comply with § ____.14 of the implementing regulations. One commenter recommended eliminating the requirement that would apply § ____.14 to a banking entity's relationship with a venture capital fund.[267] This commenter said that other proposed conditions adequately address bailout and safety and soundness concerns.[268] Other commenters said the agencies should clarify that § ____.14 does not apply to a banking entity that simply invests in a qualifying venture capital fund (as opposed to a banking entity that sponsors or advises the fund).[269]

Other commenters did not support the proposed exclusion for qualifying venture capital funds.[270] One of these commenters said if the agencies do adopt an exclusion for qualifying venture capital funds, the exclusion must include additional requirements to ensure that excluded venture capital funds serve the public interest and do not cause the harms at which section 619 of the Dodd-Frank Act was directed. Specifically, this commenter said the rule should: (1) Restrict all fund investments to ''qualifying investments'' or at least very significantly restrict investments in non-qualifying investments (*e.g.,* limit them to no more than five percent of the fund's aggregate capital), (2) impose a minimum securities holding period and portfolio company revenue limitation of $35 million (or a similarly appropriate and low figure) to ensure the fund is truly focused on medium-to-long term venture (as opposed to growth stage) investments, and (3) quantitatively limit the use of leverage as a key means for distinguishing excluded venture capital funds from statutorily prohibited activities involving private equity funds.[271]

[244] Representatives Gonzalez, Steil, Stivers, Barr, Hill, Riggleman, Zeldin, Davidson, Budd, Gooden, Rose, Emmer, Timmons, Posey, Kustoff, and Loudermilk (Gonzalez et al.); Crapo; FSF; SIFMA; CCMC; IIB; Goldman Sachs; Credit Suisse; AIC; National Venture Capital Association (NVCA); ABA; and SAF.

[245] *E.g.,* Gonzalez et al. and NVCA.

[246] Gonzalez et al.; NVCA; and CCMC.

[247] *Id.*

[248] *E.g.,* FSF; SIFMA; and Goldman Sachs.

[249] SAF.

[250] FSF; SIFMA; CCMC; and NVCA.

[251] NVCA.

[252] *Id.*

[253] FSF and SIFMA.

[254] FSF; SIFMA; and Goldman Sachs.

[255] SIFMA.

[256] NVCA.

[257] FSF and SIFMA.

[258] SIFMA; NVCA; FSF; and ABA.

[259] SIFMA; NVCA; FSF; and ABA.

[260] *Id.*

[261] Better Markets.

[262] CCMC.

[263] FSF and SIFMA.

[264] FSF and SIFMA.

[265] FSF.

[266] SIFMA.

[267] SIFMA.

[268] *Id.*

[269] NVCA and ABA.

[270] Better Markets and Data Boiler. Another commenter said an exemption for venture capital funds was not supported by the 2020 proposal and not permitted under the law. Occupy.

[271] Better Markets.

Final Exclusion

The final rule adopts the proposed exclusion for qualifying venture capital funds with one clarifying change. The exclusion for qualifying venture capital funds will be available to an issuer that:

- Is a venture capital fund as defined in Rule 203(*l*)–1; and
- Does not engage in any activity that would constitute proprietary trading, under § ____.3(b)(1)(i), as if it were a banking entity. [272]

With respect to any banking entity that acts as sponsor, investment adviser, or commodity trading advisor to the issuer, and that relies on the exclusion to sponsor or acquire an ownership interest in the qualifying venture capital fund, the banking entity will be required to:

- Provide in writing to any prospective and actual investor the disclosures required under § ____.11(a)(8), as if the issuer were a covered fund;
- Ensure that the activities of the issuer are consistent with the safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly; and
- Comply with the restrictions imposed in § ____.14 (except the banking entity may acquire and retain any ownership interest in the issuer), as if the issuer were a covered fund.[273]

Like the 2020 proposal, a banking entity that relies on the exclusion may not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the issuer.[274]

Finally, like the 2020 proposal, the final rule requires a banking entity's ownership interest in or relationship with a qualifying venture capital fund to:

- Comply with the limitations imposed in § ____.15 of the implementing regulations, as if the issuer were a covered fund; and
- Be conducted in compliance with and subject to applicable banking laws and regulations, including applicable safety and soundness standards.[275]

The agencies believe the exclusion for qualifying venture capital funds will support capital formation, job creation, and economic growth, particularly with respect to small businesses and start-up companies. These banking entity investments in qualifying venture capital funds can benefit the broader financial system by improving the flow of financing to small businesses and start-ups. The agencies expect that the new exclusion for qualifying venture capital funds will provide banking entities with an additional avenue for providing funding to smaller businesses, which can help to support job creation and economic growth.

As described further below, the requirements of the exclusion, including the SEC's definition of venture capital fund in Rule 203(*l*)–1, address the concerns the agencies expressed in the preamble to the 2013 rule that the activities and risk profiles of venture capital funds are not readily distinguishable from those of funds that section 13 of the BHC Act was intended to capture. Accordingly, the agencies determined these requirements will give effect to the language and purpose of section 13 of the BHC Act without allowing banking entities to evade the requirements of section 13.

An exclusion for qualifying venture capital funds is permitted by the statutory language of section 13 of the BHC Act. As the agencies discussed in the preamble to the 2013 final rule, the language, structure, and purpose of section 13 of the BHC Act authorize the agencies to adopt a tailored definition of ''covered fund'' that focuses on vehicles used for purposes that were the target of the funds prohibition.[276] The agencies do not believe the fact that Congress expressly distinguished venture capital funds from other types of private funds in other contexts is dispositive. In this context, the agencies do not believe that the differences in how the terms private equity fund and venture capital fund are used in the Dodd-Frank Act prohibit this exclusion. Rather, the text of section 619 and the Dodd-Frank Act as a whole indicate that venture capital funds were not the intended target of the funds prohibition. The plain language of the statutory prohibition applies to hedge funds and private equity funds.[277] This language is silent with respect to venture capital funds. In Title IV of the Dodd-Frank Act, Congress mandated specific treatment for venture capital funds for purposes of the registration requirements under the Investment Advisers Act of 1940 (''Advisers Act'').[278] This provision suggests that Congress knew how to accord specific treatment for venture capital funds. Yet, Congress did not list venture capital funds among the types of funds that were restricted under section 13.[279] That Congress did not intend to prohibit venture capital fund investments is further supported by the legislative history of section 13, in which several Members of Congress specifically addressed venture capital funds in the context of the funds prohibition.[280]

Like the 2020 proposal, the final rule incorporates the definition of venture capital fund from Rule 203(*l*)–1. Most commenters accepted or supported the proposed approach to incorporate the definition of venture capital fund in Rule 203(*l*)–1.[281] For the reasons discussed in the 2020 proposal,[282] the agencies believe this definition

[272] Final rule § ____.10(c)(16)(i).

[273] Final rule § ____.10(c)(16)(ii).

[274] Final rule § ____.10(c)(16)(iii).

[275] Final rule § ____.10(c)(16)(iv).

[276] 79 FR 5671.

[277] 12 U.S.C. 1851(a)(1)(B).

[278] 15 U.S.C. 80b–3(*l*).

[279] In the preamble to the 2013 final rule, the agencies cited to Congressional reports related to Title IV that characterized venture capital funds as ''a subset of private investment funds specializing in long-term equity investment in small or start-up businesses.'' 79 FR 5704 (quoting S. Rep. No. 111–176 (2010)). However, there is no indication in the statutory text itself that Congress intended to treat venture capital funds identically to private equity funds. Moreover, the agencies did not address the difference in terminology that Congress used in section 402 of the Dodd-Frank Act (''private funds'') and section 619 (''hedge funds'' and ''private equity funds''). The difference between these two terms—specifically, the broader term ''private funds'' used in Title IV—may indicate why Congress found it necessary to exclude venture capital explicitly in section 407 but not in section 619.

[280] *See* 156 Cong. Rec. E1295 (daily ed. July 13, 2010) (statement of Rep. Eshoo) (''the purpose of the Volcker Rule is to eliminate risk-taking activities by banks and their affiliates while at the same time preserving safe, sound investment activities that serve the public interest . . . Venture capital funds do not pose the same risk to the health of the financial system. They promote the public interest by funding growing companies critical to spurring innovation, job creation, and economic competitiveness. I expect the regulators to use the broad authority in the Volcker Rule wisely and clarify that funds . . . such as venture capital funds, are not captured under the Volcker Rule and fall outside the definition of 'private equity.' ''); 156 Cong. Rec. S5905 (daily ed. July 15, 2010) (statement of Sen. Dodd) (confirming ''the purpose of the Volcker rule is to eliminate excessive risk taking activities by banks and their affiliates while at the same time preserving safe, sound investment activities that serve the public interest'' and stating ''properly conducted venture capital investment will not cause the harms at which the Volcker rule is directed. In the event that properly conducted venture capital investment is excessively restricted by the provisions of section 619, I would expect the appropriate Federal regulators to exempt it using their authority under section 619[d][1](J) . . .''); and 156 Cong. Rec. S6242 (daily ed. July 26, 2010) (statement of Sen. Scott Brown) (''One other area of remaining uncertainty that has been left to the regulators is the treatment of bank investments in venture capital funds. Regulators should carefully consider whether banks that focus overwhelmingly on lending to and investing in start-up technology companies should be captured by one-size-fits-all restrictions under the Volcker rule. I believe they should not be. Venture capital investments help entrepreneurs get the financing they need to create new jobs. Unfairly restricting this type of capital formation is the last thing we should be doing in this economy.'').

[281] SIFMA; NVCA; FSF; ABA; and Goldman Sachs.

[282] 85 FR 12135–12136.

accurately identifies venture capital funds and addresses the concerns the agencies identified in declining to adopt an exclusion for venture capital funds in the 2013 rule.

The SEC has defined ''venture capital fund'' as any private fund [283] that:

- Represents to investors and potential investors that it pursues a venture capital strategy;
- Immediately after the acquisition of any asset, other than qualifying investments or short-term holdings, holds no more than 20 percent of the amount of the fund's aggregate capital contributions and uncalled committed capital in assets (other than short-term holdings) that are not qualifying investments, valued at cost or fair value, consistently applied by the fund;
- Does not borrow, issue debt obligations, provide guarantees or otherwise incur leverage, in excess of 15 percent of the private fund's aggregate capital contributions and uncalled committed capital, and any such borrowing, indebtedness, guarantee or leverage is for a non-renewable term of no longer than 120 calendar days, except that any guarantee by the private fund of a qualifying portfolio company's obligations up to the amount of the value of the private fund's investment in the qualifying portfolio company is not subject to the 120 calendar day limit;
- Only issues securities the terms of which do not provide a holder with any right, except in extraordinary circumstances, to withdraw, redeem or require the repurchase of such securities but may entitle holders to receive distributions made to all holders pro rata; and
- Is not registered under section 8 of the Investment Company Act, and has not elected to be treated as a business development company pursuant to section 54 of that Act.[284]

''Qualifying investment'' is defined in the SEC's regulation to be: (1) An equity security issued by a qualifying portfolio company that has been acquired directly by the private fund from the qualifying portfolio company; (2) any equity security issued by a qualifying portfolio company in exchange for an equity security issued by the qualifying portfolio company described in (1); or (3) any equity security issued by a company of which a qualifying portfolio company is a majority-owned subsidiary, as defined in section 2(a)(24) of the Investment Company Act, or a predecessor, and is acquired by the private fund in exchange for an equity security described in (1) or (2).[285]

''Qualifying portfolio company,'' in turn, is defined in the SEC's regulation to be a company that: (1) At the time of any investment by the private fund, is not reporting or foreign traded and does not control, is not controlled by or under common control with another company, directly or indirectly, that is reporting or foreign traded; (2) does not borrow or issue debt obligations in connection with the private fund's investment in such company and distribute to the private fund the proceeds of such borrowing or issuance in exchange for the private fund's investment; and (3) is not an investment company, a private fund, an issuer that would be an investment company but for the exemption provided by 17 CFR 270.3a–7, or a commodity pool.[286] The SEC explained that the definitions of ''qualifying investment'' and ''qualifying portfolio company'' reflect the typical characteristics of investments made by venture capital funds and that these definitions work together to cabin the definition of venture capital fund to only the funds that Congress understood to be venture capital funds during the passage of the Dodd-Frank Act.[287]

In the preamble to the regulation adopting this definition of venture capital fund, the SEC explained that the definition's criteria distinguish venture capital funds from other types of funds, including private equity funds and hedge funds. For example, the SEC explained that it understood the criteria for ''qualifying portfolio companies'' to be characteristic of issuers of portfolio securities held by venture capital funds and, taken together, would operate to exclude most private equity funds and hedge funds from the venture capital fund definition.[288] The SEC also explained that the criteria for ''qualifying investments'' under the SEC's regulation would help to differentiate venture capital funds from other types of private funds, such as leveraged buyout funds.[289] The SEC further explained that its regulation's restriction on the amount of borrowing, debt obligations, guarantees or other incurrence of leverage was appropriate to differentiate venture capital funds from other types of private funds that may engage in trading strategies that use financial leverage and may contribute to systemic risk.[290]

This definition of venture capital fund helps to distinguish the investment activities of venture capital funds from those of hedge funds and private equity funds, which was one of the agencies' primary concerns in declining to adopt an exclusion for venture capital funds in the 2013 rule. Further, this definition includes criteria reflecting the characteristics of venture capital funds that the agencies believe may pose less potential risk to a banking entity sponsoring or investing in venture capital funds and to the financial system—specifically, the smaller role of leverage financing and a lesser degree of interconnectedness with the public markets.[291] These characteristics help to address the concern expressed in the preamble to the 2013 rule that the activities and risk profiles for banking entities regarding sponsorship of, and investment in, venture capital fund activities are not readily distinguishable from those funds that section 13 of the BHC Act was intended to capture.

One commenter said requiring that a fund satisfy the requirements of Rule 203(*l*)–1 would have the effect of making the exclusion too narrow. This commenter said the exclusion for qualifying venture capital funds should permit investments in EGCs and, more generally, should ''reflect the evolving nature of the venture capital industry and not rely solely on the existing SEC definition.'' [292] The final rule does not modify the requirement that a qualifying venture capital fund must satisfy the requirements of Rule 203(*l*)–1. These requirements focus the exclusion on the types of less mature and start-up portfolio companies that characterize traditional venture capital activities. At the same time, the definition of qualifying venture capital fund does not preclude investments in EGCs because a qualifying venture capital fund could make investments in EGCs within the 20 percent limit for non-qualifying investments. Because the requirement that a qualifying venture capital fund

[283] For purposes of 17 CFR 275.203(*l*)–1, ''private fund'' is defined as ''an issuer that would be an investment company, as defined in section 3 of the Investment Company Act, but for section 3(c)(1) or 3(c)(7) of that Act.'' 15 U.S.C. 80b–2(a)(29).

[284] 17 CFR 275.203(*l*)–1(a).

[285] 17 CFR 275.203(*l*)–1(c)(3).

[286] 17 CFR 275.203(*l*)–1(c)(4).

[287] *See* Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, 76 FR 39646, 39657 (Jul. 6, 2011).

[288] 76 FR 39656.

[289] *See, e.g.,* 76 FR 39653 (explaining that a limitation on secondary market purchases of a qualifying portfolio company's shares would recognize ''the critical role this condition played in differentiating venture capital funds from other types of private funds'').

[290] 76 FR 39662. *See also* 76 FR 39657 (''We proposed these elements of the qualifying portfolio company definition because of the focus on leverage in the Dodd-Frank Act as a potential contributor to systemic risk as discussed by the Senate Committee report, and the testimony before Congress that stressed the lack of leverage in venture capital investing.'').

[291] 76 FR 39662.

[292] CCMC.

must satisfy the requirements of Rule 203(*l*)–1 does not preclude investments in EGCs and helps to distinguish qualifying venture capital funds from the type of funds that section 13 of the BHC Act was intended to restrict, the agencies have determined to adopt the requirement that a qualifying venture capital fund must be a venture capital fund as defined in Rule 203(*l*)–1.

The final rule adopts the requirement that a qualifying venture capital fund may not engage in any activity that would constitute proprietary trading under § ____.3(b)(1)(i), as if the issuer were a banking entity.[293] As described in the 2020 proposal, this requirement helps to promote the specific purposes of section 13 of the BHC Act.[294] The agencies are not adopting any changes to this requirement, as recommended by some commenters. The agencies are not expressly incorporating the permitted activities in §§ ____.4, ____.5, and ____.6 of the implementing regulations into the text of the qualifying venture capital fund exclusion. The exclusion for qualifying venture capital funds is intended to allow banking entities to share the risks of otherwise permissible long-term venture capital activities. Accordingly, the agencies would not expect that a qualifying venture capital fund would be formed for the purpose of engaging, or in the ordinary course would be engaged, in the activities permitted under §§ ____.4, ____.5, and ____.6 of the implementing regulations. Moreover, such activities could reflect a purpose other than making long-term venture capital investments. Nevertheless, to the extent that a qualifying venture capital fund seeks to engage in any of those activities as an exemption from the prohibition on engaging in proprietary trading, as defined in § ____.3(b)(1)(i) of the final rule, and does so in compliance with the requirements and conditions of those permitted activities, then the final rule would not preclude such activities.[295] Similarly, with respect to the exclusions from the definition of proprietary trading in § ____.3(d) of the implementing regulations, the agencies note that that the trading activities identified in § ____.3(d) are by definition not deemed to be proprietary trading, such that the performance by an qualifying fund of those activities would not be inconsistent with the final qualifying venture capital fund exclusion.[296]

The final rule does not define proprietary trading by reference to the prong of paragraph ____.3(b)(1) that would apply to the banking entity, as recommended by some commenters, because the agencies do not believe this change would be effective or simplify the exclusion. Unlike some banking entities, venture capital funds (that are not themselves banking entities) are not subject to the market risk capital rule, and thus there is generally no need to evaluate a venture capital fund's investments under the market risk capital framework. Moreover, applying the prong that would apply to the relevant banking entity could result in one venture capital fund becoming subject to both prongs. The agencies believe this would complicate evaluation of a qualifying venture capital fund's eligibility for the exclusion, both for banking entities and the agencies. The agencies do not agree with one commenter's argument that requiring funds sponsored by banking entities that are subject to the market risk capital rule test to apply the short-term intent test for purposes of the covered funds provisions would introduce unnecessary complexity and compliance costs for these banking entities. As the agencies described in the preamble to the 2019 final rule, the Federal banking agencies' market risk capital rule [297] incorporates the same short-term intent standard as the short-term intent test in § ____.3(b)(1)(i).[298] Therefore, market risk capital rule covered banking entities continue to apply the short-term intent standard as part of their compliance with the market risk capital rule. Similar processes may be employed to apply the short-term intent standard to qualifying venture capital funds.

The final rule adopts the requirement that a banking entity that serves as a sponsor, investment adviser, or commodity trading advisor to a qualifying venture capital fund may not rely on the exclusion for qualifying venture capital funds unless it provides the disclosures required under § ____.11(a)(8) to prospective and actual investors in the fund. This requirement promotes one of the purposes of section 13 of the BHC Act, which is to prevent banking entities from bailing out funds that they sponsor or advise. The final rule also adopts the requirement that a banking entity that serves as a sponsor, investment adviser, or commodity trading advisor to a qualifying venture capital fund must ensure the activities of the qualifying venture capital fund are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activity directly. Therefore, a banking entity may not rely on this exclusion to sponsor or invest in an investment fund that exposes the banking entity to the type of high-risk trading and investment activities that the covered fund provisions of section 13 of the BHC Act were intended to restrict.

In the final rule, the requirement that the banking entity must comply with § ____.14 of the implementing regulations is moved to § ____.10(c)(16)(ii). This change clarifies that this requirement applies to a banking entity that acts as sponsor, investment adviser, or commodity trading adviser to the qualifying venture capital fund and does not apply to a banking entity that merely invests in a qualifying venture capital fund.

The final rule does not eliminate the requirement that a banking entity's investment in or relationship with a qualifying venture capital fund must comply with § ____.14 of the implementing regulations, as recommended by one commenter. The agencies do not agree that applying the requirements of § ____.14 is duplicative of the requirement that the banking entity not directly or indirectly guarantee, assume, or otherwise insure the obligations or performance of the issuer. In addition to prohibiting guarantees, § ____.14 also prohibits other types of transactions that function as extensions of credit or that could raise the type of bail-out concerns that section 13 of the BHC Act was intended to address. The agencies also do not agree that applying the requirements of § ____.14 is duplicative of the requirement that the banking entity's investment in and relationships with

[293] Final rule § ____.10(c)(16)(i)(B).

[294] 85 FR 12136.

[295] As the agencies noted in the discussion of the final credit fund exclusion, compliance with certain requirements and conditions in ____.4, ____.5, and ____.6 of the implementing regulations may be inapt and/or highly impractical in the context of a qualifying venture capital fund, particularly given the activity restrictions contained in § ____.10(c)(16). For example, the exemptions for underwriting and market making-related activities in ____.4 require that a banking entity relying on such exemptions, among other things, be licensed or registered to engage in the applicable activity in accordance with applicable law. Moreover, to the extent that a qualifying venture capital fund is a banking entity with significant trading assets and liabilities (*i.e.,* because it, together with its affiliates and subsidiaries, has trading assets and liabilities that equal or exceeds $20 billion over the four previous calendar quarters), it also would be required to maintain a separate compliance program specific to those exemptions.

[296] Similarly, and consistent with the discussion of the final credit fund exclusion, trading activity that satisfies the 60-day rebuttable presumption in § ____.3(b)(4) would be presumed not to be proprietary trading for these purposes.

[297] *See* 12 CFR part 3, subpart F; part 217, subpart F; part 324, subpart F.

[298] 84 FR 61986.

the qualifying venture capital fund must comply with the backstop provisions in § ____.15. The backstop provisions in § ____.15 address high-risk assets and high-risk trading strategies, and material conflicts of interest, but do not address extensions of credit that may not entail a ''substantial financial loss'' to the banking entity. The agencies do not expect that applying § ____.14 to a banking entity that sponsors or advises a qualifying venture capital fund will unduly interfere with the effectiveness of the exclusion. The final rule incorporates revisions to § ____.14 that will improve banking entities' ability to enter into certain ordinary course transactions with sponsored and advised funds.[299] The agencies expect these changes will mitigate concerns that applying the requirements of § ____.14 to qualifying venture capital funds will limit the exclusion's utility.[300]

The final rule adopts the requirement that the banking entity must not guarantee, assume, or otherwise insure the obligations or performance of a qualifying venture capital fund.[301] The final rule also adopts the requirements that a banking entity's ownership in or relationship with a qualifying venture capital fund must comply with the limitations in § ____.15 of the implementing regulations, as if the issuer were a covered fund, and be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.[302] These requirements promote several of the purposes of section 13 of the BHC Act. The requirement that the banking entity not guarantee, assume, or otherwise ensure the obligations or performance of a qualifying venture capital fund promotes the purpose of preventing banking entities from bailing out the fund. The requirements that a banking entity's ownership in or relationship with a qualifying venture capital fund must comply with the limitations in § ____.15 of the implementing regulations, as if the issuer were a covered fund, and be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards, prevent a qualifying venture capital fund from being used to expose a banking entity to the type of high-risk trading and investment activities that the covered fund provisions of section 13 of the BHC Act were intended to restrict. To the extent a fund would expose a banking entity to a high-risk assets or a high-risk trading strategy, the fund would not be a qualifying venture capital fund. Therefore, prior to making an investment in a qualifying venture capital fund, a banking entity would need to ensure that the fund's investment mandate and strategy would satisfy the requirements of § ____.15. In addition, a banking entity would need to monitor the activities of a qualifying venture capital fund to ensure it satisfies these requirements on an ongoing basis.

The agencies do not believe that any additional conditions to the exclusion for qualifying venture capital funds are necessary. One commenter said that the exclusion should (1) restrict all fund investments to ''qualifying investments'' or at least very significantly restrict investments in non-qualifying investments (*e.g.,* limit them to no more than five percent of the fund's aggregate capital), (2) impose a minimum securities holding period and portfolio company revenue limitation of $35 million (or a similarly appropriate and low figure) to ensure the fund is truly focused on medium-to-long term venture (as opposed to growth stage) investments, and (3) quantitatively limit the use of leverage as a key means for distinguishing excluded venture capital funds from statutorily prohibited activities involving private equity funds.[303] The agencies have determined not to impose any additional criteria for the reasons discussed below.

First, the agencies decline to limit a qualifying venture capital fund's non-qualifying investments to five percent or less of total assets. The agencies agree with commenters that it is necessary to provide some amount of flexibility for a venture capital fund to make investments that deviate from the typical form of venture capital investment activity. For example, the agencies understand that certain common venture capital fund activities, such as secondary acquisition of portfolio company shares from founders, are not qualifying investments under Rule 203(*l*)–1. The agencies agree with commenters, as well as with the rationale the SEC provided in the 2011 adopting release, that said providing flexibility for this type of non-qualifying investment is consistent with the overall goal of identifying funds engaged in a venture capital strategy. In making this determination, the agencies find it significant that the SEC considered this issue as part of its 2011 rulemaking and concluded that a 20 percent bucket for non-qualifying investments was appropriate.[304] Moreover, all activities of a qualifying venture capital fund, including any investments that would be non-qualifying investments under Rule 203(*l*)–1, will be subject to the other requirements in § ____.10(c)(16), including the requirement that the fund not engage in proprietary trading and not result in a material exposure by the banking entity to a high-risk asset or high-risk trading strategy.

The agencies also decline to impose additional requirements, such as a minimum securities holding period or a portfolio company revenue limitation. The agencies believe a minimum securities holding period is unnecessary in light of the requirements that the fund (1) represent to investors and potential investors that it pursues a venture capital strategy [305] and (2) not engage in any activity that would constitute proprietary trading under § ____.3(b)(1)(i), as if it were a banking entity.[306]

The agencies also considered whether to include a portfolio company revenue limitation, as discussed in the preamble to the 2020 proposal. Most commenters did not support imposing a revenue limitation, while one commenter supported imposing a limitation of $35 million. After considering all comments received, the agencies determined that a revenue limit could unnecessarily disadvantage certain companies because the revenues of startups can vary greatly based on industry and geography. The agencies determined it would be unnecessarily restrictive to create a revenue limit that could limit funding to otherwise eligible portfolio companies. Again, the agencies found it significant that the SEC expressly considered this issue as part of the 2011 rulemaking and determined that any ''single factor test could ignore the complexities of doing business in different industries or regions'' and ''could inadvertently restrict venture capital funds from funding otherwise promising young small companies.'' [307] In addition, the definition of ''qualifying portfolio company'' in the SEC's rule

[299] *See infra,* Section IV.D (Limitations on Relationships with a Covered Fund).

[300] The commenter that recommended eliminating the requirement that the banking entity's investment in or relationship with a qualifying venture capital fund said that doing so would ''limit the utility and related benefits of the qualifying venture capital fund exclusion, regardless of the proposed new exceptions to Super 23A.'' SIFMA. However, the commenter did not provide any examples or further explain how the utility of the exclusion would be impacted.

[301] Final rule § ____.10(c)(16)(iii).

[302] Final rule § ____.10(c)(16)(iv).

[303] Better Markets.

[304] 76 FR 39683.

[305] 17 CFR 275.203(*l*)–(1)(a)(1).

[306] Final rule § ____.10(c)(16)(i)(B).

[307] 76 FR 39649.

incorporates appropriate standards that distinguish newer ventures from more established companies. In particular, a ''qualifying portfolio company'' may not be ''reporting or foreign traded'' and may not control, be controlled by or under common control with another company that is reporting or foreign traded.[308] A ''reporting or foreign traded'' company for these purposes means a company that is subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 or having a security listed or traded on any exchange or organized market operating in a foreign jurisdiction.[309] In addition to publicly offered companies, this definition excludes issuers if they have more than $10 million in total assets and a class of equity securities, such as common stock, that is held of record by either 2,000 or more persons or 500 or more persons who are not accredited investors.[310] In adopting the ''reporting or foreign traded'' requirement of Rule 203(*l*)–1, the SEC explained that it found ''a key consideration by Congress'' was that venture capital funds ''are less connected with the public markets and may involve less potential systemic risk.'' [311] This condition that qualifying portfolio companies not be capitalized by the public markets serves to limit the type of companies in which a qualifying venture capital fund may invest.

Finally, the agencies determined it is unnecessary to include an additional quantitative limit on the use of leverage because the exclusion incorporates a leverage limit. Specifically, Rule 203(*l*)–1 provides that a venture capital fund may not borrow or otherwise incur leverage in excess of 15 percent of the fund's aggregate capital contributions and uncalled capital commitments, and then only on a short-term basis. Because the exclusion already incorporates a limit on leverage for a qualifying venture capital fund, it is not necessary for the final rule to incorporate an additional limit on leverage.

ii. Long-Term Investment Funds

In the preamble to the 2020 proposal, the agencies asked whether the final rule should include an exclusion for long-term investment funds. In the preamble, the agencies asked if an exclusion should be provided for issuers (1) that make long-term investments that a banking entity could make directly, (2) that hold themselves out as entities or arrangements that make investments that they intend to hold for a set minimum time period, such as two years, (3) whose relevant offering and governing documents reflect a long-term investment strategy, and (4) that meet all other requirements of the proposed qualifying venture capital fund exclusion (other than that the issuers would be venture capital funds as defined in Rule 203(*l*)–1.

Several commenters supported an exclusion for long-term investment funds.[312] Many of these commenters said an exclusion for qualifying long-term investment funds would help to close gaps in the availability of financing that exist under the implementing regulations while promoting and protecting the safety and soundness of the banking entity and the financial stability of the U.S.[313] These commenters said the exclusion would allow banking entities to diversify their assets and income streams, thereby reducing the overall risk of their assets and operations and increasing their resiliency against failure.[314] Several of these commenters supported an exclusion for long-term investment funds because they said it would allow banking entities to do indirectly through a fund structure the same activities they may conduct directly.[315] Some commenters said long-term investment vehicles do not engage in short-term proprietary trading or the high-risk activities that section 619's backstop provisions are intended to address.[316]

One commenter said the rule should not establish an exclusion for long-term investment vehicles because section 619 of the Dodd-Frank Act was put in place to reorient banks away from risky speculative activities and toward responsible lending to businesses and households.[317]

The final rule does not include an exclusion for long-term investment funds. After reviewing all comments received, the agencies determined that it remains difficult to distinguish effectively such funds from the type of funds that section 13 of the BHC Act was designed to restrict. A general exclusion for long-term investment funds would be too broad of an approach for addressing specific types of issuers, such as inadvertent investment companies and incubators that do not hold themselves out as engaging in a venture capital strategy, as described by some commenters. An exclusion based primarily on the length of time that an issuer holds its investments could be overbroad because it could also permit funds that are engaged in the type of investment activity that section 13 of the BHC Act was designed to restrict. Moreover, the agencies believe the exclusions for credit funds and qualifying venture capital funds will improve banking entities' ability to provide long-term financing through certain fund structures in a manner that is consistent with the statute.

3. Family Wealth Management Vehicles

The agencies are adopting an exclusion from the definition of ''covered fund'' under § ____.10(b) of the rule for any entity that acts as a ''family wealth management vehicle.'' This exclusion is available to an entity that is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities. For family wealth management vehicles that are trusts, the grantor(s) must be family customers.[318] For non-trust family

[308] 17 CFR 275.203(*l*)–1(c)(4).

[309] 17 CFR 275.203(l)–1(c)(5).

[310] 15 U.S.C. 78*l*(g).

[311] 76 FR 39656.

[312] Gonzalez et al.; Crapo; FSF; SIFMA; CCMC; CCMR; IIB; Goldman Sachs; AIC; and ABA. One commenter said the final rule should exclude an issuer with the following characteristics: (1) Its investment strategy or business purpose is to invest in assets in which a financial holding company would be permitted to invest directly; (2) it holds itself out to investors as acquiring and holding long-term assets for at least two years; (3) it does not engage in activities that would constitute impermissible proprietary trading (as defined in the implementing regulations) if conducted directly by a banking entity; and (4) if it is sponsored by a banking entity, (A) the sponsoring banking entity and its affiliates cannot, directly or indirectly, guarantee, assume or otherwise insure its obligations, (B) it must comply with the disclosure obligations under § ____.11(a)(8) of the rule and (C) the sponsoring banking entity must comply with the limitations imposed by § ____.14 (except that the banking entity may acquire and retain any ownership interest in the issuer) and § ____.15, as if the vehicle were a covered fund. The commenter said these conditions would adequately address concerns regarding evasion, promote long-term capital formation, and exclude certain entities that are inadvertently captured by the definition of ''covered fund'' such as certain incubators. Goldman Sachs.

[313] SIFMA; AIC; and CCMR. One commenter said an exclusion for long-term investment funds is necessary because the proposed exclusion for qualifying venture capital funds would not address incubators and other issuers that do not hold themselves out as pursuing a venture capital strategy. Goldman Sachs. Two commenters said excluding long-term investment funds would provide certainty for banking entities that hold interests in ''inadvertent'' or ''accidental'' investment companies. SIFMA and Goldman Sachs.

[314] *Id.*

[315] FSF; CCMR; AIC; CCMC; and SIFMA.

[316] ABA and CCMC.

[317] Robert Rutowski.

[318] Under § ____.10(c)(17)(iii)(B) of the final rule, a ''family customer'' is a ''family client,'' as defined in Rule 202(a)(11)(G)–1(d)(4) of the Advisers Act (17 CFR 275.202(a)(11)(G)–1(d)(4)); or any natural person who is a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law of a family client, or a spouse or

wealth management vehicles, family customers must own a majority of the voting interests (directly or indirectly) as well as a majority of interests in the entity. Ownership of non-trust family wealth management vehicles is generally limited to family customers and up to five closely related persons of the family customers.[319] However, there is a *de minimis* ownership allowance that permits one or more entities, including a banking entity, that are not family customers or closely related persons, to acquire or retain, as principal, up to an aggregate 0.5 percent of the family wealth management vehicle's outstanding ownership interests for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.[320]

In addition, a banking entity may rely on the exclusion only if the banking entity: (1) Provides bona fide trust, fiduciary, investment advisory, or commodity trading advisory services to the entity; (2) does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such entity; (3) complies with the disclosure obligations under § ____.11(a)(8), as if such entity were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the entity; (4) does not acquire or retain, as principal, an ownership interest in the entity, other than up to an aggregate 0.5 percent of the family wealth management vehicle's outstanding ownership interests for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns; (5) complies with the requirements of §§ ____.14(b) and ____.15, as if such entity were a covered fund; and (6) except for riskless principal transactions as defined in § ____.10(d)(11),[321] complies with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the entity were an affiliate thereof.[322]

In the 2020 proposal, the agencies requested comment on whether to exclude family wealth management vehicles from the definition of ''covered fund.'' [323] Several commenters supported this exclusion stating, generally, that it would reduce uncertainty for banking entities about the permissibility of providing traditional banking, investment management, and trust and estate planning services to family wealth management vehicle clients.[324] As discussed below, other commenters opposed the exclusion or recommended revisions to it.[325]

The agencies believe that the exclusion for family wealth management vehicles will appropriately allow banking entities to structure services or transactions for customers, or to otherwise provide traditional customer-facing banking and asset management services, through a vehicle, even though such a vehicle may rely on section 3(c)(1) or 3(c)(7) of the Investment Company Act or would otherwise be a covered fund under the implementing regulations.[326] The agencies believe the exclusion for family wealth management vehicles will effectively tailor the definition of covered fund by permitting banking entities to continue to provide traditional banking and asset management services that do not involve the types of risks section 13 of the BHC Act was designed to address. As the agencies noted in the preamble to the 2013 rule, section 13 and the implementing regulations were designed in part to permit banking entities to continue to provide client-oriented financial services, including asset management services.[327] Furthermore, the agencies believe that the provisions of the exclusion will work together to sufficiently reduce the likelihood that these vehicles could be used to evade the requirements of section 13 or the implementing regulations.

One of the commenters that opposed the exclusion expressed concern with the agencies adding an exclusion from the definition of ''covered fund'' that they believed would only benefit a few wealthy families.[328] Banking entities may provide asset management services to families through a trust structure. The agencies believe that banking entities should have flexibility to offer such asset management services to families through a fund structure subject to appropriate limits. As noted above, the agencies believe the exclusion for family wealth management vehicles will effectively tailor the definition of covered fund by permitting banking entities to continue to provide traditional banking and asset management services that do not involve the types of risks section 13 was designed to address.

The agencies continue to believe that the exclusion for family wealth management vehicles is consistent with section 13(d)(1)(D), which permits banking entities to engage in transactions on behalf of customers, when those transactions would otherwise be prohibited under section 13.[329] The exclusion will similarly allow banking entities to provide traditional services to customers through vehicles used to manage the wealth and other assets of those customers and their families.

Another commenter suggested that, rather than providing an exclusion for family wealth management vehicles through a rulemaking, the agencies should instead provide no-action relief on a case-by-case basis.[330] The agencies do not believe that a case-by case approach would further the aims of section 13 or the implementing regulations. The agencies believe that a case-by-case approach would be

spousal equivalent of any of the foregoing. All terms defined in Rule 202(a)(11)(G)–1 of the Advisers Act (17 CFR 275.202(a)(11)(G)–1) have the same meaning in the family wealth management vehicle exclusion.

[319] Under § ____.10(c)(17)(iii)(A) of the final rule, ''closely related person'' means ''a natural person (including the estate and estate planning vehicles of such person) who has longstanding business or personal relationships with any family customer.''

[320] This 0.5 percent ownership interest represents the aggregate amount of a family wealth management vehicle's ownership interests that may be acquired or retained by all entities that are neither a family customer nor a closely related person.

[321] ''Riskless principal transaction'' means a transaction in which a banking entity, after receiving an order to buy (or sell) a security from a customer, purchases (or sells) the security in the secondary market for its own account to offset a contemporaneous sale to (or purchase from) the customer. Final rule § ____.10(d)(11). The allowance for riskless principal transactions in the final rule does not affect the independent application of the Board's Regulation W (12 CFR part 223).

[322] Final rule § ____.10(c)(17)(ii).

[323] 85 FR 12120.

[324] *See, e.g.,* Goldman Sachs; FSF; CCMR; IAA; ABA; BPI; PNC; and SIFMA.

[325] *See, e.g.,* Better Markets, Data Boiler; SIFMA; BPI; ABA.

[326] Several commenters supported the exclusion, with two stating that many family wealth management vehicles do not rely on the exclusions in 3(c)(1) and (c)(7) of the Investment Company Act and are not covered funds under the implementing regulations. *See* ABA and PNC. Banking entities that sponsor or invest in family wealth management vehicles that are not subject to the covered funds provisions under section 13 of the BHC Act or the implementing regulations would not need to rely on this exclusion.

[327] *See* 79 FR 5541 (describing the 2013 rule as ''permitting banking entities to continue to provide, and to manage and limit the risks associated with providing, client-oriented financial services that are critical to capital generation for businesses of all sizes, households and individuals, and that facilitate liquid markets. These client-oriented financial services, which include underwriting, market making, and asset management services, are important to the U.S. financial markets and the participants in those markets.'').

[328] *See* Better Markets.

[329] 12 U.S.C. 1851(d)(1)(D).

[330] Data Boiler.

unnecessarily burdensome and difficult to administer. This approach would also unnecessarily deviate from the agencies' treatment of other excluded entities under the implementing regulations and hinder transparency and consistency.

The agencies believe that the adopted exclusion for a family wealth management vehicle will appropriately distinguish it from the type of entity that the covered funds provisions of section 13 of the BHC Act were intended to capture. The exclusion requires that a family wealth management vehicle not raise money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities. This aspect of the exclusion will help to differentiate family wealth management vehicles from covered funds, which raise money from investors for this purpose.

In addition, the family wealth management vehicle exclusion contains ownership limits designed to ensure that the vehicle is used to manage the wealth and other assets of customers and their families. One such limit is the definition of ''family customer.'' As proposed, the definition of ''family customer'' is based on the definition of ''family client'' in rule 202(a)(11)(G)–1(d)(4) under the Advisers Act (the family office rule), and also incorporates certain in-laws and their spouses and spousal equivalents. Several commenters supported this approach,[331] however, one commenter suggested that the agencies exclude in-laws, their spouses and their spousal equivalents from the definition of ''family customer.'' [332] The agencies believe that in-laws, their spouses and spousal equivalents share the same close familial relations as others included in the definition of ''family client.'' Furthermore, the agencies believe that the final rule's definition of ''family customer'' reflects the types of relationships typically present in family wealth management vehicles.[333] Reflecting those relationships prevents unnecessary constraints on the utility of the exclusion and will allow banking entities to provide traditional banking services to these clients.

Another ownership limit designed to ensure that a family wealth management vehicle is used to manage the wealth and other assets of customers and their families is the requirement that a majority of the interests in the entity are owned by family customers.[334] The inclusion of this limit in the final rule is a modification from the 2020 proposal which only required family customers to own a majority of the voting interests (directly or indirectly) in the entity. One commenter suggested this modification to ensure that the exclusion is not used to evade the intent of section 13 and the implementing regulations.[335] The agencies believe this modification is an appropriate means of ensuring that the exclusion is used by banking entities that are providing services to family wealth management vehicles, rather than to hedge funds or private equity funds.

Another commenter suggested additional ownership limits for family wealth management vehicles, including limits on the vehicle's ability to restructure, to prevent evasion of the prohibitions of section 13 and the implementing regulations.[336] However, as discussed above, the agencies believe that the requirements of the exclusion, along with the conditions a banking entity must meet in order to rely on it, will help to ensure that banking entities will not be able to use family wealth management vehicles as a means to evade section 13 and the implementing regulations.

Another ownership limit designed to ensure that a family wealth management vehicle is used to manage the wealth and other assets of customers and their families is the requirement that only up to five closely related persons of family customers may hold ownership interests in the vehicle.[337] The agencies proposed to permit three closely related persons to hold ownership interests. Several commenters supported allowing a finite number of closely related persons of family customers to hold ownership interests.[338] However, some commenters suggested that the proposed limit of three closely related persons did not reflect the typical manner in which family wealth management vehicles are constituted and would unnecessarily constrain the availability of the exclusion.[339] These commenters recommended that the agencies modify the proposed rule to allow for up to ten closely related persons to invest in family wealth management vehicles.[340] One of these commenters stated that increasing the number of closely related persons would allow banking entities to provide traditional wealth management and estate planning services to family wealth management vehicles and that the other conditions imposed by the proposed rule would keep such vehicles from evading the covered fund provisions of the implementing regulations.[341] The commenter further noted that a limit of ten closely related persons would align the exclusion with the numerical limitation of unaffiliated owners provided for in the joint venture exclusion.[342]

The final rule will allow up to five closely related persons to hold ownership interests in a family wealth management vehicle. Commenters indicated that many family wealth management vehicles currently include more than three closely related persons.[343] The agencies believe that the final rule will more closely align the exclusion with the current composition of family wealth management vehicles, thereby increasing the utility of the exclusion without allowing such a large number of non-family customer owners to suggest the entity is in reality a hedge fund or private equity fund. Additionally, the agencies believe that requiring family customers to own a majority of the interests in the family wealth management vehicle will serve as an additional safeguard against evasion of the provisions of section 13 of the BHC Act.

As proposed, the final rule's definition of ''closely related person'' is ''a natural person (including the estate and estate planning vehicles of such person) who has longstanding business or personal relationships with any family customer.'' [344] One commenter suggested that the definition of ''closely related person'' should include only persons with personal relationships with family customers and not also business relationships.[345] The agencies believe that it is not practical or worthwhile to exclude business relationships from the definition of ''closely related person'' because it would require banking entities to engage in an assessment of relationships that are likely to include elements common in both personal and business relationships. The agencies also believe that requiring these relationships to be ''longstanding'' will help ensure that they are bona fide established relationships and not simply related to the planned investment activities through the family wealth management vehicle.

[331] *See, e.g.,* SIFMA; BPI; and ABA.

[332] *See* Better Markets.

[333] *See, e.g.,* SIFMA; BPI; and ABA.

[334] Final rule § ____.10(c)(17)(i)(B)(2).

[335] *See* ABA.

[336] *See* Data Boiler.

[337] Final rule § ____.10(c)(17)(i)(B)(3).

[338] *See, e.g.,* BPI; SIFMA; PNC; and ABA.

[339] *See, e.g.,* BPI; SIFMA; ABA; and PNC.

[340] *See, e.g.,* SIFMA; BPI; ABA; and PNC.

[341] *See* SIFMA.

[342] *See* SIFMA.

[343] *See, e.g.,* BPI; ABA; and PNC.

[344] Final rule § ____.10(c)(17)(iii)(A).

[345] *See, e.g.,* Better Markets.

In a change to the 2020 proposal, the final rule permits any entity, or entities—not only banking entities—to acquire or retain, as principal, up to an aggregate 0.5 percent of the entity's outstanding ownership interests, for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.[346] Some commenters requested that the agencies include this modification because often, family wealth management vehicles use unaffiliated third parties—such as third-party trustees or similar service providers—when structuring family wealth management vehicles.[347] The agencies believe that permitting *de minimis* ownership by non-banking entity third parties is appropriate and in some cases necessary to reflect the typical structure of family wealth management vehicles. The *de minimis* ownership provision recognizes that ownership by an entity other than a family customer or closely related person may be necessary under certain circumstances—such as establishing corporate separateness or addressing bankruptcy, insolvency, or similar matters. Whether the entity that owns a *de minimis* amount is a banking entity or some other third party does not raise any concerns that are not sufficiently addressed by the aggregate ownership limit and the narrow circumstances in which such entities may take an ownership interest. The agencies recognize that without this modification, family wealth management vehicles may be forced to engage in less effective and/or efficient means of structuring and organization because the exclusion would limit the vehicle's access to some customary service providers that have traditionally taken small ownership interests for structuring purposes. The agencies are therefore expanding the types of entities that may acquire or retain the *de minimis* ownership interest to include any third party. However, the aggregate *de minimis* amount and the purpose for which it may be owned is unchanged from the 2020 proposal.

As stated above, under the final rule, a banking entity may only rely on the exclusion with respect to a family wealth management vehicle if the banking entity meets certain conditions.[348] The agencies believe that, collectively, the conditions of the exclusion will help to ensure that family wealth management vehicles are used for client-oriented financial services provided on arms-length, market terms, and to prevent evasion of the requirements of section 13 of the BHC Act and the implementing regulations. In addition, these conditions are based on existing conditions in other provisions of the implementing regulations,[349] which the agencies believe will facilitate banking entities' compliance with the exclusion.

As proposed, the agencies are not applying § ____.14(a), which applies section 23A of the Federal Reserve Act to banking entities' relationships with covered funds, to family wealth management vehicles because the agencies understand that the application of § ____.14(a) to family wealth management vehicles could prohibit banking entities from providing the full range of banking and asset management services to customers using these vehicles.[350] The agencies are, however, applying §§ ____.14(b) and ____.15 to family wealth management vehicles, as proposed, because the agencies continue to believe that it will help ensure that banking entities and their affiliates' exposure to risk remains appropriately limited.

The agencies are also adopting a prohibition, with modifications described below, on banking entity purchases of low-quality assets from family wealth management vehicles that would be prohibited under Regulation W concerning transactions with affiliates (12 CFR 223.15(a))—as if such banking entity were a member bank and the entity were an affiliate thereof—to prevent banking entities from ''bailing out'' family wealth management vehicles.[351] Regulation W (12 CFR 223.15(a)) provides that a member bank may not purchase a low-quality asset from an affiliate unless, pursuant to an independent credit evaluation, the member bank had committed itself to purchase the asset before the time the asset was acquired by the affiliate.[352] Several commenters requested clarification that the exclusion permits banking entities to engage in riskless principal transactions to purchase assets—including low quality assets for purposes of section 223.15 of the Board's Regulation W—from family wealth management vehicles.[353] Commenters stated that the need for such asset purchases may arise as a result of a family customer's preferences and that permitting the banking entities to engage in such purchases may facilitate the family customer's sale of the asset.[354] Commenters stated that allowing these transactions would pose minimal market or credit risk to a banking entity because the banking entity would purchase and sell the same asset contemporaneously.[355] Furthermore, one commenter stated that without clarity on the permissiveness of riskless principal transactions, family wealth management vehicles would be forced to obtain the services of a third-party service provider to sell low quality assets, which would increase costs and operational complexity of the family wealth management vehicles without furthering the aims of section 13 of the BHC Act or the implementing regulations.[356]

The agencies believe that permitting a banking entity to engage in riskless principal transactions that involve the purchase of low-quality assets from a family wealth management vehicle is unlikely to pose a substantive risk of evading section 13 of the BHC Act. In a riskless principal transaction, the riskless principal (the banking entity) buys and sells the same security contemporaneously, and the asset risk passes promptly from the customer (family wealth management vehicle, in this context) through the riskless principal to a third-party.[357] The agencies are adopting the condition that banking entities and their affiliates comply with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the entity were an affiliate. However, in a change from the 2020 proposal and in response to the concerns raised by

[346] Final rule § ____.10(c)(17)(i)(C).

[347] *See, e.g.,* SIFMA and BPI.

[348] Final rule § ____.10(c)(17)(ii).

[349] *See* implementing regulations §§ ____.11(a)(5) (imposing, as a condition of the exemption for organizing and offering a covered fund, that a banking entity and its affiliates do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests); ____.11(a)(8) (imposing, as a condition of the exemption for organizing and offering a covered fund, that the banking entity provide certain disclosures to any prospective and actual investor in the covered fund); ____.10(c)(2)(ii) (allowing, as a condition of the exclusion from the covered fund definition for wholly-owned subsidiaries, for the holding of up to 0.5 percent of outstanding ownership interests by a third party for limited purposes); and ____.14(b) (subjecting certain transactions with covered funds to section 23B of the Federal Reserve Act).

[350] *See* SIFMA (stating that it agreed with the agencies' approach of not applying § ____.14 to relationships between banking entities and family wealth management vehicles because doing so would prevent banking entities from making ordinary extensions of credit and entering into a number of other transactions with family wealth management vehicles that are critical to the banking entity providing traditional asset management and estate planning services).

[351] Final rule § ____.10(c)(17)(ii)(F).

[352] 12 CFR 223.15(a).

[353] *See, e.g.,* BPI and SIFMA.

[354] *See, e.g.,* BPI and SIFMA.

[355] *See, e.g.,* SIFMA and BPI.

[356] *See* SIFMA.

[357] *See* 67 FR 76597.

commenters, the condition will explicitly exclude from those requirements transactions that meet the definition of riskless principal transactions as defined in § ____.10(d)(11). The definition of riskless principal transactions adopted in § ____.10(d)(11) is similar to the definition adopted in the Board's Regulation W, as this definition is appropriately narrow and generally familiar to banking entities.[358] The agencies expect that, together, the adopted criteria for the family wealth management vehicle exclusion will prevent a banking entity from being able to bail out such entities in periods of financial stress or otherwise expose the banking entity to the types of risks that the covered fund provisions of section 13 were intended to address.

Several commenters requested that the agencies remove the condition that banking entities and their affiliates comply with the disclosure obligations under § ____.11(a)(8) of the final rule, as if the vehicle were a covered fund, because such disclosures would not apply to a vehicle that a banking entity was not organizing and offering pursuant to § ____.11(a) of the final rule and therefore would be confusing.[359] In particular, these commenters stated that the required disclosure under § ____.11(a)(8) concerning the banking entity's ''ownership interests'' in the fund and referencing the fund's ''offering documents'' may create confusion in circumstances where the banking entity does not own an interest in the family wealth management vehicle, or where such vehicles do not have offering documents. Also, commenters requested confirmation from the agencies that banking entities would be permitted to (i) modify the required disclosures to reflect the specific circumstances of their relationship with, and the particular structure of, their family wealth management vehicle clients; and (ii) satisfy the written disclosure requirement by means other than including such disclosures in the governing document(s) of the family wealth management vehicle(s).[360]

The agencies are adopting the condition that banking entities and their affiliates comply with the disclosure obligations under § ____.11(a)(8) of the final rule with respect to family wealth management vehicles. However, in a change from the 2020 proposal and in response to the concerns raised by commenters, the condition will explicitly permit banking entities and their affiliates to modify the content of such disclosures to prevent the disclosure from being misleading and also permit banking entities to modify the manner of disclosure to accommodate the specific circumstances of the entity.[361] The obligations under § ____.11(a)(8) of the final rule apply in connection with the exemption for organizing and offering covered funds, which would typically require the preparation and distribution of offering documents. The agencies, however, understand that many family wealth management vehicles may not have offering documents. The agencies have an interest in providing family wealth management vehicle customers with the substance of the disclosure, rather than a concern with the specific wording of the disclosure or with the document in which the disclosure is provided. Accordingly, the agencies have provided that the content of the disclosure may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the family wealth management vehicle.

For example, § ____.11(a)(8) requires disclosure that an investor ''should read the fund offering documents before investing in the covered fund.'' In order to accurately reflect the specific circumstances of a family wealth management vehicle for which there are no offering documents, the modified provision will allow the banking entity to revise this disclosure to reference the appropriate disclosure documents, if any, provided in connection with the vehicle. Similarly, the agencies understand the specific wording of the disclosures in § ____.11(a)(8) of the rule may need to be modified to accurately reflect the specific circumstances of the banking entity's relationship with the family wealth management vehicle. For example, a banking entity that holds no ownership interest in the family wealth management vehicle may modify the disclosure required in § ____.11(a)(8)(i)(A) to reflect its lack of ownership. Moreover, § ____.11(a)(8) requires that the banking entity provide these disclosures, ''such as through disclosure in the . . . offering documents.'' The agencies expect that a banking entity could satisfy these disclosure delivery obligations in a number of ways, such as by including them in the family wealth management vehicle's governing documents, in account opening materials or in supplementary materials (*e.g.,* a separate disclosure document provided by the banking entity solely for purposes of complying with this exclusion and providing the required disclosures).

4. Customer Facilitation Vehicles

The agencies are adopting an exclusion from the definition of ''covered fund'' under § ____.10(b) of the rule for any issuer that acts as a ''customer facilitation vehicle.'' The customer facilitation vehicle exclusion will, as proposed, be available for any issuer that is formed by or at the request of a customer of the banking entity for the purpose of providing such customer (which may include one or more affiliates of such customer) with exposure to a transaction, investment strategy, or other service provided by the banking entity.[362]

A banking entity may only rely on the exclusion with respect to an issuer provided that: (1) All of the ownership interests of the issuer are owned by the customer (which may include one or more of its affiliates) for whom the issuer was created; [363] and (2) the banking entity and its affiliates: (i) Maintain documentation outlining how the banking entity intends to facilitate the customer's exposure to such transaction, investment strategy, or service; (ii) do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such issuer; (iii) comply with the disclosure obligations under § ____.11(a)(8), as if such issuer were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the issuer; (iv) do not acquire or retain, as principal, an ownership interest in the issuer, other than up to an aggregate 0.5 percent of the issuer's outstanding ownership interests for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns; (v) comply with the

[358] 12 CFR 223.3(ee).

[359] *See, e.g.,* ABA and PNC.

[360] *See, e.g.,* BPI.

[361] In the 2020 proposal, the agencies had indicated that for purposes of the proposed exclusion, a banking entity could satisfy these written disclosure obligations in a number of ways and could modify the specific wording of the disclosures in § ____.11(a)(8) to accurately reflect the specific circumstances of the family wealth management vehicle.

[362] Final rule § ____.10(c)(18)(i).

[363] Notwithstanding this condition, up to an aggregate 0.5 percent of the issuer's outstanding ownership interests may be acquired or retained by one or more entities that are not customers if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns. Final rule § ____.10(c)(18)(ii)(B).

requirements of §§ ____.14(b) and ____.15, as if such issuer were a covered fund; and (vi) except for riskless principal transactions as defined in § ____.10(d)(11), comply with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the entity were an affiliate thereof.[364]

The agencies continue to believe that this exclusion will appropriately allow banking entities to structure certain types of services or transactions for customers, or to otherwise provide traditional customer-facing banking and asset management services, through a vehicle, even though such a vehicle may rely on section 3(c)(1) or 3(c)(7) of the Investment Company Act or would otherwise be a covered fund under the final rule. Most commenters that addressed this exclusion were supportive,[365] stating that it would provide banking entities with greater flexibility to meet client needs and objectives.[366] Some commenters found the exclusion's conditions to be reasonable and sufficient.[367] However, two commenters recommended that the agencies impose additional limitations on the exclusion.[368] One of these commenters argued that the exclusion would permit, and possibly encourage, banking entities to increase their risk exposures through the use of customer facilitation vehicles, and the agencies should minimize such risk exposures and promote risk monitoring and management.[369]

The agencies continue to believe that these vehicles do not expose banking entities to the types of risks that section 13 of the BHC Act was intended to restrict, and that this exclusion is consistent with section 13(d)(1)(D), which permits banking entities to engage in transactions on behalf of customers, when such transactions would otherwise be prohibited under section 13. The agencies have elsewhere tailored the 2013 rule to allow banking entities to meet their customers' needs.[370] This exclusion will similarly allow banking entities to provide customer-oriented financial services through a vehicle when that vehicle's purpose is to facilitate a customer's exposure to those services.[371] As stated in the 2020 proposal, the agencies do not believe that section 13 of the BHC Act was intended to interfere unnecessarily with the ability of banking entities to provide services to their customers simply because the customer may prefer to receive those services through a vehicle or through a transaction with a vehicle instead of directly with the banking entity.[372] Some commenters agreed, stating that customer facilitation vehicles would not expose banking entities to the types of risks that section 13 was intended to prohibit or limit, particularly given that such vehicles will be subject to a number of conditions, as discussed below.[373]

The exclusion will, as proposed, require that the vehicle be formed by or at the request of the customer.[374] One commenter suggested that the agencies remove this requirement, arguing that it would inhibit a banking entity's ability to provide customers with services in a timely manner.[375] However, the agencies continue to believe that this requirement is an important component of the exclusion because it helps differentiate customer facilitation vehicles from covered funds that are organized and offered by the banking entity. As stated in the 2020 proposal, the requirement will not preclude a banking entity from marketing its customer facilitation vehicle services or discussing with its customers prior to the formation of such vehicles the potential benefits of structuring such services through a vehicle.[376]

As in the 2020 proposal, the agencies are not specifying the types of transaction, investment strategy or other service that a customer facilitation vehicle may be formed to facilitate.[377] One commenter recommended specifying that the exclusion only allow vehicles to be formed for extensions of intraday credit, and payment, clearing, and settlement services, and only for purposes of operational efficiency.[378] Another commenter argued that attempting to specify may prevent banking entities from being able to appropriately respond to a customer's requests.[379] The agencies continue to believe that providing flexibility enhances the utility of this exclusion. Specifically, the agencies note that the purpose of this exclusion is to allow banking entities to provide customer-oriented financial services through vehicles, providing customers with exposure to a transaction, investment strategy, or other service that the banking entity may provide to such customers directly. Limiting the type of transaction, investment strategy, or service for which the customer facilitation vehicle may be formed would interfere with this purpose. Accordingly, the agencies are adopting this requirement as proposed.

Under the final rule, similar to the 2020 proposal, a banking entity will be able to rely on the customer facilitation vehicle exclusion only under certain conditions, as stated above.[380] Commenters supported most of the conditions, stating that the exclusion imposes reasonable conditions that provide safeguards.[381] Commenters also suggested modifications to certain conditions, as discussed below.[382] The agencies are adopting the conditions, largely as proposed. However, the agencies are modifying the conditions that relate to *de minimis* ownership of the vehicle, the requirements of 12 CFR 223.15(a), and the disclosure obligations under § ____.11(a)(8), as discussed below.

As proposed, the exclusion would have permitted banking entities and their affiliates to acquire or retain, as principal, an ownership interest in the issuer up to 0.5 percent of the issuer's outstanding ownership interests, for the purpose of and to the extent necessary

[364] Final rule § ____.10(c)(18)(ii).

[365] *See, e.g.,* SIFMA; BPI; ABA; Credit Suisse; FSF; Goldman Sachs; and IAA.

[366] *See, e.g.,* SIFMA; BPI; ABA; and Goldman Sachs.

[367] *See, e.g.,* SIFMA; FSF; and SAF.

[368] *See* Better Markets and Data Boiler.

[369] *See* Better Markets.

[370] For example, the agencies in 2019 amended the exemption for risk-mitigating hedging activities to allow banking entities to acquire or retain an ownership interest in a covered fund as a risk-mitigating hedge when acting as an intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund. *See* 2019 amendments § ____.13(a)(1)(ii). *See also* 2019 amendments § ____.3(d)(11) (excluding from the definition of ''proprietary trading'' the entering into of customer-driven swaps or customer-driven security-based swaps and matched swaps or security-based swaps under certain conditions).

[371] This exclusion does not require that the customer relationship be pre-existing. In other words, the exclusion will be available for an issuer that is formed for the purpose of facilitating the exposure of a customer of the banking entity where the customer relationship begins only in connection with the formation of that issuer. The agencies took a similar approach to this question in describing the exemption for activities related to organizing and offering a covered fund under § ____.11(a) of the 2013 rule. *See* 79 FR 5716. The agencies indicated that section 13(d)(1)(G), under which the exemption under § ____.11(a) was adopted, did not explicitly require that the customer relationship be pre-existing. Similarly, section 13(d)(1)(D) does not explicitly require a pre-existing customer relationship.

[372] 85 FR 12120.

[373] *See* SIFMA and ABA.

[374] Final rule § ____.10(c)(18)(i).

[375] SIFMA (stating that requiring a banking entity to wait for a customer to request formation would delay the banking entity's ability to provide services to the customer without any corresponding regulatory benefit).

[376] 85 FR 12120.

[377] Final rule § ____.10(c)(18)(i).

[378] *See* Data Boiler.

[379] *See* SIFMA.

[380] Final rule § ____.10(c)(18)(ii).

[381] *See, e.g.,* SIFMA; FSF; and SAF.

[382] *See, e.g.,* SIFMA; BPI; and FSF.

for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.[383] Similar to their request for family wealth management vehicles, commenters suggested that the agencies specifically allow any party that is unaffiliated with the customer, rather than only the banking entities and their affiliates, to own this *de minimis* interest.[384] For the same reasons as discussed above with respect to family wealth management vehicles, the agencies are modifying the *de minimis* ownership provision such that up to an aggregate 0.5 percent of the issuer's outstanding ownership interests may be acquired or retained by one or more entities that are not customers if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.[385]

The agencies are adopting, with modifications, the condition for a banking entity to comply with the requirements of 12 CFR 223.15(a), as if such banking entity were a member bank and the issuer were an affiliate thereof.[386] As discussed above, several commenters recommended that the agencies clarify that the family wealth management vehicle exclusion permits banking entities to engage in riskless principal transactions to purchase assets—including low quality assets for purposes of section 223.15 of the Board's Regulation W—from family wealth management vehicles.[387] One such commenter also suggested that, for purposes of consistency, the agencies should similarly clarify that banking entities are permitted to engage in such riskless principal transactions with customer facilitation vehicles.[388]

The purpose of the proposed requirement that a customer facilitation vehicle must comply with 12 CFR 223.15(a) was the same for both the family wealth management vehicle and the customer facilitation vehicle exclusions—to help ensure that the exclusions do not allow banking entities to ''bail out'' either vehicle.[389] For the same reasons discussed above with respect to family wealth management vehicles, the agencies have modified the requirement to exclude from the requirements of 12 CFR 223.15(a) transactions that meet the definition of riskless principal transactions as defined in § ____.10(d)(11).[390] Similar to the agencies' approach with respect to family wealth management vehicles, the agencies expect that, together, the adopted criteria for this exclusion will prevent a banking entity from being able to bail out customer facilitation vehicles in periods of financial stress or otherwise expose the banking entity to the types of risks that the covered fund provisions of section 13 of the BHC Act were intended to address.

The agencies are modifying the condition that the banking entity and its affiliates comply with the disclosure obligations under § ____.11(a)(8), as if such issuer were a covered fund, to provide clarification that the content of the disclosure may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the issuer.[391] Commenters requested that the agencies provide such clarification in the context of family wealth management vehicles.[392] Although the agencies did not receive any comments with respect to this condition in the context of this exclusion, the agencies are similarly modifying this condition under this exclusion. The agencies believe that these disclosures will provide important information to the customers for whom these vehicles will be used to provide services—whether they are family customers under the family wealth management vehicle exclusion or other customers under this exclusion. The agencies' treatment of this condition for family wealth management vehicles, as described above, will similarly apply to this condition for customer facilitation vehicles.[393]

The agencies are adopting, as proposed, the condition that all of the ownership interests of the issuer are owned by the customer (which may include one or more of the customer's affiliates) for whom the issuer was created (other than a *de minimis* interest that may be held by others, as discussed above).[394] The agencies continue to believe that this condition is appropriate to prevent banking entities from using this exclusion for customer facilitation vehicles to evade the restrictions of section 13 of the BHC Act. To help track compliance, a banking entity and its affiliates will, as proposed, have to maintain documentation outlining how the banking entity intends to facilitate the customer's exposure to a transaction, investment strategy, or service.[395]

The agencies are also adopting, as proposed, the condition that the banking entity and its affiliates do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such issuer.[396] The agencies continue to believe that this condition is appropriate and consistent with the goal of preventing banking entities from bailing out their customer facilitation vehicles. Commenters generally agreed, supporting the condition as one that is reasonable and appropriate in addressing the agencies' potential evasion concerns.[397]

Finally, the agencies are adopting, as proposed, the condition that the banking entity and its affiliates comply with the requirements of §§ ____.14(b) and ____.15, as if such issuer were a covered fund.[398] The agencies requested comment in the 2020 proposal whether this exclusion should also require that the banking entity and its affiliates comply with the requirements of all of § ____.14. One commenter argued that requiring compliance with the requirements of all of § ____.14 would eliminate the utility of this exclusion.[399] The same commenter supported the condition, as proposed, stating that requiring compliance with only § ____.14(b), which would apply the requirements in section 23B of the Federal Reserve Act, and the application of the prudential backstops under § ____.15 would serve as adequate safeguards to avoid the risk of bailout or other evasion concerns.[400] The agencies continue to believe that this condition will help ensure that banking entities and their affiliates' exposure to risk remains appropriately limited.

The agencies continue to believe that, collectively, the conditions on the exclusion will help to ensure that

[383] *See* 2020 proposed rule § ____.10(c)(18)(ii)(B)(4).

[384] *See* SIFMA; BPI; and FSF.

[385] Final rule § ____.10(c)(18)(ii)(B).

[386] Final rule § ____.10(c)(18)(ii)(C)(6). 12 CFR 223.15(a) provides that a member bank may not purchase a low-quality asset from an affiliate unless, pursuant to an independent credit evaluation, the member bank had committed itself to purchase the asset before the time the asset was acquired by the affiliate. 12 CFR 223.15(a).

[387] *See, e.g.,* BPI and SIFMA. *See supra,* Section IV.C.3 (Family Wealth Management Vehicles).

[388] *See* BPI.

[389] *See* 85 FR 12120.

[390] Final rule § ____.10(c)(18)(ii)(C)(6).

[391] Final rule § ____.10(c)(18)(ii)(C)(3).

[392] *See supra,* Section IV.C.3 (Family Wealth Management Vehicles).

[393] *Id.*

[394] Final rule §§ ____.10(c)(18)(ii)(A)–(B).

[395] Final rule § ____.10(c)(18)(ii)(C)(1).

[396] Final rule § ____.10(c)(18)(ii)(C)(2).

[397] *See, e.g.,* SIFMA; FSF; and Data Boiler.

[398] Final rule § ____.10(c)(18)(ii)(C)(5).

[399] *See* FSF (stating that if banking entities were required to comply with all of § ____.14, they would not be able to enter into swaps and other covered transactions with the customer facilitation vehicle for their clients, many of whom seek such transactions through the use of such vehicles).

[400] *See* FSF.

customer facilitation vehicles are used for customer-oriented financial services provided on arms-length, market terms, and to prevent evasion of the requirements of section 13 of the BHC Act and the final rule. The agencies also continue to believe that the adopted conditions will be consistent with the purposes of section 13.

As in the 2020 proposal, the agencies will not apply § ____.14(a) to customer facilitation vehicles because the agencies understand that this would prohibit banking entities from providing the full range of banking and asset management services to customers using these vehicles. Commenters generally supported this approach,[401] and one noted that applying § ____.14(a) to these vehicles would undo any practical utility of the exclusion.[402]

D. Limitations on Relationships With a Covered Fund

In the 2020 proposal, the agencies proposed to amend the regulations implementing section 13(f)(1) of the BHC Act to permit banking entities to engage in a limited set of covered transactions with covered funds for which the banking entity directly or indirectly serves as investment manager, investment adviser, or sponsor, or that the banking entity organizes and offers pursuant to section 13(d)(1)(G) of the BHC Act (such funds, related covered funds).[403]

Section 13(f)(1) of the BHC Act generally prohibits a banking entity from entering into a transaction with a related covered fund that would be a covered transaction as defined in section 23A of the Federal Reserve Act as if the banking entity was a member bank and the covered fund was an affiliate.[404] The 2020 proposal would have amended the application of section 13(f)(1) of the BHC Act in limited circumstances, by allowing a banking entity to enter into certain covered transactions with a related covered fund that would be permissible without limit for a state member bank to enter into with an affiliate under section 23A of the Federal Reserve Act. In addition, the 2020 proposal would have allowed a banking entity to enter into short-term extensions of credit with, and purchase assets from, a related covered fund in connection with payment, clearing, and settlement activities. The agencies invited comment on the past interpretation of section 13(f)(1) of the BHC Act,[405] and the proposed amendments to the regulations implementing section 13(f)(1).[406]

As described in the 2020 proposal, the agencies believe the statutory rulemaking authority under paragraph (d)(1)(J) of section 13 of the BHC Act permits the agencies to determine that banking entities may enter into covered transactions with related covered funds that would otherwise be prohibited by section 13(f)(1) of the BHC Act, provided that the rulemaking complies with applicable statutory requirements.[407] This interpretation of the agencies' rulemaking authority is supported both by the inclusion of other covered transactions within the permitted activities listed in paragraph (d)(1) of section 13 and by the manner in which section 13(f)(1) of the BHC Act is incorporated in the list of permitted activities in paragraph (d)(1), as described below.

Section 23A of the Federal Reserve Act limits the aggregate amount of covered transactions between a member bank and its affiliates, while section 13(f)(1) of the BHC Act generally prohibits covered transactions between a banking entity and a related covered fund, with no minimum amount of permissible covered transactions.[408] Despite the general prohibition on certain covered transactions in section 13(f)(1), section 13 also authorizes a banking entity to own an interest in a related covered fund, which would be a ''covered transaction'' for purposes of section 23A of the Federal Reserve Act.[409] In addition to this apparent conflict between paragraphs 13(d) and (f) with respect to covered fund ownership, there are other elements of these paragraphs that introduce ambiguity about the interpretation of the term ''covered transaction'' as used in section 13(f) of the BHC Act. For example, despite the general prohibition on covered funds, another part of section 13 permits a bank entity ''to acquire or retain an ownership interest in a covered fund in accordance with the requirements of section 13.'' [410] In the preamble to the 2013 rule, the agencies specifically interpreted section 13 to allow such investments noting that a contrary interpretation would make the specific language that permits covered transactions between a banking entity and a related covered fund ''mere surplusage.'' [411] The statute also prohibits a banking entity that organizes or offers a hedge fund or private equity fund from directly or indirectly guaranteeing, assuming, or otherwise insuring the obligations or performance of the fund (or of any hedge fund or private equity fund in which such hedge fund or private equity fund invests).[412] To the extent that section 13(f) prohibits all covered transactions between a banking entity and a related covered fund, however, the independent prohibition on guarantees in section 13(d)(1)(G)(v) would seem to be unnecessary and redundant.[413]

Although the agencies previously expressed doubt about their ability to permit banking entities to enter into covered transactions with related covered funds pursuant to their authority under section 13(d)(1)(J) of the BHC Act,[414] the activities permitted pursuant to paragraph (d) specifically contemplate allowing a banking entity to enter into certain covered

[401] *See, e.g.,* SIFMA and BPI.

[402] *See* SIFMA.

[403] *See* 2020 proposal § ____.14(a)(2), (3); 85 FR 12143–12146.

[404] 12 U.S.C. 1851(f)(1); *see also* 12 U.S.C. 371c. Section 13(f)(3) of the BHC Act also provides an exemption for prime brokerage transactions between a banking entity and a covered fund in which a covered fund managed, sponsored, or advised by that banking entity has taken an ownership interest. 12 U.S.C. 1851(f)(3). In addition, section 13(f)(2) subjects any transaction permitted under section 13(f) (including a permitted prime brokerage transaction) between a banking entity and covered fund to section 23B of the Federal Reserve Act. 12 U.S.C. 1851(f)(2); *see* 12 U.S.C. 371c–1.

[405] In the preamble to the 2013 rule, the agencies noted that ''[s]ection 13(f) of the BHC Act does not incorporate or reference the exemptions contained in section 23A of the FR Act or the Board's Regulation W.'' 79 FR 5746.

[406] 85 FR 12145–46.

[407] 12 U.S.C. 1851(b)(2), (d)(1)(J), (d)(2).

[408] 12 U.S.C. 371c, 12 U.S.C. 1851(f)(1). The term ''covered transaction'' is defined in section 23A of the Federal Reserve Act to mean, with respect to an affiliate of a member bank, (1) a loan or extension of credit to the affiliate, including a purchase of assets subject to an agreement to repurchase; (2) a purchase of or an investment in securities issued by the affiliate; (3) a purchase of assets from the affiliate, except such purchase of real and personal property as may be specifically exempted by the Board by order or regulation; (4) the acceptance of securities or other debt obligations issued by the affiliate as collateral security for a loan or extension of credit to any person or company; (5) the issuance of a guarantee, acceptance, or letter of credit, including an endorsement or standby letter of credit, on behalf of an affiliate; (6) a transaction with an affiliate that involves the borrowing or lending of securities, to the extent that the transaction causes a member bank or a subsidiary to have credit exposure to the affiliate; or (7) a derivative transaction, as defined in paragraph (3) of section 5200(b) of the Revised Statutes of the United States (12 U.S.C. 84(b)), with an affiliate, to the extent that the transaction causes a member bank or a subsidiary to have credit exposure to the affiliate. *See* 12 U.S.C. 371c(b)(7), as amended by Pub. L. 111.203, section 608 (July 21, 2010). Section 13(f) of the BHC Act does not alter the applicability of section 23A of the Federal Reserve Act and the Board's Regulation W to covered transactions between insured depository institutions and their affiliates.

[409] 12 U.S.C. 1851(d)(1)(G); (d)(4).

[410] 79 FR 5746.

[411] *Id.*

[412] 12 U.S.C. 1851(d)(1)(G)(v).

[413] *See* 12 U.S.C. 371c(b)(7)(E); 12 CFR 223.3(h)(4).

[414] *See* 76 FR 68912 n.313.

transactions with related funds.[415] The exceptions in section 13(f)(1) are also expressly incorporated into the statutory list of permitted activities, specifically in section 13(d)(1)(G)(iv).[416] By virtue of the conflict between paragraphs (d) and (f) of section 13, and the inclusion of specific covered transactions within the permitted activities in paragraph (d) of section 13, the agencies continue to believe that the authority granted pursuant to paragraph (d)(1)(J) to determine that other activities are not prohibited by the statute authorizes the agencies to exercise rulemaking authority to determine that banking entities may enter into covered transactions with related covered funds that would otherwise be prohibited by section 13(f)(1) of the BHC Act, provided that the rulemaking complies with applicable statutory requirements.[417]

Several commenters expressed support for the proposed amendments to the regulations implementing section 13(f)(1) of the BHC Act that would have permitted a banking entity to engage in a limited set of covered transactions with a related covered fund.[418] Some commenters recommended that the agencies clarify whether a banking entity may enter into exempt transactions with a related covered fund in the circumstance where such transactions would be exempt from section 23A of the Federal Reserve Act only if a bank entered into such transactions with a securities affiliate.[419] A few commenters also recommended that the agencies adopt a new exclusion allowing a banking entity to offer other types of extensions of credit to a related covered fund, including extensions of credit in the ordinary course of business.[420] Other commenters recommended that the agencies clarify that section 13(f)(1) does not apply outside of the United States.[421] The commenters noted that such an approach would limit the extraterritorial effect of section 13(f)(1), and would better align section 13(f)(1) with the manner in which section 23A of the Federal Reserve Act applies outside of the United States.

As discussed below, the final rule adopts the proposed amendments from the 2020 proposal with minor modifications. The agencies believe that, under certain circumstances, it is appropriate to permit banking entities to enter into certain covered transactions with related covered funds, in the manner described in the amendments to §____.14 of the implementing regulations. Consistent with the 2020 proposal, these amendments do not modify the definition of ''covered transaction'' but instead authorize banking entities to engage in limited transactions with related covered funds. Any transactions permitted by these revisions must still meet the eligibility requirements for the particular transaction, and the banking entity must also comply with certain conflict of interest, high-risk, and safety and soundness restrictions with respect to such transactions. The agencies are also expressly providing that a banking entity may enter into certain riskless principal transactions with a related covered fund, as described below.

Exempt Transactions Under Section 23A and the Board's Regulation W; Riskless Principal Transactions

The final rule adopts the amendments to the regulations implementing section 13(f)(1) of the BHC Act to permit banking entities to enter into exempt transactions permitted under section 23A and the Board's Regulation W. Specifically, the final rule permits a banking entity to engage in certain covered transactions with a related covered fund that would be exempt from the quantitative limits, collateral requirements, and low-quality asset prohibition under section 23A of the Federal Reserve Act, including certain transactions that would be exempt pursuant to section 223.42 of the Board's Regulation W.[422]

Section 23A of the Federal Reserve Act is designed to protect against a depository institution suffering losses in transactions with affiliates, and to limit the ability of a depository institution to transfer to its affiliates the ''subsidy'' arising from the depository institution's access to the Federal safety net.[423] Nevertheless, a member bank may enter into certain ''exempt'' covered transactions set forth in section 23A of the Federal Reserve Act and the Board's Regulation W, without regard to the quantitative limits, collateral requirements, and low-quality asset prohibition of section 23A and the Board's Regulation W, provided such transactions meet the criteria specified in Regulation W.[424]

Under the Board's Regulation W, a member bank may enter into certain exempt covered transactions only with a securities affiliate. Specifically, under these exempt covered transactions, a member bank may enter into transactions to purchase marketable securities, to purchase municipal securities, and to enter into riskless principal transactions only with a securities affiliate.[425] In permitting such transactions under Regulation W, the Board previously concluded that the condition that such transactions were permissible only with a securities affiliate was an important consideration that helped justify the exemption, noting that securities affiliates generally must be registered as broker-dealers, and are therefore subject to SEC supervision and examination, and are required to keep detailed records concerning each securities transaction.[426]

The exempt transactions specified in section 23A of the Federal Reserve Act and Regulation W are structured in a manner so as not to present the same concerns about a depository institution suffering losses or transferring the subsidy arising from the depository institution's access to the Federal safety net. The agencies believe that the same rationale that supports the exemptions in section 23A of the Federal Reserve Act and the Board's Regulation W also supports exempting such transactions from the prohibition on covered transactions between a banking entity and related covered funds under section 13(f)(1) of the BHC Act, provided that such transactions are subject to the same requirements and conditions specified in Regulation W. In particular, the agencies note that these exemptions generally do not present significant risks of loss and serve important public policy objectives.[427]

Several commenters recommended that the agencies clarify whether a banking entity may enter into certain transactions with a related covered fund that would be permissible under the Board's Regulation W if entered into between a bank and a securities affiliate,

[415] 12 U.S.C. 1851(d)(1)(G); (d)(4).

[416] 12 U.S.C. 1851(d)(1)(G)(iv).

[417] 12 U.S.C. 1851(b)(2), (d)(1)(J), (d)(2).

[418] *See, e.g.,* ABA; BPI; CBA; Data Boiler; EBF; FSF; IIB; PNC; and SIFMA.

[419] ABA; BPI; FSF; and SIFMA.

[420] BPI and PNC.

[421] CBA; EBF; and IIB.

[422] *See* 12 U.S.C. 371c(d); 12 CFR 223.42.

[423] For a brief background on section 23A of the Federal Reserve Act, see Transactions Between Member Banks and Their Affiliates, 67 FR 76560–765561 (December 12, 2002).

[424] *See* 12 U.S.C. 371c(d); 12 CFR 223.42.

[425] 12 CFR 223.42(f), (g), (m).

[426] 67 FR 76591 (December 12, 2002); *see* 67 FR 76593, 76597.

[427] For example, intraday extensions of credit are exempt covered transactions under section 23A of the Federal Reserve Act. The Board previously has noted that ''[i]ntraday overdrafts and other forms of intraday credit generally are not used as a means of funding or otherwise providing financial support for an affiliate. Rather, these credit extensions typically facilitate the settlement of transactions between an affiliate and its customers when there are mismatches between the timing of funds sent and received during the business day.'' 67 FR 76596.

even if the covered fund would not meet the eligibility criteria to be a ''securities affiliate'' under the Board's Regulation W.[428] As noted above, Regulation W imposes various conditions and requirements on transactions that a bank enters into with its affiliates, and permits a bank to enter into transactions involving the purchase of marketable securities, the purchase of municipal securities, and riskless principal transactions only with an affiliate that is a ''securities affiliate'' as defined in Regulation W. With respect to purchases of marketable securities and municipal securities, the final rule follows the approach adopted in Regulation W, and permits a banking entity to enter into such covered transactions with a related covered fund only if those transactions would meet all of the eligibility criteria to qualify as exempt transactions under Regulation W, including the requirement that the related covered fund meets the requirements to be a securities affiliate.[429] As noted above, the exempt transactions specified in Regulation W include various limits and conditions that both limit the risks of such transactions and allow the Federal banking agencies to monitor compliance. Generally, the final rule retains the eligibility criteria for exempt covered transactions defined in Regulation W. The agencies believe that these conditions serve important policies, and appropriately limit the scope of the exempt transactions permissible under the implementing regulations.

The final rule permits banking entities to enter into riskless principal transactions with a related covered fund, including in circumstances where the covered fund is not a ''securities affiliate.'' [430] In a riskless principal transaction, the riskless principal (the banking entity) buys and sells the same security contemporaneously, and the asset risk passes promptly from the affiliate (the related covered fund) through the riskless principal to a third party.[431] In permitting such transactions under Regulation W, the Board previously found that there was no regulatory benefit to subjecting riskless principal transactions to section 23A of the Federal Reserve Act, because such transactions closely resemble securities brokerage transactions, and these transactions do not allow the affiliate to transfer risk to the affiliate acting as a riskless principal.[432]

Although the 2020 proposal would have permitted a banking entity to enter into a riskless principal transaction with a covered fund provided it met the criteria in Regulation W, the final rule adopts a standalone exception to differentiate riskless principal transactions specifically from other transactions that would be exempt transactions under the Board's Regulation W.[433] In connection with permitting banking entities to enter into riskless principal transactions with related covered funds in a separate exception from Super 23A, the agencies are defining riskless principal transactions in § ____.10 of the regulations. The definition of riskless principal transactions adopted in the final rule is similar to the definition adopted in the Board's Regulation W, as this definition is appropriately narrow and generally familiar to banking entities.[434]

In addition, and as discussed in more detail below, banking entities may separately rely on the independent exception for acquisitions of assets in connection with payment, clearing, and settlement services. The agencies expect that in many instances, subject to other applicable laws and regulations, a banking entity may be able to engage in acquisitions of assets in connection with payment, clearing, and settlement services, without relying on the exception permitting banking entities to enter into covered transactions with their related covered funds that would be exempt under Regulation W.

Short-Term Extensions of Credit and Acquisitions of Assets in Connection With Payment, Clearing, and Settlement Services

The final rule adopts the proposed amendments in the 2020 proposal that would have permitted a banking entity to provide short-term extensions of credit to, and purchase assets from, a related covered fund, subject to appropriate limits. Under the final rule, each short-term extension of credit or purchase of assets must be made in the ordinary course of business in connection with payment transactions; securities, derivatives, or futures clearing; or settlement services. In addition, each extension of credit must be required to be repaid, sold, or terminated no later than five business days after it was originated. Additionally, the proposed five business day criterion is consistent with the Federal banking agencies' capital rules and would generally limit banking entities to transactions with normal settlement periods, which have lower risk of delayed settlement or failure, when providing short-term extensions of credit.[435] Each short-term extension of credit must also meet the same requirements applicable to intraday extensions of credit under section 223.42(*l*)(1)(i) and (ii) of the Board's Regulation W (as if the extension of credit was an intraday extension of credit, regardless of the duration of the extension of credit). Under these requirements, the banking entity making a short-term extension would have to meet the same requirements as it would to engage in an intraday extension of credit under Regulation W (and as incorporated in the implementing regulations). Specifically, the banking entity would need to have policies and procedures to manage the credit exposure and must have no reason to believe that the related covered fund will have difficulty repaying the extension of credit in accordance with its terms. Finally, each extension of credit or purchase of assets permitted by these revisions must also comply with certain conflict of interest, high-risk, and safety and soundness restrictions, and must otherwise be permissible for the banking entity to enter into with the fund.[436]

[428] ABA; BPI; FSF; and SIFMA. Under the Board's Regulation W, a ''securities affiliate'' is defined as ''[a]n affiliate of the member bank that is registered with the Securities and Exchange Commission as a broker or dealer; or . . . [a]ny other securities broker or dealer affiliate of a member bank that is approved by the Board.'' 12 CFR 223.3(gg).

[429] In addition to requiring that an affiliate be a securities affiliate, the exemptions under Regulation W permitting a bank to purchase marketable securities or municipal securities in certain circumstances require the bank to retain records about the underlying transaction. *See* 12 CFR 223.42(f)(6), (g)(3)(iii)(B).

[430] *Cf.* 12 CFR 223.42(m).

[431] *See* 67 FR 76597.

[432] *Id.*

[433] 12 CFR 223.42.

[434] *See* 12 CFR 223.3(ee).

[435] *See* 78 FR 62110 (October 11, 2013). While the Federal banking agencies require firms to track and monitor the credit risk exposure for transactions involving securities, foreign exchange instruments, and commodities that have a risk of delayed settlement, this requirement does not apply to other types of transactions which may be used in providing a short-term extension of credit (*e.g.,* repo-style transactions). Additionally, banking entities typically monitor credit extensions by counterparty, and not by transaction type. Thus, the final rule is consistent with the approach taken in the Federal banking agencies' capital rule, without imposing an additional compliance burden without a corresponding benefit. *See, e.g.,* 12 CFR 3.2; 217.2; 324.2 (defining derivative contract to include unsettled securities with a contractual settlement or delivery lag that is longer than the lesser of the market standard for the particular instrument or five business days); 12 CFR 3.38(d); 217.38(d); 324.38(d) (noting that an institution must hold risk-based capital against any delivery-versus-payment or payment-versus-payment transaction with a normal settlement period if the counterparty has not made delivery within five business days after settlement).

[436] For example, an investment fund with respect to which a member bank or its affiliate is an

Continued

The agencies do not believe it would be appropriate to permit banking entities to enter into other covered transactions with a related covered fund, outside of the exceptions noted above. Although some commenters recommended expanding this exception to allow banking entities to enter into limited amounts of covered transactions with related covered funds, the agencies believe that permitting banking entities to engage in other covered transactions with related covered funds would potentially raise the concerns that paragraph 13(f)(1) was intended to address.

The agencies also do not believe that it would be appropriate to limit the application of section 13(f)(1) to the United States as some commenters recommended, at this time. The agencies note that other amendments in the final rule (for example, amendments to the treatment of foreign excluded funds and foreign public funds) may help address some of the commenters' concerns about the extraterritorial application of section 13(f)(1).

Impact of the Amendments on Safety and Soundness and U.S. Financial Stability

The agencies expect that the amendments in the final rule described above would generally promote and protect the safety and soundness of banking entities and U.S. financial stability. In comments previously submitted to the agencies, banking entities that sponsor or serve as the investment adviser to covered funds have argued that the inability to engage in any covered transactions with such funds, particularly those types of transactions that are expressly exempted under section 23A of the Federal Reserve Act and the Board's Regulation W, has limited the services that they or their affiliates can provide. The commenters said that amending the regulations to permit limited covered transactions with related covered funds would not create any new incentives for the banking entity to financially support the related covered fund in times of stress and would not otherwise permit the banking entity to indirectly engage in proprietary trading through the related covered fund.[437] For example, when a banking entity sponsors or advises a covered fund, the prohibition on covered transactions between the banking entity (and its affiliates) and the covered fund may limit the ability of the banking entity and its affiliates to provide other services, such as trade settlement services, to the covered fund.

As discussed below, the agencies believe that the exceptions in the final rule would generally promote and protect the safety and soundness of banking entities and U.S. financial stability by allowing banking entities to reduce operational risk.

Currently, the restrictions under section 13(f)(1) of the BHC Act substantially limit the ability of a banking entity to both (1) organize and offer a covered fund, or act as an investment adviser to the covered fund, and (2) provide custody or other services to the fund. As a result, a third party is required to provide other necessary services for the fund's operation, including payment, clearing, and settlement services that are generally provided by the fund's custodian, even when the banking entity sponsor of the fund typically provides those services to other funds it sponsors. This is the case even when the third party may not offer the same quality of services available through an affiliate, or where the third party may charge more for the same services that could be provided by an affiliate. This increases the potential for problems at the third-party service provider (*e.g.,* an operational failure or a disruption to normal functioning) to affect the banking entity or the fund, which were required to use the third-party service provider as a result of the restrictions under section 13(f)(1). Those problems may then spread among financial institutions or markets and thereby threaten the stability of the U.S. financial system. By amending §____.14(a), therefore, the final rule allows a banking entity to reduce both operational risk and interconnectedness to other financial institutions by directly providing a broader array of services to a fund it organizes and offers, or advises. The agencies believe that reducing these risks will promote and protect the safety and soundness of banking entities.[438]

The final rule also would promote and protect U.S. financial stability by reducing interconnectedness among firms. The provision of custodial services among depository institutions in the United States is highly concentrated, with the four largest providers, all of which remain subject to the Volcker Rule, holding more than 85 percent of custodial assets. Requiring a banking entity that organizes and offers a covered fund to use a third party to provide these services could increase the interconnections between these firms and the risk that distress at one banking entity would be spread to the others. The authorized covered transactions would permit banking entities to provide a more comprehensive suite of services to related covered funds, reducing interconnectedness by reducing the need to rely on third parties to provide such services.

The final rule also retains important limits on the transactions that a banking entity may enter into with a related covered fund, including limitations that apply to transactions within the new exceptions in the regulations implementing §____.14(a). As specified in the statute, such activities are permissible only ''to the extent permitted by any other provision of Federal or state law, and subject to the limitations under section 13(d)(2) of the BHC Act and any restrictions or limitations that the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission, may determine . . .'' [439] Section 13(d)(2) of the BHC Act also imposes additional restrictions on any activities authorized pursuant to section (d)(1), including those activities authorized by rulemaking pursuant to section (d)(1)(J).[440]

Sections ____.14(b) and ____.14(c) of the regulations implementing section 13 of the BHC Act both generally require that a banking entity may enter into certain transactions specified in section 23B of the Federal Reserve Act (including ''covered transactions'' as defined in section 23A of the Federal Reserve Act) with related covered funds only on terms and under circumstances that are substantially the same (or at least as favorable) as to the banking entity as those prevailing at the time for comparable transactions with or involving other nonaffiliated companies, or in the absence of comparable transactions, on terms and under circumstances that the banking entity in good faith would offer to, or would apply to, nonaffiliated companies.[441]

investment adviser may be subject to additional restrictions under Section 23A of the Federal Reserve Act. *See* 12 U.S.C. 371c(b)(1)(D).

[437] *See* 85 FR 12144.

[438] The agencies believe that the same rationales that supported exempting certain covered transactions in section 23A of the Federal Reserve Act and the Board's Regulation W also support permitting a banking entity to engage in those exempt covered transactions with a related covered fund, subject to the same terms and conditions as applicable under section 23A and Regulation W.

[439] 12 U.S.C. 1851(d)(1).

[440] 12 U.S.C. 1851(d)(2); *see also* 2013 rule §§____.7 and ____.15.

[441] 12 U.S.C. 1851(f)(2); *see* 12 U.S.C. 371c–1(a)(1).

The agencies therefore have determined that the amendments to § ____.14(a) of the final rule, in the manner described above, would promote and protect both the safety and soundness of banking entities, and U.S. financial stability.

E. Ownership Interest

1. Definition of ''Ownership Interest''

The 2013 rule defines an ''ownership interest'' in a covered fund to mean any equity, partnership, or other similar interest. Some banking entities have expressed concern about the inclusion of the term ''other similar interest'' in the definition of ''ownership interest,'' and have indicated that the definition of this term could lead to the inclusion of debt instruments that have standard covenants within the definition of ownership interest. Under the 2013 rule, ''other similar interest'' is defined as an interest that:

- Has the right to participate in the selection or removal of a general partner, managing member, member of the board of directors or trustees, investment manager, investment adviser, or commodity trading advisor of the covered fund (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);
- Has the right under the terms of the interest to receive a share of the income, gains or profits of the covered fund;
- Has the right to receive the underlying assets of the covered fund after all other interests have been redeemed and/or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);
- Has the right to receive all or a portion of excess spread (the positive difference, if any, between the aggregate interest payments received from the underlying assets of the covered fund and the aggregate interest paid to the holders of other outstanding interests);
- Provides under the terms of the interest that the amounts payable by the covered fund with respect to the interest could be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest;
- Receives income on a pass-through basis from the covered fund, or has a rate of return that is determined by reference to the performance of the underlying assets of the covered fund; or
- Any synthetic right to have, receive, or be allocated any of the rights above.[442]

This definition focuses on the attributes of the interest and whether it provides a banking entity with economic exposure to the profits and losses of the covered fund, rather than its form. Under the 2013 rule, a debt interest in a covered fund can be an ownership interest if it has the same characteristics as an equity or other ownership interest (*e.g.,* provides the holder with certain voting rights; the right or ability to share in the covered fund's profits or losses; or the ability, directly or pursuant to a contract or synthetic interest, to earn a return based on the performance of the fund's underlying holdings or investments).

In the 2018 proposal, the agencies requested comment on all aspects of the 2013 rule's application to securitization transactions, including the definition of ownership interest. Specifically, the agencies asked whether there were any modifications that should be made to the 2013 rule's definition of ownership interest.[443] Among other things, the agencies requested comments on whether they should modify § ____.10(d)(6)(i)(A) to provide that the ''rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event'' include the right to participate in the removal of an investment manager for cause, or to nominate or vote on a nominated replacement manager upon an investment manager's resignation or removal.[444]

A number of comments received on the 2018 proposal supported the agencies' suggestion to modify § ____.10(d)(6)(i)(A) and to expressly permit creditors to participate in the removal of an investment manager for cause, or to nominate or vote on a nominated replacement manager upon an investment manager's resignation or removal without causing an interest to become an ownership interest.[445] However, a few of these commenters on the 2018 proposal noted that this modification would not address all issues with the condition as banks sometimes have contractual rights to participate in the selection or removal of a general partner, managing member or member of the board of directors or trustees of a borrower that are not limited to the exercise of a remedy upon an event of default or other default event.[446] Therefore, these commenters proposed eliminating the ''other similar interest'' clause from the definition altogether or, alternatively, replacing the definition of ownership interest with the definition of ''voting securities'' from the Board's Regulation Y.

A number of commenters on the 2018 proposal argued that debt interests issued by covered funds and loans to third-party covered funds not advised or managed by a banking entity should be excluded from the definition of ownership interest.[447] Other commenters suggested reducing the scope of the definition of ownership interest to apply only to equity and equity-like interests that are commonly understood to indicate a bona fide ownership interest in a covered fund.[448] One other commenter asked the agencies to clarify conditions under the ''other similar interest'' clause.[449] Specifically, the commenter asked the agencies to clarify whether the right to receive all or a portion of the spread extends to using the excess spread or any debt repaid from collections on underlying assets of a special purpose entity to pay principal or interest that is otherwise owed is not an ownership interest. Another commenter asked the agencies not to modify the definition of ownership interest as, the commenter argued, there is nothing under section 13 of the BHC Act that limits or restricts the ability of a banking entity or nonbank financial company to sell or securitize loans in a manner permitted by law.[450]

In response to comments received on the 2018 proposal and in order to provide clarity about the types of interests that would be considered within the scope of the definition of ownership interest, the 2020 proposal would have amended the parenthetical in § ____.10(d)(6)(i)(A) to specify that creditors' remedies upon the occurrence of an event of default or an acceleration event, which include, for example, the right to participate in the removal of an investment manager for cause or to nominate or vote on a nominated replacement manager upon an occurrence of an event of default, would not be considered an ownership interest for this reason alone.[451] The 2020 proposal also sought comment on whether it would be appropriate to

[442] 2013 rule § ____.10(d)(6)(i).

[443] 83 FR 33481.

[444] *Id.*

[445] *See, e.g.,* SFIG; JBA; LSTA; and IAA.

[446] *See* SFIG.

[447] *See, e.g.,* Capital One et al. and BPI.

[448] *See, e.g.,* ABA and CAE.

[449] *See* SFIG.

[450] *See* Data Boiler.

[451] The definition of ''ownership interest'' in the implementing regulations is independent from the definition of ''voting securities'' in the Board's Regulation Y.

further allow for an interest to confer the right to participate in any removal of an investment manager for cause, or to nominate or vote on a nominated replacement manager upon an investment manager's resignation or removal, whether or not an event of default or an acceleration event has occurred, without that interest being deemed an ownership interest. Such additional ''for cause'' termination events may include the insolvency of the investment manager, the breach by the investment manager of certain representations or warranties, or the occurrence of a ''key person'' event or a change in control with respect to the investment manager.

Commenters on the 2020 proposal generally supported the proposed amendment to the definition of ownership interest to specify that creditors' remedies upon the occurrence of an event of default or an acceleration event include the right to participate in the removal of an investment manager for cause or to nominate or vote on a nominated replacement manager upon an occurrence of an event of default. In the view of these commenters, the proposed clarification would appropriately recognize that the ability of a holder to vote on removal or appointment of managers for cause is not a right limited to equity holders. However, many of these commenters asserted that creditors' rights are also provided to debt holders in circumstances other than an event of default or acceleration. These commenters therefore recommended the proposed amendments be expanded to include additional for cause events that are independent of an event of default or acceleration, such as the insolvency of the investment manager or breach of the investment management or collateral management agreement.[452]

In light of comments received on the 2020 proposal, the agencies recognize that it is customary for debt holders to hold certain rights to participate in the removal or replacement of an investment manager for cause that may be triggered by events other than default or acceleration events. The agencies believe that debt interests that include the rights of a creditor to participate in the for-cause removal or replacement of an investment manager under certain circumstances do not necessarily constitute the type of interest Section 13 of the BHC Act is intended to capture as an ownership interest. The agencies are therefore finalizing, with certain modifications, the amendments to § ____.10(d)(6)(i)(A) in order to provide clarity about the types of creditor rights that may attach to an interest without that interest being deemed an ownership interest. The agencies have modified the scope of the definition of ownership interest in the final rule to allow for certain additional rights of creditors that are not triggered exclusively by an event of default or acceleration to attach to a debt interest without such interests being deemed ownership interests. In addition to such rights arising under events of default or acceleration, under the final rule, the definition of ownership interest does not include rights of a creditor to participate in the removal or replacement of an investment manager for cause in connection with:

(1) The bankruptcy, insolvency, conservatorship or receivership of the investment manager;

(2) the breach by the investment manager of any material provision of the covered fund's transaction agreements applicable to the investment manager;

(3) the breach by the investment manager of material representations or warranties;

(4) the occurrence of an act that constitutes fraud or criminal activity in the performance of the investment manager's obligations under the covered fund's transaction agreements;

(5) the indictment of the investment manager for a criminal offense, or the indictment of any officer, member, partner or other principal of the investment manager for a criminal offense materially related to his or her investment management activities;

(6) a change in control with respect to the investment manager;

(7) the loss, separation or incapacitation of an individual critical to the operation of the investment manager or primarily responsible for the management of the covered fund's assets; or

(8) other similar events that constitute ''cause'' for removal of an investment manager, provided that such events are not solely related to the performance of the covered fund or to the investment manager's exercise of investment discretion under the covered fund's transaction agreements.

The 2020 proposal also would have provided a safe harbor from the definition of ownership interest, as suggested by some commenters to the 2018 proposal.[453] The safe harbor was intended to address concerns of commenters to the 2018 proposal that some ordinary debt interests could be construed as an ownership interest. The 2020 proposal, therefore, would have provided that any senior loan or other senior debt interest that meets all of the following characteristics would not be considered to be an ownership interest:

(1) The holders of such interest do not receive any profits of the covered fund but may only receive: (i) Interest payments which are not dependent on the performance of the covered fund; and (ii) fixed principal payments on or before a maturity date (which may include prepayment premiums intended solely to reflect, and compensate holders of the interest for, foregone income resulting from an early prepayment);

(2) The entitlement to payments on the interest is absolute and may not be reduced because of the losses arising from the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the principal and interest payable; and

(3) The holders of the interest are not entitled to receive the underlying assets of the covered fund after all other interests have been redeemed and/or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event).

Commenters on the 2020 proposal generally supported the proposed safe harbor from the definition of ownership interest for certain senior loans or senior debt interests that do not have equity-like characteristics.[454] However, certain commenters also requested that the agencies clarify that the safe harbor is available to senior loans and senior debt interests where repayment of principal may vary as a result of acceleration or amortization provisions.[455] Additionally, certain commenters also requested that the agencies clarify that the reference to senior loans or senior debt interests in the proposed safe harbor includes all exposures that would meet the definition of ''investment grade'' found in 12 CFR part 1 and implementing guidelines, as long as such exposures comply with the proposed conditions.[456]

The agencies intended for the proposed conditions of the safe harbor to provide clarity and predictability to banking entities by enabling them to determine more readily whether an interest would be an ownership interest under the regulations implementing section 13 of the BHC Act. After considering comments received, the

[452] *See, e.g.,* SIFMA.

[453] *See* SFIG.

[454] *See, e.g.,* SIFMA; BPI; LSTA; Mortgage Bankers Association; and PNC.

[455] *See* SIFMA.

[456] *See, e.g.,* LSTA and SFA.

agencies have included the conditions from the 2020 proposal for the safe harbor with a modification to § ____.10(d)(6)(ii)(B)(*1*)(*ii*). The modification requires that the senior loan or senior debt interest involves, among other things, repayment of a fixed principal amount, on or before a maturity date, in a contractually-determined manner (which may include prepayment premiums intended solely to reflect, and compensate holders of the interest for, forgone income resulting from an early prepayment). The agencies believe this modification will provide additional clarity that the safe harbor is available to senior loan and senior debt interests where contractual principal payments vary over the life of a senior loan or senior debt interest for reasons such as amortization and acceleration provided that the total amount of principal required to be repaid over the life of the instrument does not change. The agencies believe this modification to the safe harbor under the final rule will ensure that debt interests that do not have equity-like characteristics are not considered ownership interests. Additionally, the agencies believe that the conditions are rigorous enough to prevent banking entities from evading the prohibition on acquiring or retaining an ownership interest in a covered fund.

Further, in response to certain commenters' request that the agencies clarify that the reference to senior loans or senior debt interests in the proposed safe harbor includes all exposures that would meet the definition of ''investment grade'' found in 12 CFR part 1 and implementing guidelines, the agencies have determined that such a provision would be inappropriate for purposes of the safe harbor conditions in the final rule. Unlike the safe harbor provisions in the final rule regarding ownership interests, such a provision would not ensure that debt interests that have equity-like characteristics are treated as ownership interests for purposes of subpart C of the final rule.

In response to the 2020 proposal, one commenter requested that the agencies modify the condition in § ____.10(d)(6)(i)(B) of the implementing regulations and § ____.10(d)(6)(ii)(B)(1) of the 2020 proposal, which states that an interest that has the right to receive a share of the income, gains or profits of the covered fund is considered an ownership interest, to clarify that the condition would not include amounts payable to securitization noteholders in accordance with a contractual priority of payments, commonly referred to as a ''waterfall,'' so long as such amounts are limited to fixed principal and interest determined on a fixed or typical index floating rate basis.[457] Specifically, the commenter suggested a modification to this condition to clarify that the term ''profit'' is intended to mean ''net profits'' out of concern for the potential ambiguity of how the condition would apply to amounts received by securitization noteholders in accordance with the securitization's waterfall of payment. Another commenter disagreed with any revision to the 2020 proposed rule that would only cover as an ownership interest an interest which has the right to receive a share of the ''net'' income, gains or profits of the covered fund.[458] The final rule does not modify § ____.10(d)(6)(i)(B) of the implementing regulations or § ____.10(d)(6)(ii)(B)(1) of the 2020 proposal. However, the agencies clarify that a debt interest in a covered fund would not be considered an ownership interest solely because the interest is entitled to receive an allocation of collections from the covered fund's underlying financial assets in accordance with a contractual priority of payments.

2. Fund Limits and Covered Fund Deduction

The 2020 proposal included amendments to the implementing regulations to better align the manner in which a banking entity calculates the aggregate fund limit and covered fund deduction with the manner in which it calculates the per fund limit, as it relates to investments by employees of the banking entity. Specifically, consistent with how investments by employees and directors are treated generally under the existing rule of construction in § ____.12(b)(1)(iv), the 2020 proposal would have modified §§ ____.12(c) and ____.12(d) to require attribution of amounts paid by an employee or director to acquire a restricted profit interest only when the banking entity has financed the acquisition.

The 2013 rule excludes from the definition of ownership interest certain restricted profit interests.[459] To be excluded from the definition of ownership interest, the restricted profit interest must also meet various other conditions, including that any amounts invested in the covered fund—including amounts paid by the entity, an employee of the entity, or former employee of the entity—are within the applicable limits under § ____.12 of the 2013 rule.[460]

Under § ____.12 of the 2013 rule, different calculation methodologies apply for purposes of calculating compliance with the per fund limit, the aggregate fund limit, and the covered fund deduction.[461] For purposes of calculating a banking entity's compliance with the aggregate fund limit and the covered fund deduction, the banking entity must include any amounts paid by the banking entity or an employee in connection with obtaining a restricted profit interest in the covered fund.[462]

The agencies did not receive comments on the proposed change in the treatment of restricted profit interests. Several commenters recommended that the agencies eliminate the per fund limit, the aggregate fund limit, and the covered fund deduction with respect to any ownership interest held by a banking entity in any covered fund, if that interest is held pursuant to underwriting and market making activities.[463]

With respect to the proposed change in the treatment of restricted profit interests, the agencies continue to believe that it is appropriate for a banking entity to count amounts invested by the banking entity (or its affiliates) to acquire restricted profit interests in a fund organized and offered by the banking entity for purposes of the aggregate fund limit and covered fund deduction. However, the agencies believe attribution of employee and director ownership of restricted profit interests to a banking entity may not be necessary in the circumstance when a banking entity does not finance, directly

[457] *See* SFA.

[458] *See* Data Boiler.

[459] 2013 rule § ____.10(d)(6)(ii). Under the 2013 rule, the exclusion from the definition of ownership interest is limited to restricted profit interests held by an entity, employee, or former employee in a covered fund for which the entity or employee serves as investment manager, investment adviser, commodity trading advisor, or other service provider. As noted in the preamble to the 2013 rule, the term ''restricted profit interest'' was used to avoid any confusion from using the term ''carried interest,'' which is used in other contexts. The proposed rule would focus on the treatment of restricted profit interests for purposes of calculating compliance with the aggregate fund limit and covered fund deduction but would not address in any way the treatment of such profit interests under other laws, including under Federal income tax law. *See* 79 FR 5706, n.2091.

[460] 2013 rule § ____.10(d)(6)(ii)(C).

[461] 2013 rule § ____.12(b)(1)(iv). As noted in the preamble to the 2013 rule, the attribution to a banking entity of ownership interests acquired by an employee or director using financing provided by the banking entity ensures that funding provided by the banking entity to acquire ownership interests in the fund, whether provided directly or indirectly, is counted against the per fund limit and aggregate fund limit. *See* 79 FR 5733.

[462] 2013 rule § ____.10(d)(6)(C); §§ ____.12(c)(1), (d). *See also* 12 U.S.C. 1851(d)(1)(G).

[463] BPI; FSF; IIB; and SIFMA.

or indirectly, the employee's or director's acquisition of a restricted profit interest in a covered fund organized or offered by the banking entity. The final rule amends the implementing regulations to limit the attribution of an employee's or director's restricted profit interest in a covered fund organized or offered by the banking entity to only those circumstances in which the banking entity has directly or indirectly financed the acquisition of the restricted profit interest. The agencies expect that this amendment will simplify a banking entity's compliance with the aggregate fund limit and covered fund deduction provisions of the rule, and more fully recognize that employees and directors may use their own resources, not provided by the banking entity, to invest in ownership interests or restricted profit interests in a covered fund they advise (for example, to align their personal financial interests with those of other investors in the covered fund).

The final rule does not adopt the recommendation from commenters that the agencies should eliminate the per fund limit, aggregate fund limit, or covered fund deduction requirements. The 2019 amendments adopted several changes to simplify the covered fund compliance requirements for banking entities that engage in market making or underwriting with respect to a third-party covered fund. Specifically, the 2019 amendments eliminated the aggregate fund limit and capital deduction requirements for the value of ownership interests in third-party funds acquired or retained in connection with permissible market making or underwriting activities (*i.e.,* covered funds that the banking entity does not advise or organize and offer pursuant to § ____.11(a) or (b) of the implementing regulations). In discussing this change in the preamble to the 2019 amendments, the agencies noted that the amendments to the treatment of ownership interests in third-party funds were intended to better align the compliance requirements for underwriting and market making involving covered funds with the risks that those activities entail.[464] The compliance challenges associated with underwriting and market making in ownership interests in covered funds is particularly acute with respect to third-party covered funds. As discussed in the preamble to the 2019 amendments, ''a banking entity can more readily determine whether a fund is a covered fund if the banking entity advises or organizes and offers the fund.'' [465] While section 13 of the BHC Act provides the agencies greater flexibility to adopt changes in the treatment of ownership interests in third-party funds, it prescribes specific requirements that apply to funds that the banking entity advises, or organizes and offers. Specifically, section 13 provides that a banking entity must not acquire or retain an ownership interest in a fund organized and offered by the banking entity except for a *de minimis* investment subject to and in compliance with paragraph (d)(4) of section 13 of the BHC Act.[466] Therefore, the final rule does not adopt the change recommended by commenters to modify the treatment of ownership interests in related covered funds that are held by a banking entity in connection with market making and underwriting activities.

F. Parallel Investments

The 2020 proposal included a new rule of construction in § ____.12(b) clarifying that banking entities are not required to treat investments alongside covered funds as investments in covered funds if certain conditions are met.[467] As explained in the 2020 proposal, this rule of construction was meant to provide clarity in light of a discrepancy between the preamble to the 2013 rule and the text of the implementing regulations.

The implementing regulations require that a banking entity hold no more than three percent of the total ownership interests of a covered fund that the banking entity organizes and offers pursuant to § ____.11.[468] Section ____.12(b)(1)(i) of the implementing regulations requires that, for purposes of this ownership limitation, ''the amount and value of a banking entity's permitted investment in any single covered fund shall include any ownership interest held under § ____.12 directly by the banking entity, including any affiliate of the banking entity.'' [469] Section ____.12(b) also includes several other rules of construction that address circumstances under which an investment in a covered fund would be attributed to a banking entity.

The 2011 notice of proposed rulemaking included a proposed provision that would have required attribution of certain direct investments by a banking entity alongside, or otherwise in parallel with, a covered fund.[470] The agencies declined to adopt this provision in the 2013 rule after considering the language of the statute as well as commenters' views on that provision.[471]

The 2013 rule restricts a banking entity's investment in a covered fund organized and offered pursuant to § ____.11 to three percent of the total number or value of the outstanding ownership interests of the fund. That regulatory requirement is consistent with section 13(d)(4) of the BHC Act, which limits the size of investments by a banking entity in a hedge fund or private equity fund.[472] Neither section 13(d)(4) of the BHC Act nor the text of the implementing regulations requires a banking entity to treat an otherwise permissible investment the banking entity makes alongside a covered fund as an investment in the covered fund. The text of the 2013 rule does not impose any quantitative limits on any investments by banking entities made alongside, or otherwise in parallel with, covered funds.[473] However, in the preamble to the 2013 rule, the agencies discussed the potential for evasion of the per fund limit and aggregate fund limit and stated that ''if a banking entity makes investments side by side in substantially the same positions as the covered fund, then the value of such investments shall be included for purposes of determining the value of the banking entity's investment in the covered fund.'' [474] The agencies also stated that ''a banking entity that sponsors the covered fund should not itself make any additional side by side co-investment with the covered fund in a privately negotiated investment unless the value of such co-investment is less than 3% of the value of the total amount co-invested by other investors in such investment.'' [475]

The 2020 proposal included a new rule of construction to address investments made by banking entities alongside covered funds. This proposed rule of construction was intended to clarify in the rule text that banking

[464] *See* 84 FR 62017.

[465] *Id.*

[466] 12 U.S.C. 1851(d)(1)(G)(iii).

[467] *See* 85 FR 12149.

[468] *See id.* at 12148; implementing regulations § ____.12.

[469] *See* implementing regulations § ____.12(b)(1)(i).

[470] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 76 FR 68846, 68951–52 (Nov. 7, 2011).

[471] In declining to adopt this parallel investment provision, the agencies noted that banking entities rely on a number of investment authorities and structures to make investments and meet the needs of their clients. 79 FR 5734.

[472] 12 U.S.C. 1851(d)(4).

[473] Any investment by the banking entity would need to comply with the proprietary trading restrictions in Subpart B of the implementing regulations.

[474] 79 FR 5734.

[475] *See id.*

entities are not required to treat a direct investment by a banking entity alongside a covered fund as an investment in the covered fund if certain conditions are met. Specifically, proposed § ____.12(b)(5) provided that:

(1) A banking entity shall not be required to include in the calculation of the investment limits under § ____.12(a)(2) any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.

(2) A banking entity shall not be restricted under § ____.12 in the amount of any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.[476]

In the preamble to the 2020 proposal, the agencies recognized that banking entities rely on a number of investment authorities and structures to make investments and meet the needs of their clients and shareholders.[477] The agencies indicated that the proposed rule of construction would provide clarity to banking entities so that they may make such investments for the benefit of their clients and shareholders, provided that those investments comply with applicable laws and regulations.[478] The preamble to the 2020 proposal went on to note several restrictions that may apply to a banking entity's investment alongside a covered fund. For example, a banking entity may not engage in prohibited proprietary trading alongside a covered fund. Likewise, a banking entity must have authority to make any investment alongside a covered fund under applicable banking and other laws and regulations and must ensure that the investment complies with applicable safety and soundness standards. For example, national banks are restricted in their ability to make direct equity investments under 12 U.S.C. 24 (Seventh) and 12 CFR part 1. In addition, a banking entity that invests alongside a covered fund that the banking entity organizes and offers under the asset management exemption in § ____.11 would need to comply with all the conditions of that exemption, which, among other things, prohibits the banking entity from guaranteeing, assuming, or otherwise insuring the obligations or performance of the covered fund. Thus, a banking entity would not be permitted to make a direct investment alongside a covered fund that the banking entity organizes and offers for the purpose of artificially maintaining or increasing the value of the fund's positions. Likewise, the banking entity would also need to ensure that any direct investment alongside an organized and offered covered fund does not cause the sponsoring banking entity's permitted organizing and offering activities to violate the prudential backstops under § ____.15.[479]

Most commenters that addressed the proposed rule of construction supported adopting the proposed revision.[480] Commenters stated that the rule of construction was consistent with section 13 of the BHC Act, would not increase the types of risks that section 13 of the BHC Act was meant to address, and would not raise concerns about evading section 13 of the BHC Act.[481] Commenters noted that banking entities would need to hold their investments in a manner consistent with relevant authorities and the associated risk management and other prudential and regulatory limits and controls, including stringent capital requirements, for these types of investments.[482] Some commenters also requested that the agencies permit employees and directors of a banking entity that sponsors a covered fund to invest directly in that covered fund, regardless of whether the employees or directors provide services to the covered fund on behalf of their banking entity employer.[483] The agencies received one comment opposing the proposed rule of construction.[484] This commenter characterized the proposed rule of construction as permitting proprietary trading at arm's length but without a limit on the ownership interest that a banking entity may hold and stated that parallel investments should be subject to the limitations that would apply to direct investments in covered funds.[485]

After carefully considering the comments received, the agencies are adopting the rule of construction in § ____.12(b)(5), as proposed.[486] As described above and in the 2020 proposal, this rule of construction is consistent with the text of section 13 of the BHC Act, which does not prohibit a banking entity from making otherwise permissible investments directly when doing so alongside a covered fund. This rule of construction will also reduce compliance burden by clarifying that a banking entity is not required under § ____.12 of the final rule to attribute to the banking entity direct investments made alongside a covered fund for purposes of the *de minimis* investment limitation. In response to the commenter who opposed the rule of construction,[487] the agencies note that the rule of construction is consistent with section 13 of the BHC Act and each investment by a banking entity must comply with laws and regulations, including any applicable safety and soundness standards.

As discussed in the preamble to the 2020 proposal, the rule of construction will not prohibit a banking entity from having investment policies, arrangements or agreements to invest alongside a covered fund in all or substantially all of the investments made by the covered fund or to fund all or any portion of the investment opportunities made available by the covered fund to other investors. Accordingly, a banking entity could market a covered fund it organizes and offers pursuant to § ____.11 on the basis of the banking entity's expectation that it would invest in parallel with the covered fund in some or all of the same investments, or the expectation that the banking entity would fund one or more co-investment opportunities made available by the covered fund. However, as discussed in the preamble to the 2020 proposal, the agencies would expect that any such investment policies, arrangements or agreements would ensure that the banking entity has the ability to evaluate each investment on a case-by-case basis to confirm that the banking entity does not make any investment unless the investment complies with applicable laws and

[476] *See* 85 FR 12149.

[477] *Id. See also* 79 FR 5734.

[478] 85 FR 12149.

[479] *See id.* In particular, to the extent the investment would result in a material conflict of interest between the banking entity and its clients, for example because the banking entity may exit the position at a different time or on different terms than the covered fund, the banking entity would be required to provide timely and effective disclosure in accordance with § ____.15(b) prior to making the investments. *Id.*

[480] *See* FSF; SIFMA; BPI; IIB; Goldman Sachs; PNC; and ABA.

[481] *See* FSF; SIFMA; and BPI.

[482] *See* FSF; SIFMA; and BPI.

[483] *See* ABA and PNC.

[484] *See* Data Boiler.

[485] *See id.*

[486] Final rule § ____.12(b)(5). These kinds of investments could be, for example, parallel investments or co-investments. For these purposes, ''parallel investments'' generally refers to a series of investments that are made side-by-side with a covered fund, and ''co-investments'' generally refers to a specific investment opportunity that is made available to third-parties when the general partner or investment manager for the covered fund determines that the covered fund does not have sufficient capital available to make the entire investment in the target portfolio company or determines that it would not be suitable for the covered fund to take the entire available investment.

[487] *See* Data Boiler.

regulations, including any applicable safety and soundness standards. The agencies believe that this would further ensure that the banking entity is not exposed to the types of risks that section 13 of the BHC Act was intended to address.

As discussed earlier and in the preamble to the 2020 proposal, the agencies recognize that the 2011 proposed rule would have required a banking entity to apply the per fund limit and aggregate fund limit to a direct investment alongside a covered fund when, among other things, a banking entity is contractually obligated to make such investment alongside a covered fund. The agencies continue to believe that such a prohibition is not necessary given the agencies' expectation that a banking entity would retain the ability to evaluate each investment on a case-by-case basis to confirm that the banking entity does not make any investment unless the investment complies with applicable laws and regulations, including any applicable safety and soundness standards.

The 2013 rule imposes certain attribution rules and eligibility requirements for investments by directors and employees of a banking entity in covered funds organized and offered by the banking entity. Specifically, § ____.12(b)(1)(iv) of the 2013 rule requires attribution of an investment by a director or employee of a banking entity who acquires an ownership interest in his or her personal capacity in a covered fund sponsored by the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the ownership interest in the fund and the financing is used to acquire such ownership interest in the covered fund. Section ____.11(a)(7) prohibits investments by any director or employee of the banking entity (or an affiliate thereof) in the covered fund, other than any director or employee who is directly engaged in providing investment advisory, commodity trading advisory, or other services to the covered fund at the time the director or employee makes the investment.

As discussed in the preamble to the 2020 proposal, the agencies recognize that directors and employees of banking entities may participate in investments alongside a covered fund, for example on an ad hoc basis or as part of a compensation arrangement. Consistent with the agencies' rule of construction regarding direct investments by banking entities alongside a covered fund, the agencies would expect that any direct investments (whether a series of parallel investments or a co-investment) by a director or employee of a banking entity (or an affiliate thereof) made alongside a covered fund in compliance with applicable laws and regulations would not be treated as an investment by the director or employee in the covered fund. Accordingly, such a direct investment would not be attributed to the banking entity as an investment in the covered fund, regardless of whether the banking entity arranged the transaction on behalf of the director or employee or provided financing for the investment.[488] Similarly, the requirements under § ____.11(a)(7) limiting the directors and employees that are eligible to invest in a covered fund organized and offered by the banking entity to those that are directly engaged in providing specified services to the covered fund would not apply to any such direct investment.[489]

With respect to investments in a covered fund, the agencies decline to permit an employee or director of a banking entity that organizes and offers a covered fund to make investments in that covered fund if the director or employee does not provide services to the covered fund on behalf of the banking entity, as requested by some commenters.[490] The restriction on these types of director and employee investments is required by the statute.[491]

G. Technical Amendments

The agencies proposed five sets of clarifying technical edits to the implementing regulations. Specifically, the agencies proposed to (1) amend § ____.12(b)(1)(ii) to add a comma after the words ''SEC-regulated business development companies'' in both places where that phrase is used; (2) amend § ____.12(b)(4)(i) to replace the phrase ''ownership interest of the master fund'' with the phrase ''ownership interest in the master fund''; (3) amend § ____.12(b)(4)(ii) to replace the phrase ''ownership interest of the fund'' with the phrase ''ownership interest in the fund;'' (4) amend §§ ____.10(c)(3)(i) and ____.10(c)(10)(i) to replace the word ''comprised'' with the word ''composed;'' and (5) amend § ____.10(c)(8)(iv)(A) to replace the word ''of'' in the phrase ''contractual rights of other assets'' with the word ''or.''

The agencies did not receive comment on these provisions and are adopting the technical amendments as proposed.

V. Administrative Law Matters

A. Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act[492] requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Federal banking agencies sought to present the proposed rule in a simple and straightforward manner and did not receive any comments on plain language.

B. Paperwork Reduction Act

Certain provisions of the final rule contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521). In accordance with the requirements of the PRA, the agencies may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The agencies reviewed the final rule and determined that the final rule creates new recordkeeping requirements and revises certain disclosure requirements that have been previously cleared under various OMB control numbers. The agencies did not receive any specific comments on the PRA. The agencies are extending for three years, with revision, these information collections. The information collection requirements contained in this final rule have been submitted by the OCC and FDIC to OMB for review and approval under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and section 1320.11 of the OMB's implementing regulations (5 CFR 1320). The Board reviewed the final rule under the authority delegated to the Board by OMB. The Board will submit information collection burden estimates to OMB, and the submission will include burden for Federal Reserve-supervised institutions, as well as burden for OCC-, FDIC-, SEC-, and CFTC-supervised institutions under a holding company. The OCC and the

[488] *See* 2013 rule § ____.12(b)(1)(iv) (requiring attribution of an investment by a director or employee *in a covered fund* organized and offered by the banking entity, where the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the ownership interest in the covered fund and the financing is used to acquire such ownership interest in the covered fund) (emphasis added).

[489] *See* 2013 rule § ____.11(a)(7) (prohibiting investments by any director or employee of the banking entity (or an affiliate thereof) *in a covered fund* organized and offered by the banking entity, other than any director or employee who is directly engaged in providing investment advisory, commodity trading advisory, or other services to the covered fund at the time the director or employee makes the investment) (emphasis added).

[490] *See* ABA and PNC.

[491] *See* 12 U.S.C. 1851(d)(1)(G)(vii).

[492] Public Law 106–102, section 722, 113 Stat. 1338, 1471 (1999).

FDIC will take burden for banking entities that are not under a holding company.

Abstract

Section 13 of the BHC Act generally prohibits any banking entity from engaging in proprietary trading or from acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with a covered fund, subject to certain exemptions. The exemptions allow certain types of permissible trading and asset management activities.

Current Actions

The final rule contains requirements subject to the PRA, and the changes relative to the implementing regulations are discussed herein. The new recordkeeping requirements are found in section ____.10(c)(18)(ii)(C)(1) and the modified disclosure requirements are found in section ____.11(a)(8)(i). The modified information collection requirements would implement section 13 of the BHC Act. The respondents are for-profit financial institutions, including small businesses. A covered entity must retain these records for a period that is no less than 5 years in a form that allows it to promptly produce such records to the relevant agency on request.

Recordkeeping Requirements

Section ____.10(c)(18)(ii)(C)(1) requires a banking entity relying on the exclusion from the covered fund definition for customer facilitation vehicles to maintain documentation outlining how the banking entity intends to facilitate the customer's exposure to a transaction, investment strategy, or service. The agencies estimate that the new recordkeeping requirement will be incurred once a year with an average hour per response of 10 hours.

Disclosure Requirements

Section ____.11(a)(8)(i), which requires banking entities that organize and offer covered funds to make certain disclosures to investors in such funds, is being expanded to also apply to banking entities relying on exclusions for credit funds, venture capital funds, family wealth management vehicles, or customer facilitation vehicles. The agencies estimate that the current average hours per response of 0.1 will increase to 0.5.

Revision, With Extension, of the Following Information Collections

Estimated average hours per response:

Reporting

Section ____.4(c)(3)(i)—0.25 hours for an average of 20 times per year.

Section ____.12(e)—20 hours (Initial set-up 50 hours) for an average of 10 times per year.

Section ____.20(d)—41 hours (Initial set-up 125 hours) quarterly.

Section ____.20(i)—20 hours.

Recordkeeping

Section ____.3(d)(3)—1 hour (Initial set-up 3 hours).

Section ____.4(b)(3)(i)(A)—2 hours quarterly.

Section ____.4(c)(3)(i)—0.25 hours for an average of 40 times per year.

Section ____.5(c)—40 hours (Initial setup 80 hours).

Section ____.10(c)(18)(ii)(C)(1)—10 hours.

Section ____.11(a)(2)—10 hours.

Section ____.20(b)—265 hours (Initial set-up 795 hours).

Section ____.20(c)—100 hours (Initial set-up 300 hours).

Section ____.20(d)—10 hours.

Section ____.20(e)—200 hours.

Section ____.20(f)(1)—8 hours.

Section ____.20(f)(2)—40 hours (Initial set-up 100 hours).

Disclosure

Section ____.11(a)(8)(i)—0.5 hours for an average of 26 times per year.

OCC

Title of Information Collection: Reporting, Recordkeeping, and Disclosure Requirements Associated with Restrictions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds.

Frequency: Annual, quarterly, and event driven.

Affected Public: Businesses or other for-profit.

Respondents: National banks, state member banks, state nonmember banks, and state and federal savings associations.

OMB control number: 1557–0309.

Estimated number of respondents: 39.

Revisions estimated annual burden: 302 hours.

Estimated annual burden hours: 20,410 hours (3,681 hour for initial set-up and 16,729 hours for ongoing).

Board

Title of Information Collection: Reporting, Recordkeeping, and Disclosure Requirements Associated with Regulation VV.

Frequency: Annual, quarterly, and event driven.

Affected Public: Businesses or other for-profit.

Respondents: State member banks, bank holding companies, savings and loan holding companies, foreign banking organizations, U.S. State branches or agencies of foreign banks, and other holding companies that control an insured depository institution and any subsidiary of the foregoing other than a subsidiary for which the OCC, FDIC, CFTC, or SEC is the primary financial regulatory agency. The Board will take burden for all institutions under a holding company including:

- OCC-supervised institutions,
- FDIC-supervised institutions,
- Banking entities for which the CFTC is the primary financial regulatory agency, as defined in section 2(12)(C) of the Dodd-Frank Act, and
- Banking entities for which the SEC is the primary financial regulatory agency, as defined in section 2(12)(B) of the Dodd-Frank Act.

Legal authorization and confidentiality: This information collection is authorized by section 13 of the BHC Act (12 U.S.C. 1851(b)(2) and 12 U.S.C. 1851(e)(1)). The information collection is required in order for covered entities to obtain the benefit of engaging in certain types of proprietary trading or investing in, sponsoring, or having certain relationships with a hedge fund or private equity fund, under the restrictions set forth in section 13 and the final rule. If a respondent considers the information to be trade secrets and/or privileged, such information could be withheld from the public under the authority of the Freedom of Information Act (5 U.S.C. 552(b)(4)). Additionally, to the extent that such information may be contained in an examination report, such information could also be withheld from the public (5 U.S.C. 552 (b)(8)).

Agency form number: FR VV.

OMB control number: 7100–0360.

Estimated number of respondents: 255.

Revisions estimated annual burden: 7,880 hours.

Estimated annual burden hours: 36,112 hours (4,381 hour for initial set-up and 31,731 hours for ongoing).

FDIC

Title of Information Collection: Volcker Rule Restrictions on Proprietary Trading and Relationships with Hedge Funds and Private Equity Funds.

Frequency: Annual, quarterly, and event driven.

Affected Public: Businesses or other for-profit.

Respondents: State nonmember banks, state savings associations, and certain subsidiaries of those entities.

OMB control number: 3064–0184.

Estimated number of respondents: 10.

Revisions estimated annual burden: 175 hours.

Estimated annual burden hours: 3,288 hours (1,759 hours for initial set-up and 1,529 hours for ongoing).

C. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) [493] requires an agency to either provide a regulatory flexibility analysis with a final rule or certify that the final rule will not have a significant economic impact on a substantial number of small entities. The U.S. Small Business Administration (SBA) establishes size standards that define which entities are small businesses for purposes of the RFA.[494] Except as otherwise specified below, the size standard to be considered a small business for banking entities subject to the final rule is $600 million or less in consolidated assets.[495]

Board

The Board has considered the potential impact of the final rule on small entities in accordance with section 603 of the RFA. Based on the Board's analysis, and for the reasons stated below, the Board certifies that the final rule will not have a significant economic impact on a substantial of number of small entities.

The Board invited comment on all aspects of its analysis related to the requirements of the RFA in connection with the 2020 proposal. In particular, the Board requested that commenters describe the nature of any impact on small entities and provide empirical data to illustrate and support the extent of the impact. The Board did not receive any comments related to this issue.

As discussed in the **SUPPLEMENTARY INFORMATION**, the agencies are adopting revisions to the regulations implementing section 13 of the BHC Act in order to improve and streamline the regulations by modifying and clarifying requirements related to the covered fund provisions.[496] Certain of the exclusions from the covered fund definition included in the final rule contain recordkeeping and disclosure requirements that would apply to banking entities relying on the exclusion. For example, the exclusion for customer facilitation vehicles requires a banking entity relying on the exclusion to maintain documentation outlining how the banking entity intends to facilitate the customer's exposure to a transaction, investment strategy, or service. The final rule is expected to reduce regulatory burden on banking entities, and the Board does not expect these recordkeeping requirements to result in a significant economic impact.

The Board's rule generally applies to state-chartered banks that are members of the Federal Reserve System, bank holding companies, and foreign banking organizations and nonbank financial companies supervised by the Board (collectively, ''Board-regulated entities''). However, section 203 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA),[497] which was enacted on May 24, 2018, amended section 13 of the BHC Act by narrowing the definition of banking entity to exclude certain community banks.[498] The Board is not aware of any Board-regulated entities that meet the SBA's definition of ''small entity'' that are subject to section 13 of the BHC Act and its implementing regulations following the enactment of EGRRCPA. Furthermore, to the extent that any Board-regulated entities that meet the definition of ''small entity'' are or become subject to section 13 of the BHC Act and its implementing regulations, the Board does not expect the total number of such entities to be substantial. Accordingly, the Board's final rule is not expected to have a significant economic impact on a substantial number of small entities.

OCC

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* requires an agency, in connection with a final rule, to prepare a Final Regulatory Flexibility Analysis describing the impact of the rule on small entities (defined by the Small Business Administration (SBA) for purposes of the RFA to include commercial banks and savings institutions with total assets of $600 million or less and trust companies with total assets of $41.5 million or less) or to certify that the final rule would not have a significant economic impact on a substantial number of small entities. The OCC currently supervises approximately 745 small entities.[499] Under the EGRRCPA, banking entities with total consolidated assets of $10 billion or less generally are not ''banking entities'' within the scope of section 13 of the BHC Act if their trading assets and trading liabilities do not exceed five percent of their total consolidated assets. In addition, section 13 of the BHC Act generally excludes certain institutions that function only in a trust or fiduciary capacity from the definition of ''banking entity. As a result, no OCC-supervised small entities are subject to section 13 of the BHC Act. Thus, the final rule will not impact any OCC-supervised small entities. Therefore, the OCC certifies that the final rule will not have a significant impact on a substantial number of OCC-supervised small entities.

FDIC

The RFA generally requires that, in connection with a final rulemaking, an agency prepare and make available for public comment a final regulatory flexibility analysis describing the impact of the final rule on small entities.[500] However, a regulatory flexibility analysis is not required if the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. The SBA has defined ''small entities'' to include banking organizations with total assets of less than or equal to $600 million that are independently owned and operated or owned by a holding company with less than or equal to $600 million in total assets.[501] Generally, the FDIC considers

[493] 5 U.S.C. 601 *et seq.*

[494] U.S. SBA, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, *available at https://www.sba.gov/document/support--table-size-standards.*

[495] *See id.* Pursuant to SBA regulations, the asset size of a concern includes the assets of the concern whose size is at issue and all of its domestic and foreign affiliates. 13 CFR 121.103(6).

[496] The agencies are explicitly authorized under section 13(b)(2) of the BHC Act to adopt rules implementing section 13. 12 U.S.C. 1851(b)(2).

[497] Public Law 115–174 (May 24, 2018).

[498] Under EGRRCPA, a community bank and its affiliates are generally excluded from the definition of banking entity, and thus section 13 of the BHC Act, if the bank and all companies that control the bank have total consolidated assets equal to $10 billion or less and trading assets and liabilities equal to five percent or less of total consolidated assets.

[499] The OCC bases its estimate of the number of small entities on the SBA's size thresholds for commercial banks and savings institutions, and trust companies, which are $600 million and $41.5 million, respectively. Consistent with the General Principles of Affiliation, 13 CFR 121.103(a), the OCC counts the assets of affiliated financial institutions when determining if the OCC should classify an OCC-supervised institution as a small entity. The OCC uses December 31, 2019, to determine size because a ''financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' *See* footnote 8 of the SBA's Table of Size Standards.

[500] 5 U.S.C. 601 *et seq.*

[501] The SBA defines a small banking organization as having $600 million or less in assets, where an organization's ''assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' *See* 13 CFR 121.201 (as amended by 84 FR 34261, effective August 19, 2019). In its determination, the ''SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.'' *See* 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to

a significant effect to be a quantified effect in excess of five percent of total annual salaries and benefits per institution, or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions. For the reasons described below and under section 605(b) of the RFA, the FDIC certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

As of December 31, 2019, the FDIC supervised 3,344 depository institutions,[502] of which 2,581 were considered small entities for the purposes of RFA.[503] The Economic Growth, Regulatory Relief, and Consumer Protection Act excluded entities from the requirements of section 13 of the BHC Act that do not have and are not controlled by a company that has total assets of more than $10 billion or trading assets and liabilities comprising more than five percent of total consolidated assets.[504] Only one small, FDIC-supervised institution is subject to section 13 of the BHC Act, because its trading assets and liabilities exceed five percent of total consolidated assets.[505]

Section 13 of the BHC Act generally prohibits any banking entity from engaging in proprietary trading or from acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with a covered fund. As previously discussed, the final rule modifies existing definitions and exclusions and introduces new exclusions to the implementing regulations. The final rule permits covered entities to engage in additional activities with respect to covered funds, including acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with covered funds, subject to certain restrictions.

This final rule excludes certain types of investment funds from the definition of a ''covered fund'' for the purposes of section 13 of the BHC Act. Investments in funds that are affected by this final rule could be reported as deductions from capital on Call Report schedule RC–R Part 1 Lines 11 or 13 if the investments qualify as ''investments in the capital of an unconsolidated financial institution'' or as additional deductions on Lines 17 or 24 of schedule RC–R otherwise.[506] The one affected small, FDIC-supervised institution did not report any such deductions over the past five years.[507]

Based on this supporting information, the FDIC certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

SEC

In the 2020 proposal, the SEC certified that, pursuant to 5 U.S.C. 605(b), the 2020 proposal would not, if adopted, have a significant economic impact on a substantial number of small entities. Although the SEC solicited written comments regarding this certification, no commenters responded to this request.

As discussed in the **SUPPLEMENTARY INFORMATION**, the amendments clarify and simplify compliance with the implementing regulations, refine the extraterritorial application of the section 13 of the BHC Act, and permit additional fund activities that do not present the risks that section 13 was intended to address.

The amendments will generally apply to banking entities, including certain SEC-registered entities. These entities include bank-affiliated SEC-registered investment advisers, broker-dealers, and security-based swap dealers. Based on information in filings submitted by these entities, the SEC believes that there are no banking entity registered investment advisers or broker-dealers that are small entities for purposes of the RFA. For this reason, the SEC certifies that the amendments will not have a significant economic impact on a substantial number of small entities.

CFTC

Pursuant to 5 U.S.C. 605(b), the CFTC hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities for which the CFTC is the primary financial regulatory agency.

As discussed in this **SUPPLEMENTARY INFORMATION**, the final rule clarifies and simplifies compliance with the implementing regulations, refines the extraterritorial application of section 13 of the BHC Act, and permits additional fund activities that do not present the risks that section 13 was intended to address. To reduce the extraterritorial impact of the implementing regulations, the final rule exempts the activities of certain funds that are organized outside of the United States and offered to foreign investors from certain restrictions of the implementing regulations. The final rule also revises several existing exclusions from the covered fund provisions, to provide clarity and simplify compliance with the requirements of the implementing regulations. The final rule adopts several new exclusions from the covered fund definition in order to more closely align the regulation with the purpose of the statute. Last, the final rule adopts revisions to the provisions that govern the relationship between a banking entity and a fund and the definition of ownership interest.

The final rule will generally apply to banking entities, including certain CFTC-registered entities. These entities include bank-affiliated CFTC-registered swap dealers, futures commission merchants, commodity trading advisors and commodity pool operators.[508] The CFTC has previously determined that swap dealers, futures commission merchants and commodity pool operators are not small entities for purposes of the RFA and, therefore, the requirements of the RFA do not apply to those entities.[509] As for commodity trading advisors, the CFTC has found it appropriate to consider whether such registrants should be deemed small entities for purposes of the RFA on a case-by-case basis, in the context of the particular regulation at issue.[510]

In the context of the final rule, the CFTC believes it is unlikely that a substantial number of the commodity trading advisors that are potentially affected are small entities for purposes of the RFA. In this regard, the CFTC notes that only commodity trading advisors that are registered with the CFTC are covered by the implementing regulations, and generally those that are registered have larger businesses.

determine whether the covered entity is ''small'' for the purposes of RFA.

[502] FDIC-supervised institutions are set forth in 12 U.S.C. 1813(q)(2).

[503] FDIC Call Report data, December 31, 2019.

[504] Public Law 115–174, May 24, 2018. *https://www.congress.gov/bill/115th-congress/senate-bill/2155.*

[505] FDIC Call Report data, December 2019.

[506] *See* ''Supervisory Guidance on the Capital Treatment of Certain Investments in Covered Funds.'' FDIC FIL–50–2015: November 6, 2015. *https://www.fdic.gov/news/news/financial/2015/fil15050a.pdf.*

[507] FDIC Call Report data, March 2015–December 2019.

[508] The final rule may also apply to other types of CFTC registrants that are banking entities, such as introducing brokers, but the CFTC believes it is unlikely that such other registrants will have significant activities that would implicate the final rule. *See* 79 FR 5808, 5813 (Jan. 31, 2014) (CFTC version of 2013 final rule).

[509] *See* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618 (Apr. 30, 1982) (futures commission merchants and commodity pool operators); Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, 2620 (Jan. 19, 2012) (swap dealers and major swap participants).

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

Similarly, the final rule applies to only those commodity trading advisors that are affiliated with banks, which the CFTC expects are larger businesses.

The CFTC requested that commenters address in particular whether any of these commodity trading advisors, or other CFTC registrants covered by the proposed revisions, are small entities for purposes of the RFA. The CFTC did not receive any public comments on this or any other aspect of the RFA as it relates to the rule.

Because the CFTC believes that there are not a substantial number of registered, banking entity-affiliated commodity trading advisors that are small entities for purposes of the RFA, and the other CFTC registrants that may be affected by the proposed revisions have been determined not to be small entities, the CFTC believes that the final rule will not have a significant economic impact on a substantial number of small entities for which the CFTC is the primary financial regulatory agency.

D. Riegle Community Development and Regulatory Improvement Act

Section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA)[511] requires that each Federal banking agency, in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. The agencies have considered comment on these matters in other parts of this **SUPPLEMENTARY INFORMATION**.

In addition, under section 302(b) of the RCDRIA, new regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[512] Therefore, the effective date for the Federal banking agencies is October 1, 2020, the first day of the calendar quarter.[513]

E. OCC Unfunded Mandates Reform Act

The OCC has analyzed the final rule under the factors in the Unfunded Mandates Reform Act of 1995 (UMRA). Under this analysis, the OCC considered whether the final rule includes a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (adjusted annually for inflation). The UMRA does not apply to regulations that incorporate requirements specifically set forth in law.

The final rule does not impose new mandates. Therefore, the OCC finds that the final rule does not trigger the UMRA cost threshold. Accordingly, the OCC has not prepared the written statement described in section 202 of the UMRA.

F. SEC Economic Analysis

1. Broad Economic Considerations

i. Background

As discussed above, section 13 of the Bank Holding Company (BHC) Act generally prohibits banking entities from acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with, a hedge fund or private equity fund (covered funds), subject to certain exemptions. Section 13(h)(1) of the BHC Act defines the term ''banking entity'' to include (1) any insured depository institution (as defined by statute), (2) any company that controls an insured depository institution, (3) any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978, and (4) any affiliate or subsidiary of such an entity.[514] In addition, the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA),[515] enacted on May 24, 2018, amended section 13 of the BHC Act to exclude from the definition of ''insured depository institution'' any institution that does not have and is not controlled by a company that has (1) more than $10 billion in total consolidated assets; and (2) total trading assets and trading liabilities, as reported on the most recent applicable regulatory filing filed by the institution, that are more than 5% of total consolidated assets.[516]

Certain SEC-regulated entities, such as broker-dealers, security-based swap dealers (SBSDs), and registered investment advisers (RIAs) affiliated with an insured depository institution, fall under the definition of ''banking entity'' and are subject to the prohibitions of section 13 of the BHC Act.[517] The SEC's economic analysis is limited to areas within the scope of the SEC's function as the primary securities markets regulator in the United States. In particular, the SEC's economic analysis focuses primarily on the potential effects of the rule amendments being adopted here (the ''final rule'') on (1) SEC registrants, in their capacity as such, (2) the functioning and efficiency of the securities markets, (3) investor protection, and (4) capital formation. SEC registrants that may be affected by the final rule include SEC-registered broker-dealers, SBSDs, and RIAs. Thus, the analysis below does not consider the direct effects of the final rule on broker-dealers, SBSDs, and registered investment advisers that are not banking entities, or banking entities that are not SEC registrants. In addition, potential spillover effects on these and other entities are reflected in the SEC's analysis of effects on efficiency,

[511] 12 U.S.C. 4802(a).

[512] 12 U.S.C. 4802(b).

[513] Additionally, the Administrative Procedure Act generally requires that the effective date of a rule be no less than 30 days after publication in the **Federal Register**. 5 U.S.C. 553(d)(1). The effective date, October 1, 2020, will be more than 30 days after publication in the **Federal Register**.

[514] *See* 12 U.S.C. 1851(h)(1).

[515] *See supra* note 504.

[516] These and other aspects of the regulatory baseline against which the SEC is assessing the economic effects of the final rule being adopted here on SEC-regulated entities are discussed in the economic baseline. On July 22, 2019, the agencies adopted a final rule amending the definition of ''insured depository institution'' in a manner consistent with EGRRCPA. *See* Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 84 FR 35008 (July 22, 2019). In November 2019, the agencies adopted the 2019 amendments, which tailored certain proprietary trading and covered fund restrictions of the 2013 rule. *See supra* note 8.

[517] Throughout this economic analysis, the terms ''banking entity'' and ''entity'' generally refer only to banking entities for which the SEC is the primary financial regulatory agency. While section 13 of the BHC Act and its associated rules apply to a broader set of banking entities, this economic analysis is limited to those banking entities for which the SEC is the primary financial regulatory agency as defined in section 2(12)(B) of the Dodd-Frank Act. *See* 12 U.S.C. 1851(b)(2), 5301(12)(B).

Compliance with SBSD registration requirements is not yet required and there are currently no registered SBSDs. However, the SEC has previously estimated that as many as 50 entities may potentially register as SBSDs and that as many as 16 of these entities may already be SEC-registered broker-dealers. *See* Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers, 84 FR 43872 (Aug. 22, 2019) (''Capital, Margin, and Segregation Adopting Release'').

For the purposes of this economic analysis, the term ''dealer'' generally refers to SEC-registered broker-dealers and SBSDs.

competition, investor protection, and capital formation in securities markets. This economic analysis also discusses the impact of the final rule on private funds,[518] to the degree that it may flow through to SEC registrants, such as RIAs, SEC-registered broker-dealers and SBSDs, and securities markets and investors.

In implementing section 13 of the BHC Act, the agencies sought to increase the safety and soundness of banking entities, promote financial stability, and reduce conflicts of interest between banking entities and their customers.[519] The regulatory regime created by the 2013 rule may have enhanced regulatory oversight and compliance with the substantive prohibitions of section 13 of the BHC Act, but could also have impacted capital formation and liquidity, as well as the provision by banking entities of a variety of financial services for customers.

Section 13 of the BHC Act also provides a number of statutory exemptions to the general prohibitions on proprietary trading and covered funds activities. For example, the statute exempts certain covered funds activities, such as organizing and offering covered funds.[520] The 2013 rule implemented these exemptions.[521] Banking entities engaged in activities and investments covered by section 13 of the BHC Act and the implementing regulations are required to establish a compliance program reasonably designed to ensure and monitor compliance with the implementing regulations.[522]

In the 2020 proposal, the SEC solicited comment on all aspects of the costs and benefits associated with the proposed amendments for SEC registrants, including spillover effects the proposed amendments may have on efficiency, competition, and capital formation in securities markets. The SEC has considered these comments, as discussed in greater detail in the sections that follow.

ii. Broad Economic Effects

Certain aspects of the implementing regulations may have resulted in a complex and costly compliance regime that is unduly restrictive and burdensome on some affected banking entities. Distinguishing between permissible and prohibited activities may be complex and costly, resulting in uncertain determinations for some entities. Moreover, the implementing regulations may include in their scope some groups of market participants that do not necessarily engage in the activities or pose the risks that section 13 of the BHC Act intended to address. For example, definition of the term ''covered fund'' may include entities that do not engage in the activities contemplated by section 13 of the BHC Act or may include entities that do not pose the risks that section 13 is intended to mitigate.

The final rule includes amendments that (1) reduce the scope of entities that may be treated as covered funds (*e.g.,* credit funds, venture capital funds, family wealth management vehicles, and customer facilitation vehicles), (2) modify existing covered fund exclusions under the implementing regulations (*e.g.,* foreign public funds, public welfare funds, and small business investment companies), and (3) affect the types of permitted activities between certain banking entities and certain covered funds (*e.g.,* restrictions on relationships between banking entities and covered funds, definition of ''ownership interest,'' and treatment of loan securitizations). The final rule also reduces the burden on affected banking entities by codifying an existing policy statement by the Federal banking agencies that addresses the potential issues related to a foreign banking entity controlling a qualifying foreign excluded fund and adopting a rule of construction to provide clarity regarding a banking entity's permissible investments alongside a covered fund.

Broadly, to the extent that the final rule directly changes the scope of permissible covered fund activities, and indirectly reduces costs to banking entities and covered funds by reducing uncertainty regarding the scope of permissible activities, the final rule may enhance the beneficial economic effects of the implementing regulations.[523] The SEC's economic analysis continues to recognize that the overall risk exposure of banking entities generally reflects a combination of activities, including proprietary trading, market making, traditional banking, asset management, investment activities, and the extent to which banking entities engage in hedging and other risk-mitigating activities. The overall risk exposure is also a function of the magnitude, structure, and manner in which banking entities engage in such activities, both within such activities individually and across all of these activities collectively. As discussed elsewhere,[524] the SEC recognizes the complex baseline effects of section 13 of the BHC Act, as amended by sections 203 and 204 of EGRRCPA, and the implementing regulations (including those made with respect to sections 203 and 204 of EGRRCPA) on overall levels and structure of banking entity risk exposures.

The final rule may promote the ability of the capital markets to intermediate between suppliers and users of capital through, for example, increased ability and willingness of banking entities and investors in ''covered funds'' to facilitate capital formation through sponsorship and participation in certain types of funds and to transact with certain groups of counterparties.[525] For

[518] There is significant overlap between the definitions of ''private fund'' and ''covered fund.'' For purposes of this economic analysis, ''private fund'' means an issuer that would be an investment company, as defined in section 3 of the Investment Company Act (15 U.S.C. 80a–3(a)), but for section 3(c)(1) or section 3(c)(7) of that Act (15 U.S.C. 80–3(c)(1) or (7)). *See also* 15 U.S.C. 80b–2(a)(29). Section 13(h)(2) of the BHC Act defines ''hedge fund'' and ''private equity fund'' to mean an issuer that would be an investment company, but for section 3(c)(1) or 3(c)(7) of the Investment Company Act, or ''such similar funds'' as the agencies determine by rule (*see* 12 U.S.C. 1851(h)(2)). In the 2013 rule, the agencies combined the definitions of ''hedge fund'' and ''private equity fund'' into a single term ''covered fund'' and defined this term to include any issuer that would be an investment company as defined in the Investment Company Act but for section 3(c)(1) or 3(c)(7) of that Act with a number of express exclusions and additions as determined by the agencies. Implementing regulations § ____.10(b) and (c).

[519] *See, e.g.,* 79 FR 5536, 5541, 5574, 5659, 5666. An extensive body of research has examined moral hazard arising out of federal deposit insurance, implicit bailout guarantees, and systemic risk issues. *See, e.g.,* Andrew G. Atkeson et al., *Government Guarantees and the Valuation of American Banks,* 33 NBER Macroeconomics Ann. 81 (2018). *See also* Javier Bianchi, *Efficient Bailouts?* 106 Amer. Econ. Rev. 3607 (2016); Bryan Kelly, Hanno Lustig, & Stijn Van Nieuwerburgh, *Too-Systematic-to-Fail: What Option Markets Imply about Sector-Wide Government Guarantees,* 106 Amer. Econ. Rev. 1278 (2016); Deniz Anginer, Asli Demirguc-Kunt, & Min Zhu, *How Does Deposit Insurance Affect Bank Risk? Evidence from the Recent Crisis,* 48 J. Banking & Fin. 312 (2014); Andrea Beltratti & Rene M. Stulz, *The Credit Crisis Around the Globe: Why Did Some Banks Perform Better?,* 105 J. Fin. Econ. 1 (2012); Pietro Veronesi & Luigi Zingales, *Paulson's Gift,* 97 J. Fin. Econ. 339 (2010). For a literature review, *see, e.g.,* Sylvain Benoit et al., *Where the Risks Lie: A Survey on Systemic Risk,* 21 Rev. Fin. 109 (2017).

[520] *See* 12 U.S.C. 1851(d)(1)(G).

[521] *See* 2013 rule §§ ____.4, ____.5, ____.6, ____.11, and ____.13.

[522] *See* 2013 rule § ____.20. *See also* 2019 amendments, 84 FR 62021–25, which, among other things, modified these requirements for banking entities with limited trading assets and liabilities. This SEC Economic Analysis follows earlier sections by referring to the regulations implementing section 13 of the BHC Act, as amended through June 1, 2020 as the ''implementing regulations.'' *See supra* note 8.

[523] *See, e.g.,* 2019 amendments, 84 FR 62037–92.

[524] *See id.*

[525] *See, e.g.,* U.S. Dep't of the Treasury, A Financial System That Creates Economic Opportunities: Banks and Credit Unions (June 2017), at 77, *available at https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf.*

example, exclusions from the ''covered fund'' definition of specific types of entities may benefit banking entities by providing clarity and removing certain constraints around potentially profitable business opportunities and by reducing compliance costs, and may benefit excluded funds and their banking entity sponsors and advisers by increasing the spectrum of available counterparties and improving the quality or cost of financial services available to customers.

The final rule, however, may also facilitate risk mitigation as well as risk-taking activities of banking entities. The final rule also may change aspects of the relationships among banking entities and certain other groups of market participants, including potentially introducing new conflicts of interest, and increasing or reducing the potential effects of conflicts of interest. To the degree that some banking entities react to the final rule by restructuring activities involving covered funds to take advantage of the exclusions contained in the final rule, there may be shifts in the structure and levels of activities of banking entities that would, in turn, decrease or increase risk exposure. Recognizing these various potential effects, each of the exclusions includes a number of conditions aimed at facilitating banking entity compliance while also allowing for customer oriented financial services provided on arms-length, market terms, and preventing evasion of the requirements of section 13.

In evaluating these various potential effects, it is important to acknowledge that the exclusions made available by the final rule, such as for credit funds and qualifying venture capital funds, allow banking entities to engage indirectly through fund structures in the same activities in which they are currently permitted to engage directly (*e.g.,* extensions of credit or direct ownership stakes). Thus, the type of exposure permitted by engaging in those activities directly, and indirectly through covered funds, is the same and the banking entities may use fund structures to diversify or otherwise mitigate their risk exposure. Other exclusions permit banking entities to provide traditional banking and asset management services to customers through a legal entity structure, with conditions (*e.g.,* limitation on ownership by the banking entity and prohibition on ''bail outs'') intended to ensure that the risks that section 13 of the BHC Act was intended to address are mitigated. Finally, nothing in the final rule removes or modifies prudential capital, margin, and liquidity requirements that are applicable to banking entities and that facilitate the safety and soundness of banking entities and the financial stability of the United States.

The final rule may also impact competition, allocative efficiency, and capital formation. To the extent that the implementing regulations have constrained banking entities in their covered fund activities, including providing traditional banking and asset management services to customers through a legal entity structure, the exclusions from the definition of ''covered fund'' made available by the final rule may increase competition between banking entities and other entities providing services to and otherwise transacting with those types of funds and other entities. Such competition may reduce costs or increase the quality of certain financial services provided to such funds and their counterparties.

Finally, the final rule's costs, benefits, and effects on efficiency, competition, and capital formation will be influenced by a variety of factors, including the prevailing macroeconomic conditions, the financial condition of firms seeking to raise capital and of funds seeking to transact with banking entities, competition between bank and non-bank providers of capital, and many others. Moreover, these effects are likely to vary widely among banking entities and funds. The SEC recognizes that the economic effects of the final rule may be dampened or magnified in different phases of the macroeconomic cycle, depend on monetary and fiscal policy developments and other government actions, and may vary across different types of banking entities.

The SEC also considered the implications of the final rule for investors. Broadly, the final rule should increase the number of funds and other entities that will be excluded from the covered fund definition. This is likely to result in an increase in offerings of such funds or an increase in the number of banking entities providing services to customers through entities such as customer facilitation vehicles and family wealth management vehicles. If the final rule increases the ability of investors to access public and private markets through funds and other entities, the final rule may result in the relaxing of constraints on investors' portfolio optimization and, thus, enhance the efficiency of portfolio allocations. The ability of additional investors to access these markets through funds and other entities may, in addition to providing those investors with greater choice, benefit the issuers of the securities held by those funds and other entities by potentially increasing demand for those securities. Increased demand typically results in increased liquidity which can benefit investors because it may enable them to enter or exit their positions in fund instruments, products, and portfolios in a more timely manner and at a more attractive price.

Moreover, investors who seek access to public capital markets investments or other investments through foreign public funds may benefit to the extent the final rule results in banking entities offering more foreign public funds or offering these funds at a lower cost. Further, investors that prefer to implement a trading or investing strategy through a legal entity structure may benefit from the final rule, which allows banking entities to implement or facilitate such a trading or investing strategy while providing other banking and asset management services to the investor.[526] At the same time, it is possible that, as a result of banking entities sponsoring or investing in more funds that are excluded from the definition of covered fund by the final rule, general market risk could increase and that risk could adversely affect markets generally, including through the impact on financial stability. However, due to the mitigation effects of the various conditions of the exclusions from the definition of covered fund contained in the final rule as well as expectations regarding the relative size and mix of the investments in the aggregate, the SEC believes this risk to be small. For example, the final rule permits a banking entity to act as a sponsor, investment adviser, or commodity trading advisor to certain excluded funds (*e.g.,* credit funds and qualifying venture capital funds) only to the extent the banking entity ensures that the activities of the funds are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly.

iii. Analytical Approach

The SEC's economic analysis is informed by research [527] on the effects of section 13 of the BHC Act and the 2013 rule, comments received by the agencies from a variety of interested parties, and experience administering the implementing regulations. Throughout this economic analysis, the SEC discusses how different market

[526] *See supra* Section IV.B.1. (Foreign Public Funds).

[527] *See* 2019 amendments, 84 FR 62044–54.

participants [528] may respond to various aspects of the final rule. This analysis also considers the potential effects of the final rule on activities by banking entities that involve risk, their willingness and ability to engage in client-facilitation activities, and competition, market quality, and capital formation.

The final rule tailors, removes, or alters the scope of various covered fund requirements in the implementing regulations. Since section 13 of the BHC Act and the implementing regulations impose a number of different requirements, and, as discussed above, the type and level of risk exposure of a banking entity is the result of a combination of activities,[529] it is difficult to attribute the observed effects to a specific provision or subset of requirements. In addition, analysis of the effects of the implementation of the 2013 rule is confounded by macroeconomic factors, other policy interventions, and post-crisis changes to market participants' risk aversion and return expectations.[530] Because of the extended timeline of implementation of section 13 of the BHC Act and the overlap of the period during which the 2013 rule was in effect with other post-crisis changes affecting the same group or certain sub-groups of SEC registrants, the SEC cannot rely on quantitative methods that might otherwise provide insight into causal attribution and quantification of the effects of section 13 of the BHC Act and the 2013 rule on measures of capital formation, liquidity, competition, and informational or allocative efficiency. Moreover, empirical measures of capital formation or liquidity are substantially limited by the fact that they do not provide insight into security issuance and transaction activity that does not occur (or occurs in a sector of the market for which data is not readily available) as a result of the implementing regulations. Accordingly, it is difficult to quantify the primary security issuance and secondary market liquidity that would have been observed since the financial crisis absent various provisions of section 13 of the BHC Act and the implementing regulations.

Importantly, the existing securities markets—including market participants, their business models, market structure, etc.—differ in significant ways from the securities markets that existed prior to enactment of section 13 of the BHC Act and the implementation of the 2013 rule. For example, the role of dealers in intermediating trading activity has changed in important ways, including the following: (1) In recent years, on both an absolute and relative basis, bank dealers generally committed less capital to intermediation activities while non-bank dealers generally committed more, although not always in the same manner or on the same terms as bank dealers; (2) the volume and profitability of certain trading activities after the financial crisis may have decreased for bank dealers while it may have increased for other intermediaries, including non-bank entities that provide intraday liquidity, but generally not overnight liquidity, including in some sectors of the market through the use of electronic trading algorithms and high speed access to data and trading venues; and (3) the introduction of alternative credit markets, including non-bank direct lending markets, may have contributed to liquidity fragmentation across markets while potentially increasing access to capital.[531]

Where possible, the SEC has attempted to quantify the costs and benefits it expects to result from the final rule. In many cases, however, the SEC is unable to quantify these potential economic effects. Some of the primary economic effects, such as the effect on incentives that may give rise to conflicts of interest in various regulated entities and the degree to which the implementing regulations may be impeding activity of banking entities with respect to certain investment vehicles, are inherently difficult to quantify. Moreover, some of the intended benefits of the implementing regulations' definitions and prohibitions that the agencies are amending include the potential for more resilient markets during a financial crisis or during periods of severe market stress. These intended benefits are less readily observable under periods of strong economic conditions, periods of significant government credit accommodation, and when markets have significant liquidity and are less volatile. Even following an economic shock, identification of these intended benefits requires a sufficient amount of data covering a relevant sample period. Moreover, identifying these benefits following an economic shock could prove difficult if the effects of past regulation are confounded by other interventions aimed at mitigating the impact of the shock on financial markets, including regulation, credit accommodation, and fiscal stimulus. Finally, it is difficult to quantify the net economic effects of any individual amendment because of overlapping implementation periods of various post-crisis regulations. Further, it is difficult to quantify the net economic effects of any individual amendment because of the fact that many market participants changed their behavior in anticipation of future changes in regulation.

In some instances, the SEC lacks the information or data necessary to provide reasonable estimates for the economic effects of the final rule. For example, the SEC lacks information and data on how market participants may choose to restructure their relationships with various types of entities in response to the final rule; the amount of capital formation in covered funds that does not occur because of current covered fund provisions, including those concerning the definition of covered fund, restrictions on relationships with covered funds, the definition of ownership interest, and the exclusion for loan securitizations; the volume of loans, guarantees, securities lending, and derivatives activity dealers may wish to engage in with related covered funds; as well as the extent of risk reduction associated with the covered fund provision of the 2013 rule. Where the SEC cannot quantify the relevant economic effects, they are discussed in qualitative terms.

2. Economic Baseline

In the context of this economic analysis, the economic costs and benefits, and the impact of the final rule on efficiency, competition, and capital formation, are considered relative to a baseline that includes the implementing regulations (including the 2013 rule and the 2019 amendments), legislative amendments in EGRRCPA, and current practices aimed at compliance with these regulations.

i. Regulation

The SEC is assessing the economic impact of the final rule against a baseline that includes the legal and regulatory framework as it exists at the

[528] As discussed above, *supra* Section V.F.1.i. (Background), the SEC's economic analysis is focused on the potential effects of the final rule on (1) SEC registrants, (2) the functioning and efficiency of the securities markets, (3) investor protection, and (4) capital formation. Thus, the below analysis does not consider the direct effects of the final rule on broker-dealers, SBSDs, or investment advisers that are not banking entities, or banking entities that are not SEC registrants, in either case for purposes of section 13 of the BHC Act, beyond the potential spillover effects on these entities and effects on efficiency, competition, investor protection, and capital formation in securities markets. *See infra* Section V.F.2.i. (Affected Participants).

[529] *See, e.g.,* 2013 rule at 5541.

[530] With respect to the 2019 amendments, *supra* note 8, analysis of the effects is difficult because of the relatively short time that has passed since they became effective.

[531] *See* U.S. Sec. & Exch. Comm'n, Access to Capital and Market Liquidity (Aug. 2017), *available at https://www.sec.gov/files/access-to-capital-and-market-liquidity-study-dera-2017.pdf.*

time of this release. Thus, the regulatory baseline for the SEC's economic analysis includes section 13 of the BHC Act as amended by EGRRCPA, and the 2013 rule. Further, the baseline accounts for the fact that since the adoption of the 2013 rule, the agencies have adopted the 2019 amendments, which, among other things, relate to the ability of banking entities to engage in certain activities, including underwriting, market-making, and risk-mitigating hedging, with respect to ownership interests in covered funds, as well as amendments conforming the 2013 rule to sections 203 and 204 of EGRRCPA. In addition, the agencies' staffs have provided FAQ responses related to the regulatory obligations of banking entities, including SEC-regulated entities that are also banking entities under the 2013 rule, which likely influenced these entities' decisions about how to comply with the 2013 rule and may influence these entities' decisions about how to comply with the 2019 amendments.[532] The Federal banking agencies also issued the policy statement in 2017 with respect to foreign excluded funds, and has since extended the policy statement to 2021.[533]

Although the 2013 rule also included restrictions on proprietary trading and compliance requirements (as modified by the 2019 amendments), the most relevant portion of the 2013 rule for establishing an economic baseline is that involving covered fund restrictions.[534] The features of the regulatory framework under the 2013 rule most relevant to the baseline include the definition of the term ''covered fund''; restrictions on a banking entity's relationships with covered funds; and restrictions on parallel investment, co-investment, and investments in the fund by banking entity employees.

Scope of the Covered Fund Definition

The definition of ''covered fund'' impacts the scope of the substantive prohibitions on banking entities acquiring or retaining an ownership interest in, sponsoring, and having certain relationships with, covered funds. The implementing regulations define covered funds, in part, as issuers that would be investment companies but for section 3(c)(1) or 3(c)(7) of the Investment Company Act and then excludes specific types of entities from the definition. The definition also includes certain commodity pools as well as certain foreign funds. Funds that rely on the exclusions in sections 3(c)(1) or 3(c)(7) of the Investment Company Act are covered funds unless an exclusion from the covered fund definition is available. Funds that rely on any exclusion or exemption from the definition of ''investment company'' under the Investment Company Act, other than the exclusion contained in section 3(c)(1) or 3(c)(7), such as real estate and mortgage funds that rely on the exclusion in section 3(c)(5)(C), are not covered funds under the implementing regulations. The covered fund provisions of the implementing regulations may reduce the ability and incentives of banking entities to bail out affiliated funds to mitigate reputational risk, limit conflicts of interest with clients, customers, and counterparties, and reduce the ability of banking entities to engage in proprietary trading indirectly through funds.

The broad definition of covered funds encompasses many different types of vehicles, and the implementing regulations exclude some of them from the definition of a covered fund.[535] The excluded fund types relevant to the baseline are funds that are regulated by the SEC under the Investment Company Act: Registered investment companies (RICs) and business development companies (BDCs). Seeding vehicles for these funds are also excluded from the covered fund definition during their seeding period.[536]

Restrictions on Relationships Between Banking Entities and Covered Funds

Under the baseline, banking entities are limited in the types of transactions in which they are able to engage with covered funds with which they have certain relationships. Banking entities that serve, directly or indirectly, as the investment manager, adviser, or sponsor to a covered fund are prohibited from engaging in a ''covered transaction,'' as defined in section 23A of the Federal Reserve Act, with the covered fund or with any other covered fund that is controlled by such covered fund.[537] Similarly, a banking entity that organizes and offers a covered fund pursuant to § ____.11 or that continues to hold an ownership interest in a covered fund in accordance with § ____.11(b) is prohibited from engaging in such a ''covered transaction.'' This prohibits all ''covered transactions'' that cause the banking entity to have credit exposure to the affiliated covered fund, including short-term extensions of credit and various other transactions required for a banking entity to provide an affiliated covered fund payment, clearing, and settlement services.

Definition of ''Banking Entity''

For foreign banking entities,[538] certain funds organized under foreign law and offered to foreign investors (''foreign excluded funds'') are not ''covered funds'' under the implementing regulations, but may be subject to the implementing regulations as ''banking entities'' under certain circumstances. Through the policy statement, the Federal banking agencies (in consultation with the staffs of the SEC and the CFTC) have provided temporary relief, that is currently scheduled to expire on July 21, 2021, for qualifying foreign excluded funds that may otherwise be subject to the implementing regulations as banking entities.[539]

Definition of ''Ownership Interest''

The implementing regulations prohibit a banking entity, as principal, from directly or indirectly acquiring or retaining an ''ownership interest'' in a covered fund.[540] The implementing regulations define an ''ownership interest'' in a covered fund to mean any equity, partnership, or other similar interest. Under the implementing regulations, ''other similar interest'' is defined as an interest that:

(A) Has the right to participate in the selection or removal of a general partner, managing member, member of the board of directors or trustees,

[532] *See supra* note 14.

[533] *See supra* Section VI.A. (Qualifying Foreign Excluded Funds) and notes 26 and 28 (discussion of ''the policy statement'').

[534] *See* 84 FR 61974.

[535] The exclusions from the covered fund definition are set forth in § ____.10(c) of the implementing regulations.

[536] *See* implementing regulations §§ ____.10(c)(12)(i) and ____.10(c)(12)(iii).

[537] *See* implementing regulations § ____.14(a).

[538] For purposes of this analysis, ''foreign banking entity'' has the same meaning as used in the policy statement, *supra* note 27, *i.e.,* a banking entity that is not, and is not controlled directly or indirectly by, a banking entity that is located in or organized under the laws of the United States or any state.

[539] *See supra* note 26 and 28. For purposes of the policy statement, a ''qualifying foreign excluded fund'' means, with respect to a foreign banking entity, an entity that (1) is organized or established outside the United States and the ownership interests of which are offered and sold solely outside the United States; (2) would be a covered fund were the entity organized or established in the United States, or is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments; (3) would not otherwise be a banking entity except by virtue of the foreign banking entity's acquisition or retention of an ownership interest in, or sponsorship of, the entity; (4) is established and operated as part of a bona fide asset management business; and (5) is not operated in a manner that enables the foreign banking entity to evade the requirements of section 13 or implementing regulations.

[540] Implementing regulations § ____.10(a).

investment manager, investment adviser, or commodity trading advisor of the covered fund (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(B) Has the right under the terms of the interest to receive a share of the income, gains or profits of the covered fund;

(C) Has the right to receive the underlying assets of the covered fund after all other interests have been redeemed and/or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(D) Has the right to receive all or a portion of excess spread (the positive difference, if any, between the aggregate interest payments received from the underlying assets of the covered fund and the aggregate interest paid to the holders of other outstanding interests);

(E) Provides under the terms of the interest that the amounts payable by the covered fund with respect to the interest could be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest;

(F) Receives income on a pass-through basis from the covered fund, or has a rate of return that is determined by reference to the performance of the underlying assets of the covered fund; or

(G) Any synthetic right to have, receive, or be allocated any of the rights above.[541]

The implementing regulations permit a banking entity to acquire and retain an ownership interest in a covered fund that the banking entity organizes and offers pursuant to § ____.11, but limits such ownership interests to three percent of the total number or value of the outstanding ownership interests of such fund (the per-fund limit).[542]

Loan Securitizations

As discussed above, section 13 of the BHC Act provides a rule of construction that explicitly allows the sale and securitization of loans as otherwise permitted by law.[543] Accordingly, the implementing regulations exclude from the covered fund definition entities that issue asset-backed securities if they meet specified conditions, including that they hold only loans, certain rights and assets, and a small set of other financial instruments (permissible assets).[544] In addition, the baseline includes the FAQs issued by agencies' staff in June 2014 regarding the servicing asset provision of the loan securitization exclusion.[545]

Public Welfare and SBIC Exclusions

Under the implementing regulations, issuers in the business of making investments that are designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24),[546] are excluded from the covered fund definition. Similarly, the implementing regulations exclude from the covered fund definition small business investment companies (SBICs) and issuers that have received notice from the Small Business Administration to proceed to qualify for a license as a SBIC and for which the notice or license has not been revoked.[547]

Attribution of Certain Investments to a Banking Entity

As discussed above, the implementing regulations include a per-fund limit and aggregate fund limit on a banking entity's ownership of covered funds that the banking entity organizes and offers.[548] The preamble to the 2013 rule stated, ''if a banking entity makes investments side by side in substantially the same positions as a covered fund, then the value of such investments shall be included for purposes of determining the value of the banking entity's investment in the covered fund.'' [549] The agencies also stated that a banking entity that sponsors a covered fund should not make any additional side-by-side co-investment with the covered fund in a privately negotiated investment unless the value of such co-investment is less than 3% of the value of the total amount co-invested by other investors in such investment.[550] The 2019 amendments eliminated the aggregate fund limit and capital deduction requirement under § ____.12(d) for the value of ownership interests held by banking entities in third-party covered funds (*e.g.,* covered funds that those banking entities do not organize or offer), acquired or retained as a result of certain underwriting or market-making activities. However, the 2019 amendments did not change or amend the application of the per-fund limit or aggregate funds limit to co-investments alongside a covered fund.

For purposes of calculating the aggregate fund limit and the capital deduction requirement, the implementing regulations require attribution to a banking entity of restricted profit interests in a covered fund as ownership interests in the covered fund for which the banking entity serves as investment manager, investment adviser, commodity trading advisor, or other service provider.[551] Under the implementing regulations, for purposes of calculating a banking entity's compliance with the aggregate fund limit and the capital deduction requirement, a banking entity must include any amounts paid by the banking entity or an employee in connection with obtaining a restricted profit interest in the covered fund.[552]

ii. Affected Participants

The SEC-regulated entities directly affected by the final rule include broker-dealers, security-based swap dealers, and investment advisers. The implementing regulations impose a range of restrictions and compliance obligations on banking entities with respect to their covered fund activities and investments. To the degree that the final rule reduces or otherwise alters the scope of private funds subject to covered fund restrictions, SEC-registered banking entities, including broker-dealers, security-based swap dealers, and investment advisers may be affected.

Broker-Dealers [553]

Under the implementing regulations, some of the largest SEC-regulated

[541] Implementing regulations § ____.10(d)(6)(i).

[542] Implementing regulations §§ ____.12(a)(1)(ii) and ____.12(a)(2)(ii)(A). The implementing regulations also require that the aggregate value of all ownership interests of a banking entity and its affiliates in all covered funds acquired or retained under § ____.12 may not exceed three percent of the tier 1 capital of the banking entity. Implementing regulations § ____.12(a)(2)(iii) (the aggregate funds limit).

[543] 13 U.S.C. 1851(g)(2). *See also supra* Section IV.B.2 (Loan Securitizations).

[544] *See* implementing regulations § ____.10(c)(8). Loan is further defined as any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative. Implementing regulations rule § ____.2(t).

[545] *See supra* Section IV.B.2 (Loan Securitizations, discussion of servicing assets).

[546] *See* implementing regulations § ____.10(c)(11)(ii).

[547] *See* implementing regulations § ____.10(c)(11)(i).

[548] *See* implementing regulations § ____.12(a). *See also supra* Section IV.E.2. (Ownership Interest—Fund Limits and Covered Fund Deduction).

[549] 79 FR 5734.

[550] *See id.*

[551] Implementing regulations §§ ____.10(d)(6)(ii) and ____.12(c)(1), (d). *See also* 12 U.S.C. 1851(d)(1)(G).

[552] Implementing regulations §§ ____.12(c)(1), (d).

[553] This analysis is based on data from Reporting Form FR Y–9C for domestic holding companies on a consolidated basis and Report of Condition and Income for banks regulated by the Board, FDIC, and

Continued

broker-dealers are banking entities. Table 1 reports the number, total assets, and holdings of broker-dealers affiliated with banks and broker-dealers that are not.

While the 3,487 domestic broker-dealers that are not affiliated with banks greatly outnumber the 202 banking entity broker-dealers subject to the implementing regulations, banking entity broker-dealers dominate non-banking entity broker-dealers in terms of total assets (72% of total broker-dealer assets) and aggregate holdings (66% of total broker-dealer holdings).

TABLE 1—BROKER-DEALER COUNT, ASSETS, AND HOLDINGS BY AFFILIATION

Broker-dealer affiliation	Number	Total assets, $mln [554]	Holdings, $mln [555]	Holdings (alternative), $mln [556]
Affected bank broker-dealers [557]	202	3,240,045	777,192	607,086
Non-bank broker-dealers [558]	3,487	1,258,510	404,754	255,380
Total	3,689	4,498,556	1,181,946	862,466

Security-Based Swap Dealers

The final rule may also affect bank-affiliated SBSDs. As compliance with SBSD registration requirements is not yet required, there are currently no registered SBSDs. However, the SEC has previously estimated that as many as 50 entities may potentially register with the SEC as security-based swap dealers and that as many as 16 may already be SEC-registered broker-dealers.[559] Given the analysis of DTCC Derivatives Repository Limited Trade Information Warehouse (TIW) transaction and positions data on single-name credit-default swaps and consistent with other recent SEC rulemakings, the SEC preliminarily believes that 41 entities that may register with the SEC as SBSDs are bank-affiliated firms, including those that are SEC-registered broker-dealers. Therefore, the SEC preliminarily estimates that, in addition to the bank-affiliated SBSDs that are already registered as broker-dealers and included in the discussion above, as many as 25 other bank-affiliated SBSDs may be affected by the final rule.[560] Similarly, the SEC's analysis of TIW data suggests that none of the entities that may register with the SEC as Major Security-Based Swap Participants are affected by the final rule.

October 6, 2021 is the compliance date for the SEC's registration rules for SBSDs, as well as several rules applicable to those entities, including segregation requirements and non-bank capital and margin requirements, recordkeeping and reporting requirements, business conduct standards, and risk mitigation techniques.[561] Accordingly, the SEC recognizes that in anticipation of the compliance date for registration, firms may choose to restructure their security-based swap trading activity into (or out of) an affiliated bank or an affiliated broker-dealer instead of registering as a standalone SBSD if bank or broker-dealer capital and other regulatory requirements are less (or more) costly than those that may be imposed on SBSDs under Title VII. As a result, the above figures may overestimate or underestimate the number of SBSDs that are not broker-dealers and that may become SEC-registered entities affected by the final rule.

Private Funds and Private Fund Advisers [562]

This section describes RIAs advising private funds that may be affected by the final rule. Using Form ADV data, Table 2 reports the number of RIAs advising private funds by fund type as defined in Form ADV.[563] Private funds rely on either section 3(c)(1) or 3(c)(7) of the Investment Company Act and so meet the implementing regulations' definition of ''covered fund.'' Table 3

OCC for the most recent available four-quarter average, as well as data from S&P Market Intelligence LLC on the estimated amount of global trading activity of U.S. and non-U.S. bank holding companies. Broker-dealer bank affiliations were obtained from the Federal Financial Institutions Examination Council's National Information Center. Broker-dealer assets and holdings were obtained from FOCUS Report data for Q4 2019.

[554] Broker-dealer total assets are based on FOCUS report data for ''Total Assets.''

[555] Broker-dealer holdings are based on FOCUS report data for securities and spot commodities owned at market value, including bankers' acceptances, certificates of deposit and commercial paper, state and municipal government obligations, corporate obligations, stocks and warrants, options, arbitrage, other securities, U.S. and Canadian government obligations, and spot commodities.

[556] This alternative measure excludes U.S. and Canadian government obligations and spot commodities.

[557] This category includes all bank-affiliated broker-dealers except those exempted by section 203 of EGRRCPA.

[558] This category includes both bank affiliated broker-dealers subject to section 203 of EGRRCPA and broker-dealers that are not affiliated with banks or holding companies.

[559] *See* Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers, 84 FR 68550, 68607 (Dec. 16, 2019).

[560] *See id.*

[561] *See* Capital, Margin, and Segregation Adopting Release, *supra* note 517, at 43954. *See also* Rule Amendments and Guidance Addressing Cross-Border Application of Certain Security-Based Swap Requirements, 85 FR 6270, 6345–49 (Feb. 4, 2020).

[562] These estimates are calculated from Form ADV data as of December 31, 2019. An investment adviser is defined as a ''private fund adviser'' for the purposes of this economic analysis if it indicates that it is an adviser to any private fund on Form ADV Item 7.B. An investment adviser is defined as a ''banking entity RIA'' if it indicates on Form ADV Item 6.A.(7) that it is actively engaged in business as a bank, or it indicates on Form ADV Item 7.A.(8) that it has a ''related person'' that is a banking or thrift institution. For purposes of Form ADV, a ''related person'' is any advisory affiliate and any person that is under common control with the adviser. The definition of ''control'' for purposes of Form ADV, which is used in identifying related persons on the form, differs from the definition of ''control'' under the BHC Act. In addition, this analysis does not exclude SEC-registered investment advisers affiliated with banks that have consolidated total assets less than or equal to $10 billion and trading assets and liabilities less than or equal to 5% of total assets. Those banks are no longer subject to the requirements of the 2013 rule following enactment of the EGRRCPA. Thus, these figures may overestimate or underestimate the number of banking entity RIAs.

[563] RIAs may also advise foreign public funds that are excluded from the covered fund definition in the implementing regulations, are the subject of the final rule discussed below, and are not reported on Form ADV.

reports the number and gross assets of private funds advised by RIAs and separately reports these statistics for banking entity RIAs. As can be seen from Table 2, the two largest categories of private funds advised by RIAs are hedge funds and private equity funds.[564]

Banking entity RIAs advise a total of 4,387 private funds with approximately $2.089 trillion in gross assets. From Form ADV data, banking entity RIAs' gross private fund assets under management are concentrated in hedge funds and private equity funds. The SEC estimates on the basis of this data that banking entity RIAs advise 890 hedge funds with approximately $606 billion in gross assets and 1,518 private equity funds with approximately $466 billion in assets.

TABLE 2—SEC-REGISTERED INVESTMENT ADVISERS ADVISING PRIVATE FUNDS BY FUND TYPE [565]

Fund type	All RIA	Banking entity RIA
Hedge Funds	2,620	151
Private Equity Funds	1,738	96
Real Estate Funds	551	51
Securitized Asset Funds	233	44
Venture Capital Funds	223	8
Liquidity Funds	44	16
Other Private Funds	1,060	140
Total Private Fund Advisers	4,781	282

TABLE 3—THE NUMBER AND GROSS ASSETS OF PRIVATE FUNDS ADVISED BY SEC-REGISTERED INVESTMENT ADVISERS [566]

Fund type	Number of private funds		Gross assets, $bln	
	All RIA	Banking entity RIA	All RIA	Banking entity RIA
Hedge Funds	10,445	890	8,048	606
Private Equity Funds	16,217	1,518	4,119	466
Real Estate Funds	3,699	320	732	94
Securitized Asset Funds	2,000	380	767	145
Venture Capital Funds	1,387	44	174	3
Liquidity Funds	76	30	304	231
Other Private Funds	4,757	1,206	1,543	542
Total Private Funds	38,581	4,387	15,685	2,089

In addition, the SEC's economic analysis is informed by private fund statistics submitted by certain RIAs of private funds through Form PF as summarized in quarterly ''Private Fund Statistics.'' [567]

Registered Investment Companies and Business Development Companies

The baseline also reflects the potential that a RIC or a BDC would be treated as a banking entity where the RIC or BDC's sponsor is a banking entity that holds 25% or more of the RIC or BDC's voting securities after a seeding period.[568] On the basis of SEC filings and public data, the SEC estimates that, as of December 2019, there were approximately 15,300 RICs [569] and 101 BDCs. Although RICs and BDCs are generally not themselves banking entities subject to the implementing regulations, they may be indirectly affected by the implementing regulations and the final rule, for example, if their sponsors or advisers are banking entities. For instance, bank-affiliated RIAs or their affiliates may reduce their level of investment in the RICs or BDCs they advise, or potentially close those funds, to eliminate the risk of those funds becoming banking entities themselves.

Small Business Investment Companies

Small business investment companies are generally ''privately owned and managed investment funds, licensed and regulated by the Small Business Administration (SBA), that use their own capital plus funds borrowed with

[564] For purposes of Form ADV, ''private equity fund'' is defined as ''any private fund that is not a hedge fund, liquidity fund, real estate fund, securitized asset fund, or venture capital fund and does not provide investors with redemption rights in the ordinary course.'' *See* Form ADV: Instructions for Part 1A, Instruction 6. For purposes of Form ADV, ''hedge fund'' is defined as ''any private fund (other than a securitized asset fund): (a) With respect to which one or more investment advisers (or related persons of investment advisers) may be paid a performance fee or allocation calculated by taking into account unrealized gains (other than a fee or allocation the calculation of which may take into account unrealized gains solely for the purpose of reducing such fee or allocation to reflect net unrealized losses); (b) that may borrow an amount in excess of one-half of its net asset value (including any committed capital) or may have gross notional exposure in excess of twice its net asset value (including any committed capital); or (c) that may sell securities or other assets short or enter into similar transactions (other than for the purpose of hedging currency exposure or managing duration).

[565] This table includes only the advisers that list private funds on section 7.B.(1) of Form ADV. The number of advisers in the ''Total Private Fund Advisers'' row is not the sum of the rows that precede it since an adviser may advise multiple types of private funds. Each listed private fund type (*e.g.,* real estate funds and liquidity funds) is defined in Form ADV, and those definitions are the same for purposes of the SEC's Form PF.

[566] Gross assets include uncalled capital commitments on Form ADV. The large decrease in Gross assets for Liquidity Funds from that reported in the proposing release is due, in part, to the removal of certain Form ADV data from one filer that contained an erroneous value for gross assets.

[567] *See* U.S. Sec. and Exchange Comm'n, Div. of Inv. Mgmt. Analytics Office, Private Fund Statistics, Third Calendar Quarter 2019 (May 14, 2020), *available at https://www.sec.gov/divisions/investment/private-funds-statistics/private-funds-statistics-2019-q3-accessible.pdf.* Statistics for preceding quarters are *available at https://www.sec.gov/divisions/investment/private-funds-statistics.shtml.*

[568] *See, e.g.,* 2019 amendments, 84 FR 61979.

[569] This estimate includes open-end companies, exchange-traded funds, closed-end funds, and non-insurance unit investment trusts and does not include fund of funds. The inclusion of fund of funds increases this estimate to approximately 16,800.

an SBA guarantee to make equity and debt investments in qualifying small businesses.'' [570] The final rule provides relief with respect to banking entity investments in SBICs during the wind-down process by excluding from the definition of ''covered fund'' those SBICs.[571] While the SEC does not have data to quantify the number of SBICs undergoing wind-down, trends in the number of SBIC licenses can be indicative of the turnover in the total number of SBIC licensees. For example, according to SBA data, there were 295 SBIC licensees as of March 31, 2020 [572] and 299 SBIC licensees as of December 31, 2019.[573] By contrast, as of September 30, 2017, there were 315 SBICs licensed by the SBA.[574]

The final rule includes an exclusion for rural business investment companies (RBICs) from the implementing regulations similar to that provided to SBICs.[575] As the SEC has discussed elsewhere,[576] an RBIC is defined in section 384A of the Consolidated Farm and Rural Development Act as a company that is approved by the Secretary of Agriculture and that has entered into a participation agreement with the Secretary.[577] Because SBICs and RBICs share the common purpose of promoting capital formation in their respective sectors, advisers to SBICs and RBICs are treated similarly under the Advisers Act in that they have the opportunity to take advantage of expanded exemptions from investment adviser registration.[578] As of August 2019, there were 5 RBICs who were licensed by the USDA managing approximately $352 million in assets.[579]

The Tax Cuts and Jobs Act established the ''opportunity zone'' program to provide tax incentives for long-term investing in designated economically distressed communities.[580] The program allows taxpayers to defer and reduce taxes on capital gains by reinvesting gains in ''qualified opportunity funds'' (QOFs) that are required to have at least 90 percent of their assets in designated low-income zones.[581] In this regard, QOFs are similar to SBICs and public welfare companies. The final rule provides relief to QOFs from the implementing regulations that is similar to the relief provided to SBICs.[582] SEC staff is not aware of an official source for data regarding QOFs that are available for investment, but some private firms collect and report such data. One such firm reports that, as of April 2020, there were 406 QOFs that report raising $10.09 billion in equity, and have a fundraising goal of $31.89 billion.[583]

3. Costs and Benefits

Section 13 of the BHC Act generally prohibits banking entities from acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with covered funds, subject to certain exemptions.[584] The SEC's economic analysis concerns the potential costs, benefits, and effects on efficiency, competition, and capital formation of the final rule for five groups of market participants. First, the final rule may impact SEC-registered investment advisers that are banking entities, including those that sponsor or advise covered funds and those that do not, as well as SEC-registered investment advisers that are not banking entities that sponsor or advise covered funds and compete with banking entity RIAs. Second, the final rule permits dealers greater flexibility in providing services to more types of funds since dealers can provide a broader array of services to funds that would be excluded from the covered fund definition. Third, banking entities that are broker-dealers or RIAs may enjoy reduced uncertainty and greater flexibility in making direct investments alongside covered funds. Fourth, the final rule may impact private funds and other vehicles, including those entities scoped in or out of the covered fund provisions of the implementing regulations, as well as private funds competing with such funds. One such impact may be seen to the extent that the final rule permits banking entities to provide a full range of traditional customer-facing banking and asset management services to certain entities, such as customer facilitation vehicles and family wealth management vehicles. Fifth, to the extent that the final rule impacts efficiency, competition, and capital formation in covered funds or underlying securities, investors in, and sponsors of, covered funds and underlying securities and issuers may be affected as well.

As discussed below, the agencies carefully considered the competing effects that could potentially result from the final rule and alternatives. For example, the final rule could result in enhanced competition among, and capital formation driven by, entities that would be treated as covered funds under the implementing regulations.

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[570] *See* U.S. Small Bus. Admin., SBIC Program Overview, *available at https://www.sba.gov/content/sbic-program-overview.*

For purposes of the Advisers Act, an SBIC is (other than an entity that has elected to be regulated or is regulated as a business development company pursuant to section 54 of the Investment Company Act of 1940): (A) A small business investment company that is licensed under the Small Business Investment Act of 1958, (B) an entity that has received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company under the Small Business Investment Act of 1958, which notice or license has not been revoked, or (C) an applicant that is affiliated with 1 or more licensed small business investment companies described in subparagraph (A) and that has applied for another license under the Small Business Investment Act of 1958, which application remains pending. 15 U.S.C. 80b–3(b)(7).

[571] Specifically, the final rule excludes from the definition of ''covered fund'' any SBIC that has voluntarily surrendered its license to operate as an SBIC in accordance with 13 CFR 107.1900 and does not make any new investments (with some exceptions) after such voluntary surrender. *See* § ____.10(c)(11)(i).

[572] *See* U.S. Small Bus. Admin., SBIC Program Overview as of March 31, 2020, *available at: https://www.sba.gov/sites/default/files/2020-05/SBIC%20Quarterly%20Report%20as%20of%20March_31_2020%20Amended%205.14.2020.pdf.*

[573] *See* U.S. Small Bus. Admin., SBIC Program Overview as of December 31, 2019, *available at https://www.sba.gov/sites/default/files/2020-02/SBIC%20Quarterly%20Report%20as%20of%20December_31_2019.pdf.*

[574] *See id.*

[575] Under the implementing regulations, an SBIC is excluded from the ''covered fund'' definition. *See* implementing regulations § ____.10(c)(11)(i).

[576] *See* Exemptions from Investment Adviser Registration for Advisers to Certain Rural Business Investment Companies, 85 FR 13734 (Mar. 10, 2020) (''RBIC Investment Adviser Adopting Release'').

[577] *See* the RBIC Advisers Relief Act of 2018, Public Law 115–417, 132 Stat. 5438 (2019) (the ''RBIC Advisers Relief Act''). To be eligible to participate as an RBIC, the company must be a newly formed for-profit entity or a newly formed for-profit subsidiary of such an entity, have a management team with experience in community development financing or relevant venture capital financing, and invest in enterprises that will create wealth and job opportunities in rural areas, with an emphasis on smaller enterprises. *See* 7 U.S.C. 2009cc–3(a).

[578] Following enactment of the RBIC Advisers Relief Act, *supra* note 577, advisers to solely RBICs and advisers to solely SBICs are exempt from investment adviser registration pursuant to Advisers Act sections 203(b)(8) and 203(b)(7), respectively. The venture capital fund adviser exemption deems RBICs and SBICs to be venture capital funds for purposes of the registration exemption 15 U.S.C. 80b–3(l). Accordingly, the exclusion for certain venture capital funds discussed below (*see infra* text accompanying notes 672 and 673) which require that a fund be a venture capital fund as defined in the SEC regulations implementing the registration exemption, could include RBICs and SBICs to the extent that they satisfy the other elements of the exclusion.

[579] *See* RBIC Investment Adviser Adopting Release, *supra* note 576.

[580] Tax Cuts and Jobs Act of 2017, Public Law 115–97, 131 Stat. 2054 (2017).

[581] *See* U.S. Sec. and Exchange Comm'n & NASAA, Staff Statement on Opportunity Zones: Federal and State Securities Laws Considerations, *available at https://www.sec.gov/2019_Opportunity-Zones_FINAL_508v2.pdf (''Opportunity Zone Statement'').*

[582] *See supra* note 575.

[583] As reported by Novogradac, a national professional services organization that collects and reports information on QOFs. *See https://www.novoco.com/resource-centers/opportunity-zone-resource-center/opportunity-funds-listing.*

[584] *See* 12 U.S.C. 1851.

The final rule could also potentially increase (or decrease) financial and other risks posed by the ability to make investments in covered funds in addition to or in lieu of direct investments; however, the agencies have sought to mitigate the potential for increased risk and other concerns by imposing various conditions on the exclusions designed to address such risks.

In addition, to the extent that the covered fund provisions of the implementing regulations limit fund formation, the final rule could provide a greater ability for banking entities to organize funds and attract capital from third party investors. This could increase revenues for banking entities while reducing long-term compliance costs; increase the availability of venture, credit, and other financing, including for small businesses and start-ups; and, as a result, increase capital formation. The SEC is not currently aware of any information or data that would allow a quantification of the extent to which the covered fund provisions of the implementing regulations are inhibiting capital formation via funds. Therefore, the bulk of the analysis below is necessarily qualitative. To the extent that the covered fund provisions of the implementing regulations limit alignment of interests between banking entities and their clients, customers, or counterparties, and to the extent the final rule alters the alignment of interests, the final rule could have a positive or negative effect on conflict of interest concerns.

The final rule creates new recordkeeping requirements and revise certain disclosure requirements. Specifically, a banking entity may only rely on the exclusion for customer facilitation vehicles if the banking entity and its affiliates maintain documentation outlining how the banking entity intends to facilitate the customer's exposure to a transaction, investment strategy or service provided by the banking entity. As discussed above in Section V.B. (Paperwork Reduction Act) [585] and discussed further below, these new recordkeeping burdens may impose an initial burden of $1,078,650 [586] and an ongoing annual burden of $1,078,650.[587] In addition, under certain circumstances, a banking entity must make certain disclosures with respect to an excluded credit fund, venture capital fund, family wealth vehicle, or customer facilitation vehicle, as if the entity were a covered fund. As discussed above in Section V.B, these disclosure requirements may impose an initial burden of $53,933 [588] and an ongoing burden of $1,402,245.[589]

The sections that follow discuss how each of the amendments in the final rule change the implementing regulations, and the anticipated costs and benefits of the amendments, subject to the caveat that not all anticipated costs and benefits can be meaningfully quantified.[590]

i. Amendments Related to Specific Types of Funds

As discussed above, the final rule modifies a number of the provisions of the implementing regulations related to the treatment of certain types of funds (*e.g.,* credit funds, family wealth management vehicles, small business investment companies, qualifying venture capital funds, customer facilitation vehicles, foreign excluded funds, foreign public funds, and loan securitizations).[591]

Broadly, such modifications reduce the number and types of funds that are within the scope of the implementing regulations, impacting the economic effects of section 13 of the BHC Act and the implementing regulations.[592]

Form ADV data is not sufficiently granular to allow the SEC to estimate the number of funds and fund advisers affected by the exclusions from the covered fund definition added or modified by the final rule and other relief addressed by the final rule. However, Table 2 and Table 3 in the economic baseline quantify the number and asset size of private funds advised by banking entity RIAs by the type of private fund they advise, as those fund types are defined in Form ADV.[593]

Using Form ADV data, the SEC estimates that approximately 151 banking entity RIAs advise hedge funds and 96 banking entity RIAs advise private equity funds (as those terms are defined in Form ADV).[594] As can be seen from Table 2 in the economic baseline, 44 banking entity RIAs advise securitized asset funds. Table 3 shows that banking entity RIAs advise 380 securitized asset funds with $145 billion in gross assets. Another 51 banking entity RIAs advise real estate funds, and banking entity RIAs advise 320 real estate funds with $94 billion in gross assets. Venture capital funds are advised by only 8 banking entity RIAs, and all 44 venture capital funds advised by banking entity RIAs have in aggregate approximately $3 billion in gross assets.

As noted elsewhere, the covered fund provisions of the implementing regulations may limit the ability of banking entities to use covered funds to circumvent the proprietary trading prohibition, reduce bank incentives to bail out their covered funds, and mitigate conflicts of interest between banking entities and their clients, customers, or counterparties. As discussed in the 2020 proposal, the implementing regulations may limit the ability of banking entities to conduct traditional asset management activities and reduce the availability of capital by imposing significant costs on some banking entities without providing commensurate benefits.[595] Moreover, the 2013 rule's limitations on banking entities' investment in covered funds may be more significant for certain covered funds that are typically small in size such as many venture capital funds, with potentially more negative spillover

[585] For the purposes of the burden estimates in this release, we are assuming the cost of $423 per hour for an attorney, from SIFMA's Management and Professional Earnings in the Securities Industry 2013 (*available at https://www.sifma.org/resources/research/management-and-professional-earnings-in-the-securities-industry-2013/*), modified to account for an 1800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, and adjusted for inflation.

[586] In the 2019 amendments, amendments that sought, among other things, to provide greater clarity and certainty about what activities were prohibited by the 2013 rule—in particular, under the prohibition on proprietary trading—and to better tailor the compliance requirements to the risk of a banking entity's activities, banking entity PRA-related burdens were apportioned to SEC-regulated entities on the basis of the average weight of broker-dealer assets in holding company assets. *See* 2019 amendments, 84 FR 62074. The SEC believes that such an approach would be inappropriate for the PRA-related burdens associated with the final rule because we do not have a comparable proxy for an investment adviser's significance within the holding company. Since we do not have sufficient information to determine the extent to which the costs associated with any of the new recordkeeping and disclosure requirements would be borne by SEC registrants specifically, we report the entire burden estimated based on information in *supra* Section V.B (Paperwork Reduction Act).

Initial recordkeeping burdens: (10 hours) × (255 entities) × (Attorney at $423 per hour) = $1,078,650.

[587] Annual recordkeeping burdens: (10 hours) × (255 entities) × (Attorney at $423 per hour) = $1,078,650.

[588] Initial recordkeeping burdens: (0.5 hours) × (255 entities) × (Attorney at $423 per hour) = $53,933.

[589] Annual recordkeeping burdens: (0.5 hours) × (255 entities) × (26 disclosures per year) × (Attorney at $423 per hour) = $1,402,245.

[590] *See supra* Section V.F.1.iii. (SEC Economic Analysis—Analytical Approach).

[591] *See supra* Section IV. (Summary of the Final Rule).

[592] *See, e.g.,* 2019 amendments, 84 FR 62037–92.

[593] These fund types include hedge funds, private equity funds, real estate funds, securitized asset funds, venture capital funds, liquidity, and other private funds. *See supra* note 564.

[594] As noted in the economic baseline, a single RIA may advise multiple types of funds. *See supra* note 565.

[595] *See* 85 FR 12164.

effects on capital formation in the types of underlying securities in which these types of funds invest.[596]

The final rule could reduce the scope of funds that need to be analyzed for covered fund status or could simplify this analysis and enable banking entities to own, sponsor, and have relationships with the types of entities that the final rule excludes from the covered fund definition. Accordingly, the final rule may reduce costs of banking entity ownership in, sponsorship of, and transactions with certain funds; may promote greater capital formation in, and competition among such funds; and may improve access to capital for issuers of the underlying debt or equity that those funds may purchase.

The final rule may also benefit banking entity dealers through higher profits or greater demand for derivatives, margin, payment, clearing, and settlement services. Reducing restrictions on banking entities by further tailoring the covered fund definition may encourage more launches of funds that are excluded from the definition, capital formation and, possibly, competition in those types of funds. If competition increases the quality of funds available to investors or reduces the fees funds charge, investors in funds may benefit. Moreover, to the degree that the final rule may increase the spectrum of funds available to investors, the final rule may relax constraints around investor portfolio optimization and increase the efficiency of capital allocation.

The SEC received comments from a diverse set of commenters. Comments from banking entities and financial services industry trade groups were generally supportive of the proposal, although many recommended additional modifications.[597] There were also several organizations and individuals that were generally opposed to the 2020 proposal.[598] The sections that follow further discuss the economic costs, benefits, and effects on competition, efficiency, and capital formation with respect to specific types of funds and specific amendments in the final rule.

Foreign Excluded Funds

Under the baseline, foreign excluded funds are excluded from the covered fund definition, but could be considered banking entities if a foreign banking entity controls the foreign fund in certain circumstances.[599] As discussed above, the policy statement released by Federal banking agencies provides that the Federal banking agencies would not propose to take action (1) against a foreign banking entity based on attribution of the activities and investments of a qualifying foreign excluded fund to the foreign banking entity[600] or (2) against a qualifying foreign excluded fund as a banking entity, in each case where the foreign banking entity's acquisition or retention of any ownership interest in, or sponsorship of, the qualifying foreign excluded fund would meet the requirements for permitted covered fund activities and investments solely outside the United States, as provided in section 13(d)(1)(I) of the BHC Act and § ____.13(b) of the implementing regulations, as if the qualifying foreign excluded fund were a covered fund.[601] As in the 2020 proposal, the final rule provides a permanent exemption from the proprietary trading and covered fund prohibitions for certain foreign excluded funds that is substantively similar to the relief currently provided to qualifying foreign excluded funds by the policy statement.[602]

Commenters were generally supportive of the proposal to exempt qualifying foreign excluded funds from certain requirements of the rule.[603] Two commenters expressed opposition to the proposed exemption.[604]

The SEC recognizes that failing to exclude such funds from the definition of ''banking entity'' in the implementing regulations imposed proprietary trading restrictions, covered fund prohibitions, and compliance obligations on qualifying foreign excluded funds that may be more burdensome than the requirements that would apply under the implementing regulations to covered funds.

The SEC believes that, absent the qualifying foreign excluded fund exemption and upon expiry of the policy statement, the implementing regulations may have significant adverse effects on foreign banking entities' ability to organize and offer certain private funds for foreign investments, disrupting foreign asset management activities. The SEC recognizes that the exemption of qualifying foreign excluded funds from the proprietary trading and covered fund prohibitions that apply to ''banking entities'' may result in increased activity by foreign banking entities in organizing and offering such funds, and that such activity may involve risk for those banking entities. At the same time, the SEC recognizes a statutory purpose of certain portions of section 13 of the BHC Act is to limit the extraterritorial impact on foreign banking entities.[605] Accordingly, the final rule may benefit foreign banking entities and their foreign counterparties seeking to transact with and through such funds.

The agencies received comments on the 2020 proposal that expressed concern that although qualifying foreign excluded funds would be exempted from the proprietary trading and covered funds restrictions of the implementing regulations, these funds would still be required to put in place compliance programs.[606] However, since these qualifying foreign excluded funds are exempted from the proprietary trading requirements of § ____.3(a) and covered fund restrictions of § ____.10(a), the agencies believe that requiring compliance programs to be established for the qualifying foreign excluded fund itself would be overly burdensome and unnecessary. Therefore, under the final rule, in addition to the proposed exemptions from the proprietary trading and covered fund prohibitions, qualifying foreign excluded funds will also not be required to have compliance programs under § ____.20. However, any banking entity that owns or sponsors a qualifying foreign excluded fund will still be required to have in place the appropriate compliance programs as required by § ____.20.

The exemption is also expected to promote capital formation in the United States. While qualifying foreign excluded funds have a limited nexus to the United States, such funds are permitted to invest in U.S. companies. Therefore, to the extent that these funds have any direct impact on capital formation and U.S. financial stability, the exemption would promote U.S. financial stability by providing additional capital and liquidity to U.S. capital markets without a concomitant increase in risk borne by U.S. banking entities.

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[596] *See id.*

[597] *See supra* Section IV. (Summary of the Final Rule) for discussion of comments and recommendations for each of the proposed amendments.

[598] *See id.*

[599] *See supra* Section IV.A. (Qualifying Foreign Excluded Funds).

[600] Foreign banking entity was defined for purposes of the policy statement to mean a banking entity that is not, and is not controlled directly or indirectly by, a banking entity that is located in or organized under the laws of the United States or any State.

[601] *See supra* note 26. The policy statement was subsequently extended for a two-year period ending on July 21, 2021. *See also supra* Section IV.A. (Qualifying Foreign Excluded Funds) and note 28.

[602] *See* final rule §§ ____.6(f) and ____.13(d).

[603] SIFMA; BPI; BVI; AIC; ABA; EFAMA; SAF; IIB; JBA; CBA; and Credit Suisse. *See also supra* Section IV.A. (Qualifying Foreign Excluded Funds) for a discussion of individual comments.

[604] *See* Occupy and Data Boiler.

[605] *See* 85 FR 12123–26.

[606] *See* IIB; JBA; CBA; EBF; and Credit Suisse.

The final rule may increase the incentive for some foreign banking entities seeking to organize and offer qualifying foreign excluded funds to reorganize their activities so that these funds' activities qualify for the exemptions. The costs and feasibility of such reorganization will depend on the complexity and existing compliance structures for banking entities, the degree to which there is unmet demand for investment funds that may be organized as qualifying foreign excluded funds, and the profitability of such banking activities. Importantly, the principal risk of foreign banking entities' activities related to foreign excluded funds generally resides outside the United States. As discussed above,[607] because the exemption requires that the foreign banking entity's acquisition of an ownership interest in or sponsorship of the fund meets the requirements in § ____.13(b) of the final rule, the exemption will help to ensure that the risks of the investments made by these foreign funds would be booked to foreign entities in foreign jurisdictions. The agencies believe that exempting the activities of qualifying foreign excluded funds promotes and protects the safety and soundness of banking entities and U.S. financial stability,[608] and relatedly the SEC believes the exemption is unlikely to impact negatively SEC registrants.

Foreign Public Funds

The implementing regulations exclude from the covered fund definition any foreign public fund that satisfies three sets of conditions. First, the issuer must be organized or established outside of the United States, be authorized to offer and sell ownership interests to retail investors in the issuer's home jurisdiction (the ''home jurisdiction'' requirement), and sell ownership interests predominantly through one or more public offerings outside of the United States. The agencies stated in the preamble to the 2013 rule that they generally expect that an offering is made predominantly outside of the United States if 85 percent or more of the fund's interests are sold to investors that are not residents of the United States.[609] Second, for funds that are sponsored by a U.S. banking entity, or by a banking entity controlled by a U.S. banking entity, the ownership interests in the issuer must be sold ''predominantly'' to persons other than the sponsoring banking entity, the issuer, their affiliates, directors of such entities, or employees of such entities (the sales limitation). The agencies stated in the preamble to the 2013 rule that, consistent with the agencies' view concerning whether a foreign public fund has been sold predominantly outside of the United States, the agencies generally expect that a foreign public fund would satisfy this additional condition if 85 percent or more of the fund's interests are sold to persons other than the sponsoring U.S. banking entity and the specified persons connected to that banking entity.[610] Third, such public offerings must occur outside the United States, must comply with applicable jurisdictional requirements (the compliance obligation), may not restrict availability to investors having a minimum level of net worth or net investment assets, and must have publicly available offering disclosure documents filed or submitted with the relevant jurisdiction.

The final rule makes several changes to the foreign public fund exclusion. First, the final rule removes the home jurisdiction requirement.[611] Second, the final rule makes the exclusion available with respect to issuers authorized to offer and sell ownership interests through one or more public offerings, removing the requirement that the issuer sells ownership interests ''predominantly'' through such public offerings.[612] Third, the agencies are also modifying the definition of ''public offering'' from the implementing regulations to add a new requirement that the distribution is subject to substantive disclosure and retail investor protection laws or regulations in one or more jurisdictions where ownership interests are sold.[613] Fourth, the final rule applies the compliance obligation only in instances in which the banking entity serves as the investment manager, investment adviser, commodity trading advisor, commodity pool operator, or sponsor.[614] Finally, the final rule narrows the sales limitation to the sponsoring banking entity, the issuer, affiliates, and directors and senior executive officers of such entities, and requires more than 75 percent of the fund's interest to be sold to such entities and persons.[615]

As discussed in the 2020 proposal, the SEC has received comments indicating that the foreign public fund exclusion under the implementing regulations is impractical, overly narrow, and prescriptive, and results in competitive disparities between foreign public funds and RICs.[616] The SEC also received comment that the home jurisdiction requirement under the implementing regulations is narrow and fails to recognize the prevalence of non-U.S. retail funds organized in one jurisdiction and authorized to sell interests in other jurisdictions.[617]

As adopted in the final rule, the elimination of the home jurisdiction requirement may benefit such foreign public funds and may facilitate greater capital formation through such funds, with the potential to create more capital allocation choices for investors. To the degree that the implementing regulations have disadvantaged foreign public funds relative to otherwise comparable RICs, the elimination of the home jurisdiction requirement may dampen such competitive disparities.

As also discussed in the 2020 proposal, the SEC has received comment that the requirement that ownership interests be sold ''predominantly'' through one or more public offerings outside of the United States has been burdensome and poses significant compliance burdens.[618] For example, banking entities may not fully observe and predict both historical and potential future distributions of funds that are sponsored by third parties, listed on exchanges, or sold through third-party intermediaries or distributors.[619] In response to the 2020 proposal, commenters supported the elimination of the home jurisdiction requirement and the requirement that the fund be sold predominantly through one or more public offerings.[620]

To the degree that some banking entities restrict their activities because they are unable to quantify the volumes of distributions through foreign public offerings relative to, for instance, foreign private placements, the final rule may enable greater activity by banking entities relating to foreign public funds. Similar to the above discussion, this aspect of the final rule also treats foreign public funds in a manner more similar to RICs (which are not required to

[607] *See supra* Section IV.A. (Qualifying Foreign Excluded Funds).

[608] *See id.*

[609] 79 FR 5678.

[610] *Id.*

[611] *See* final rule § ____.10(c)(1)(i)(B).

[612] *See* final rule § ____.10(c)(1)(i)(B).

[613] *See* final rule § ____.10(c)(1)(iii)(A).

[614] *See* final rule § ____.10(c)(1)(iii)(B).

[615] *See* final rule § ____.10(c)(1)(ii).

[616] *See* 85 FR 12166.

[617] Such funds could be organized in a particular jurisdiction for reasons including tax treatment, investment strategy, or flexibility to distribute into multiple markets (for instance, in the European Union), even though such funds are authorized to sell interests in other jurisdictions. *See also id.*

[618] *See* 85 FR 12166.

[619] *See id.*

[620] IIB; SIFMA; BPI; ABA; EBF; EFAMA; FSF; ICI; BVI; and CBA. *See also supra* Section IV.B.1. (Foreign Public Funds).

monitor or assess distributions), with corresponding competitive effects.

Commenters on the 2020 proposal also supported the proposed change to the ''public offering'' definition to include a requirement that the distribution be subject to substantive disclosure and retail investor protection laws or regulations.[621] The final rule adopts that change, as proposed. Accordingly, the final rule tailors the scope of disclosure and compliance obligations for those jurisdictions where ownership interests are sold in recognition of the prevalence of foreign retail fund sales across jurisdictions. Similarly, the final rule limits the compliance obligation to settings in which the banking entity serves as the investment manager, investment adviser, commodity trading advisor, commodity pool operator, or sponsor—settings that may involve greater conflicts of interest between banking entities and fund investors than when the banking entity is only an investor in the fund.

The final rule also replaces the employee sales limitation with a limitation on sales to senior executive officers.[622] As discussed in the 2020 proposal, the SEC has received comment that banking entities may face significant costs and logistical and interpretive challenges monitoring investments by their employees, including those who transact in fund shares through unaffiliated brokers or through independent exchange trading.[623] The SEC has also received comment that the employee sales limitation serves no discernible anti-evasion purpose.[624] In addition, commenters noted that employee ownership interest can be a meaningful mechanism of promoting incentive alignment.[625] The final rule replaces the employee sales limitation with a corresponding sales limitation with respect only to senior executive officers. This change may reduce these reported compliance challenges and burdens while preserving, in part, the original anti-evasion purpose of the limitations on employee ownership.

The SEC received comments to the 2020 proposal that recommended the agencies modify their expectation of the level of ownership of a foreign public fund that would satisfy the requirement that a fund be ''predominantly'' sold to persons other than its U.S. banking entity sponsor and associated parties,[626] which the preamble to the 2013 rule stated was 85 percent or more (which would permit the U.S. banking entity sponsor and associated parties to own the remaining 15 percent). These commenters asserted that the relevant ownership threshold for U.S. registered investment companies is 25 percent, and that, for foreign public funds, the threshold should be the same. The agencies agree that the permitted ownership level of a foreign public fund by a U.S. banking entity sponsor and associated parties should be aligned with the functionally equivalent threshold for banking entity investments in U.S. registered investment companies, which is 24.9 percent.[627] Accordingly, the agencies have amended this provision in the final rule to require that more than 75 percent of a foreign public fund's interests must be sold to persons other than the U.S. banking entity sponsor and associated parties.[628]

Commenters on the 2020 proposal generally supported the proposed changes to the foreign public funds exclusion;[629] however, as discussed in this section and above, the agencies are making certain targeted adjustments in response to comments received.[630] One commenter stated that the proposed changes were less than ideal for maximum control but acceptable from a practical implementation standpoint to balance compliance costs and benefits.[631]

As discussed above, the SEC believes that the foreign public fund provisions of the final rule may facilitate greater capital formation through such funds, with the potential to create more capital allocation choices for investors. In particular, to the degree that some banking entities restrict their activities relating to foreign public funds because they are unable to quantify the distributions through public offerings or determine the holdings of their employees, the final rule may enable greater activity by banking entities relating to foreign public funds. The final rule also limits the compliance obligation to settings in which the banking entity serves as the investment manager, investment adviser, commodity trading advisor, commodity pool operator, or sponsor—settings that may involve greater conflicts of interest between banking entities and fund investors than when the banking entity is only an investor in the fund.

The agencies could have adopted a variety of alternatives offering more or less relief with respect to foreign public funds. For example, the agencies could have eliminated altogether the limit on sales to affiliated entities, directors and employees, which would have provided an even greater alignment of treatment between foreign public funds and RICs.[632] Alternatives providing greater relief with respect to foreign public funds may have facilitated greater banking entity activity and intermediation of such funds on the one hand, but they may also have strengthened the competitive positioning of foreign public funds relative to U.S. registered funds. Moreover, providing greater relief with respect to foreign public funds may have allowed banking entities greater flexibility in the formation and operation of foreign public funds, but may also have increased the risk that banking entities would be able to use foreign public funds to engage in activities that the restrictions on covered funds were intended to prohibit, thereby reducing the magnitude of the expected economic benefits of section 13 of the BHC Act and the implementing regulations. Similarly, relative to the final rule, alternatives providing less relief with respect to foreign public funds may have strengthened the competitive positioning of U.S. RICs relative to foreign public funds and posed lower compliance or evasion risks, but may also have reduced the benefits of the relief for capital formation in foreign public funds and their investors.

Loan Securitizations

The 2013 rule excludes from the definition of covered fund any loan securitization that issues asset-backed securities, holds only loans, certain

[621] IIB; EFAMA; FSF; ICI; and BVI.

[622] Final rule § ____.10(c)(1)(ii)(D).

[623] *See* 85 FR 12166.

[624] *See id.*

[625] *See id.*

[626] BPI; FSF; ICI; and CCMC. *See also supra* Section IV.B.1. (Foreign Public Funds).

[627] Although the implementing regulations do not explicitly prohibit a banking entity from acquiring 25 percent or more of a U.S. registered investment company, a U.S. registered investment company would become a banking entity if it is affiliated with another banking entity (other than as described in § ____.12(b)(1)(ii) of the implementing regulations). *See* 79 FR 5732 (''[F]or purposes of section 13 of the BHC Act and the final rule, a registered investment company . . . will not be considered to be an affiliate of the banking entity if the banking entity owns, controls, or holds with the power to vote less than 25 percent of the voting shares of the company or fund, and provides investment advisory, commodity trading advisory, administrative, and other services to the company or fund only in a manner that complies with other limitations under applicable regulation, order, or other authority.'').

[628] *See supra* note 69.

[629] IIB; SIFMA; BPI; ABA; EBF; EFAMA; FSF; ICI; BVI; CBA; CCMR; Data Boiler; GS; IAA; JBA; SAF; and CCMC.

[630] *See supra* Section IV.B.1. (Foreign Public Funds).

[631] *See* Data Boiler.

[632] *See* 2020 proposal at 12166.

rights and assets that arise from the structure of the loan securitization or from the loans supporting a loan securitization, and a small set of other financial instruments (permissible assets), and meets other criteria.[633] As discussed in the 2020 proposal, the SEC received comment that, as a result of the 2013 rule, some banking entities may have divested or restructured their interests in loan securitizations due to the narrowly-drawn conditions of the exclusion, and that a limited holding of non-loan assets may enable banking entities to provide traditional securitization products and services demanded by customers, clients, and counterparties.[634]

The implementing regulations permit loan securitizations to hold rights or other assets (servicing assets) that arise from the structure of the loan securitization or from the loans supporting a loan securitization.[635] In response to questions regarding the scope of the provisions permitting servicing assets and a separate provision limiting the types of permitted securities, the staffs of the agencies released the Loan Securitization Servicing FAQ.[636] The final rule codifies the staff-level approach to the loan securitization exclusion in the Loan Securitization Servicing FAQ.[637] To the degree that market participants may have restructured their activities consistent with the Loan Securitization Servicing FAQ, an effect of the final rule may be to reduce uncertainty. However, the economic effects of the codification of the Loan Securitization Servicing FAQ with respect to enabling greater capital formation through loan securitizations on the one hand, and increasing potential risks related to such activities on the other, may be limited.

In the preamble to the 2013 rule, the agencies declined to permit loan securitizations to hold a certain amount of non-loan assets.[638] Several commenters on the 2018 proposal disagreed with the agencies' views and supported expanding the range of permissible assets in an excluded loan securitization.[639] The 2020 proposal would have allowed a loan securitization vehicle to hold up to five percent of the fund's total assets in any non-loan assets.

Commenters were generally supportive of allowing loan securitizations to hold a limited amount of non-loan assets.[640] These commenters indicated that the requirements under the implementing regulations for the loan securitization exclusion have been too restrictive, excessively limited use of the exclusion, and prevented issuers from responding to investor demand. Further, commenters suggested that a limited bucket of non-loan assets would not fundamentally alter the characteristics and risks of securitizations or otherwise increase risks in banking entities or the financial system.[641]

In the final rule, the agencies are revising the loan securitization exclusion to permit a loan securitization to hold a limited amount of debt securities.[642] To minimize the potential for banking entities to use this exclusion to engage in impermissible activities or take on excessive risk, the final rule permits a loan securitization to hold debt securities (excluding asset-backed securities and convertible securities), as opposed to any non-loan asset, as the 2020 proposal would have allowed.[643]

The SEC believes that non-loan assets with materially different risk characteristics from loans could change the character and complexity of an issuer and raise the type of concerns that section 13 of the BHC Act was intended to address. Moreover, as described further below, limiting the assets to those with risk characteristics that are similar to loans may allow for a simpler and more transparent calculation of the five percent limit than would have been necessary if loan securitizations could invest in any non-loan asset, which will facilitate banking entities' compliance with the exclusion.

Alternatively, the agencies could have expanded the range of permissible assets in an excluded loan securitization to include any non-loan asset with or without limitations (*e.g.,* the holding of asset-backed securities could have been permitted). Permitting loan securitizations to hold small amounts of non-loan assets may have enabled loan securitizations to respond to investor demand and may have reduced compliance costs associated with ensuring that a loan securitization holds only assets permitted under the exclusion. However, permitting excluded loan securitizations to hold a broader range of non-loan assets could have increased the risk that the character and complexity of excluded loan securitizations would have changed in a manner that raised the type of concerns that section 13 of the BHC Act was intended to address.

However, the SEC recognizes that the loan securitization industry may have evolved since the issuance of the 2013 rule. As a result, the SEC believes that, even if the scope of non-loan assets permitted to be held were expanded beyond debt securities, loan securitizations may continue to have excluded non-loan assets. Further, permitting loan securitizations to hold a small amount of debt securities will not affect the applicable prudential requirements aimed at the safety and soundness of banking entities. Banking entities currently take on a variety of risks arising out of a broad range of permissible activities, including the core traditional banking activity related to the extension of credit and direct and indirect extension of credit by banking entities flows through to the real economy in the form of greater access to capital.

In the 2020 proposal, the agencies also requested comment on the methodology for calculating the limit on non-loan assets. Several commenters suggested using as a method for calculating the limit on non-loan assets: The par value of assets on the day they are acquired.[644] These commenters suggested that relying on par value is accepted practice in the loan securitization industry and would obviate concerns related to tracking amortization or prepayment of loans in a securitization portfolio.[645] Another commenter indicated that the limit should be calculated as the lower of the purchase price and par value of the non-qualifying assets over the issuer's aggregate capital commitments plus its subscription based credit facility.[646]

In response to these comments, the agencies are clarifying the methodology for calculating the five percent limit on non-loan assets.[647] As suggested by several commenters, the final rule specifies that the limit on debt securities must be calculated at the most recent

[633] *See* 2013 rule § ____.10(c)(8). Loan is further defined as any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative. *See also* 2013 rule § ____.2(t).

[634] *See* 85 FR 12173.

[635] Implementing regulations §§ ____.2(s); ____.10(c)(8)(i)(D), (v).

[636] *See supra* note 14 (links to the staff-level FAQs) and 78 and referencing paragraph (discussion of Loan Securitization Servicing FAQ).

[637] § ____.10(c)(8)(i)(B).

[638] 2013 rule at 5687–88.

[639] *See* 85 FR 12129.

[640] *See, e.g.,* SIFMA; CCMC; ABA; Credit Suisse; MFA; Goldman Sachs; LSTA; BPI; and SFA.

[641] *See, e.g.,* LSTA and Goldman Sachs.

[642] Final rule § ____.10(c)(8)(i)(E).

[643] The implementing regulations also allow an excluded loan securitization to hold certain interest rate and foreign exchange derivatives for risk management purposes. The final rule makes no change to this provision.

[644] SIFMA; BPI; ABA; and LSTA.

[645] SIFMA and BPI.

[646] Goldman Sachs.

[647] Final rule § ____.10(c)(8)(i)(E).

time of acquisition of such assets.[648] Specifically, the aggregate value of debt securities may not exceed five percent of the aggregate value of loans, cash and cash equivalents, and debt securities, where the value of the loans, cash and cash equivalents, and debt securities is calculated using par value at the most recent time any such debt security is purchased.[649]

The agencies have determined a calculation methodology that is intended to reduce compliance costs while ensuring that the investment pool of a loan securitization is composed of loans. The agencies have chosen the most recent time any such debt security is acquired as the moment of calculation to simplify the manner in which the five percent limit applies. This would permit an issuer that, at some point in its life, held debt securities in excess of five percent of its assets to continue to qualify for the exclusion if it came into compliance with the five percent limit prior to the next acquisition of a debt security that is subject to the five percent limit. The SEC believes that this approach balances the cost of calculation with the benefits of addressing the potential for evasion. The SEC believes that the alternative of a continuous monitoring obligation (*i.e.,* requiring an excluded loan securitization to ensure that it held debt securities below or at the five percent limit at all times, regardless of any change in value of the securitization's assets) would have imposed significant burdens on banking entities and could have caused an issuer to be disqualified from the loan securitization exclusion based on market events not under its control.

In the final rule, this calculation is based only on the value of the loans and debt securities held under §§ ____.10(c)(8)(i)(A) and (E) and the cash and cash equivalents held under § ____.10(c)(8)(iii)(A) rather than the aggregate value of all of the issuing entity's assets. The purpose of the five percent limit is to ensure the investment pool of a loan securitization is composed of loans. Therefore, the calculation takes into account the assets that should make up the issuing entity's investment pool and excludes the value of other rights or incidental assets, as well as derivatives held for risk management. This further simplifies the calculation methodology by excluding assets that may be more complex to value and that are ancillary to the loan securitization's investment activities. This straightforward calculation methodology will ensure that the loan securitization exclusion remains easy to use and will facilitate banking entities' compliance with the exclusion.

The agencies recognize that a loan securitization's transaction agreements may require that some categories of loans, cash equivalents, or debt securities be valued at fair market value for certain purposes. To accommodate such situations, the exclusion provides that the value of any loan, cash equivalent, or permissible debt security may be based on its fair market value if (1) the issuing entity is required to use the fair market value of such loan or debt security for purposes of calculating compliance with concentration limitations or other similar calculations under its transaction agreements and (2) the issuing entity's valuation methodology values similarly situated assets, for example non-performing loans, consistently. This provision is intended to provide issuers with the flexibility to leverage existing calculation methodologies while preventing issuers from using inconsistent methodologies in a manner to evade the requirements of the exclusion.

Credit Funds

Under the baseline, funds that raise capital to engage in loan originations or extensions of credit or purchase and hold debt instruments that a banking entity would be permitted to acquire directly may be ''covered funds'' under the implementing regulations. As a result, prior to the final rule, banking entities faced limitations on sponsoring or investing in credit funds that engage in traditional banking activities—activities that banking entities are able to engage in directly outside of the fund structure. The SEC received several comments to the 2018 proposal supporting an exclusion for credit funds. For example, some commenters suggested that a fund or partnership structure enables banking entities to engage in permissible activities more efficiently.[650] Specifically, one commenter indicated that credit funds facilitate investments by third parties, leading to the creation of a broader and deeper pool of capital, which may allow for more diversification in banking entities' lending portfolios, the pooling of expertise of groups of market participants, and otherwise reduce the risk for banking entities and the financial system.[651] In addition, some commenters stated that to the degree that credit funds require pre-commitments of capital, they may dampen cyclical fluctuations in loan originations and may facilitate ongoing extensions of credit during times of market stress.[652]

The agencies included in the 2020 proposal a specific exclusion for credit funds. Under the 2020 proposal, a credit fund would have been an issuer whose assets consist solely of: Loans, debt instruments, related rights and other assets that are related or incidental to acquiring, holding, servicing, or selling loans, or debt instruments; and certain interest rate or foreign exchange derivatives.[653] The proposed exclusion would have been subject to certain additional requirements to reduce evasion concerns and ensure that banking entities invest in, sponsor, or advise credit funds in a safe and sound manner. For example, the proposed exclusion would have imposed (1) certain activity requirements on the credit fund, including a prohibition on proprietary trading; [654] (2) disclosure and safety and soundness requirements on banking entities that sponsor or serve as an advisor for a credit fund; [655] (3) safety and soundness requirements on all banking entities that invest in or have certain relationships with a credit fund; [656] and (4) restrictions on the banking entity's investment in, and relationship with, a credit fund.[657] The proposed exclusion also would have permitted a credit fund to receive and hold a limited amount of equity securities (or rights to acquire equity securities) that were received on customary terms in connection with the credit fund's loans or debt instruments.[658]

Commenters on the 2020 proposal were generally supportive of adopting an exclusion for credit funds.[659] After consideration of the comments, the agencies are adopting the credit fund exclusion largely as proposed. The final rule creates a separate exclusion from the covered fund definition for credit funds that meet certain conditions, including several conditions that are similar to certain conditions of the loan securitization exclusion, but that reflect

[648] This limit applies to the debt securities that a loan securitization may hold pursuant to final rule § ____.10(c)(8)(i)(E).

[649] *Id.*

[650] *See* 85 FR 12167.

[651] *See id.*

[652] *See id.*

[653] 2020 proposal § ____.10(c)(15)(i).

[654] 2020 proposal § ____.10(c)(15)(ii).

[655] 2020 proposal § ____.10(c)(15)(iii).

[656] 2020 proposal § ____.10(c)(15)(iv).

[657] 2020 proposal § ____.10(c)(15)(v).

[658] 2020 proposal § ____.10(c)(15)(i)(C)(*1*)(*iii*).

[659] *See, e.g.,* CCMC; AIC; SIFMA; FSF; ABA; Arnold & Porter; and Goldman Sachs. *See also supra* Section IV.C.1.ii. (Credit Funds—Comments) for a more detailed discussion of comments received.

the structure and operation of credit funds.

The final rule permits banking entities to extend credit through a fund structure but also contains provisions to prevent a banking entity from taking the types of risks that the covered fund provisions of section 13 were meant to address. First, the credit fund exclusion specifies the types of activities in which these funds may engage. Excluded credit funds can transact in or hold only loans, debt instruments that would be permissible for the banking entity relying on the exception to hold directly, certain rights or assets that are related or incidental to the loans or debt instruments, and certain interest rate and foreign exchange derivatives. The final rule requires that the credit fund not engage in activities that would constitute proprietary trading. Finally, the restrictions on guarantees and other limitations should eliminate the ability and incentive for either the banking entity sponsoring a credit fund or any affiliate to provide additional support beyond the ownership interest retained by the sponsor.

Credit funds are likely to carry similar returns and risks as direct extensions of credit and loan origination outside of the fund structure, including the possibility of losses or gains related to changes in interest rates, borrower default or delinquent payments, fluctuations in foreign currencies, and overall market conditions. While the presence of a fund structure may introduce certain common risks associated with pooled investments, *e.g.,* those related to governance of the fund and those related to relying on third-party investors providing capital to the fund, the SEC believes those risks to banking entities to be limited. Moreover, fund structures also entail certain common risk mitigating features (such as diversification across a larger number of borrowers) as well as significant cost efficiencies for banking entities.

The SEC believes that the credit fund exclusion may allow banking entities to engage, indirectly, in more loan origination and traditional extension of credit relative to the current baseline. To the degree that banking entities are currently constrained in their ability to engage in extensions of credit through credit funds because of the implementing regulations, the exclusion may increase the volume of intermediation of credit by banking entities and make intermediation more efficient and less costly. In addition, permitting banking entities to extend financing to businesses through credit funds could allow banking entities to compete more effectively with non-banking entities that are not subject to the same prudential regulation or supervision as banking entities subject to section 13 of the BHC Act and thereby likely result in an increase in lending activity in banking entity-sponsored credit funds without negatively affecting capital formation or the availability of financing. In this respect, the final rule could result in greater competition between bank and non-bank provision of credit with both expected lower costs that typically result from increased competition and a larger volume of permissible banking and financial activities to occur in the regulated banking system. In addition, since cost reductions and increased efficiencies are commonly passed along to customers, the exclusion may also benefit banking entities' borrowers and facilitate the extension of credit in the real economy.

The SEC continues to recognize that banking entities already engage in a variety of permissible activities involving risk, including extensions of credit, underwriting, and market-making. To the degree that credit funds may enable greater formation of capital by banking entities through various debt instruments, this may influence the risks and returns of banking entities individually and of banking entities as a whole. However, the SEC recognizes that the activities of credit funds largely replicate permissible and traditional activities of banking entities and undertaking similar activities largely results in the same risk exposures. Moreover, banking entities subject to the implementing regulations may also be subject to multiple prudential, capital, margin, and liquidity requirements that facilitate the safety and soundness of banking entities and promote the financial stability of the United States. These requirements would necessarily limit the risk that banks could take on by lending through a credit fund structure in a similar manner that would apply if the banking entity were to undertake similar lending activities directly. In addition, the final rule includes a set of conditions on the credit fund exclusion, including limitations on banking entities' guarantees, assumption or other insurance of the obligations or performance of the fund,[660] and compliance with applicable safety and soundness standards.[661]

Several provisions of the exclusion are similar to and modeled on conditions in the existing loan securitization exclusion to ease compliance burdens. For example, any derivatives held by the credit fund must relate to loans, permissible debt instruments, or other rights or assets held and reduce the interest rate and/or foreign exchange risks related to these holdings.[662] In addition, any related rights or other assets held that are securities must be cash equivalents, securities received in lieu of debts previously contracted with respect to loans or debt instruments held or, unique to the credit fund exclusion, equity securities (or rights to acquire equity securities) received on customary terms in connection with the credit fund's loans or debt instruments.[663] Establishing an exclusion for credit funds based on the framework provided by the loan securitization exclusion will allow banking entities to provide traditional extensions of credit regardless of the specific form, whether directly via a loan made by a banking entity, or indirectly through an investment in or relationship with a credit fund that transacts primarily in loans and certain debt instruments.

In the 2020 proposal, the agencies requested comment on whether to impose a limit on the amount of equity securities (or rights to acquire equity securities) that may be held by an excluded credit fund.[664] After a review of the comments and further deliberation, the agencies are not adopting a quantitative limit on the amount of equity securities (or rights to acquire equity securities) that may be held by an excluded credit fund. Any such equity securities or rights are limited by the requirements that they be (1) received on customary terms in connection with the fund's loans or debt instruments and (2) related or incidental to acquiring, holding, servicing, or selling those loans or debt instruments. The agencies generally expect that the equity securities or rights satisfying those criteria in connection with an investment in loans or debt instruments of a borrower (or affiliated borrowers) would not exceed five percent of the value of the fund's total investment in the borrower (or affiliated borrowers) at the time the investment is made.

The agencies could have imposed a quantitative limit on the amount of equity securities (or rights to acquire equity securities) held by the fund. However, the value of those equity securities or other rights may change over time for a variety of reasons, including as a result of market

[660] Final rule § ____.10(c)(15)(iv)(A).

[661] Final rule § ____.10(c)(15)(v)(B).

[662] Final rule § ____.10(c)(15)(i)(D).

[663] Final rule § ____.10(c)(15)(i)(C).

[664] 85 FR 12133.

conditions and business performance, as well as more fundamental changes in the business and the credit fund's corresponding management of the investment (*e.g.,* exchanges of debt instruments for equity in connection with mergers and restructurings or a disposition of all portion of the credit investment without a corresponding disposition of the equity securities or rights due to differences in market conditions or other factors). Accordingly, the agencies can foresee various circumstances where the relative value of such equity securities or rights in a borrower (or affiliated borrowers) would over the life of the investment exceed five percent on a basis consistent with the requirements. Therefore, a quantitative limit on the amount of equity securities held by the fund could have imposed compliance, opportunity, and performance costs on a fund without a substantial reduction in risk to the fund. Nonetheless, the agencies expect that the fund's exposure to equity securities (or other rights), individually and collectively and when viewed over time, would be managed on a basis consistent with the fund's overall purpose.

The credit fund exclusion prevents a banking entity from relying on the exclusion unless any debt instruments and equity securities (or rights to acquire an equity security) held by the credit fund and received on customary terms in connection with the credit fund's loans or debt instruments are permissible for the banking entity to acquire and hold directly. A banking entity that acts as sponsor, investment adviser or commodity trading advisor of a credit fund must ensure that the activities of the credit fund are consistent with certain safety and soundness standards.[665] In addition, a banking entity's investment in, and relationship with, a credit fund must be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.[666] Combined with the prohibition on proprietary trading by a credit fund,[667] these limitations are expected to prevent evasion of section 13 of the BHC Act.

The final rule does not separately permit credit funds to hold derivatives under the provision allowing related rights and other assets. The preamble to the 2020 proposal made clear that ''any derivatives held by the credit fund must relate to loans, permissible debt instruments, or other rights or assets held, and reduce the interest rate and/or foreign exchange risks related to these holdings.'' [668] The agencies suggested then and currently believe that allowing a credit fund to hold derivatives not related to interest rate or foreign exchange hedging would not be necessary to facilitate the indirect extensions of credit by banking entities that are the goal of the exclusion and may pose the very risks that section 13 of the BHC Act was intended to reach. To help ensure that the credit fund exclusion does not inadvertently allow the holding of certain derivatives unrelated to hedging interest rate and/or foreign exchange risks, the final rule explicitly excludes derivatives from permissible related rights and other assets.[669]

Importantly, extensions of credit and loan origination by banking entities, whether directly or indirectly, are influenced by a wide variety of factors, including the prevailing macroeconomic conditions, the creditworthiness of borrowers and potential borrowers, competition between bank and non-bank credit providers, and many others. Moreover, the efficiencies of credit funds relative to direct extensions of credit described above are likely to vary considerably among banking entities and funds. The SEC recognizes that the potential effects described above of the credit fund exclusion may be dampened or magnified in different phases of the macroeconomic cycle and across various types of banking entities.

Investors in a credit fund that a banking entity sponsors or for which the banking entity serves as an investment adviser or commodity trading advisor may have expectations related to the performance of the credit fund that raise bailout concerns. To ensure that these investors are adequately informed of the banking entity's role in the credit fund, the final rule requires a banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an excluded credit fund to provide prospective and actual investors the disclosures specified in § ____.11(a)(8) of the implementing regulations as if the credit fund were a covered fund.[670] In addition, a banking entity that acts as a sponsor, investment adviser, or commodity trading advisor must ensure that the activities of the credit fund are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly.[671]

As an alternative, the agencies could have adopted a credit fund exclusion that restricted permissible assets to only loans or debt instruments and not equity. The SEC recognizes that many banking entities are permitted to take as consideration for a loan to a borrower a warrant or option issued by the borrower that may result in an equity holding. The SEC recognizes that if banking entities are to be allowed to provide credit through a fund structure that they would otherwise be allowed to provide outside of a fund structure, an allowance for equity holdings is necessary. However, allowing a credit fund to hold an unlimited amount of equity in connection with an extension of credit could turn the exclusion for credit funds into an exclusion for the type of funds that section 13 of the BHC Act was intended to address. Accordingly, the agencies indicate above that they generally expect that the equity securities or other rights acquired by a credit fund would not exceed five percent of the value of the fund's total investment in a borrower at the time the investment is made.

Venture Capital Funds

As discussed above, the agencies are adopting amendments in the final rule to exclude certain venture capital funds from the definition of ''covered fund,'' which allow banking entities to acquire or retain an ownership interest in, or sponsor, those venture capital funds to the extent the banking entity is otherwise permitted to engage in such activities under applicable law.[672] The exclusion is available with respect to qualifying venture capital funds, which includes an issuer that meets the definition of ''venture capital fund'' in 17 CFR 275.203(l)–1 and that meets several additional criteria.[673]

A qualifying venture capital fund is an issuer that, among other criteria, is a venture capital fund as defined in 17 CFR 275.203(l)–1.[674] In the preamble to the regulations adopting this definition of venture capital fund, the SEC explained that the definition's criteria distinguish venture capital funds from other types of funds, including private

[665] Final rule §§ ____.10(c)(15)(iv)(B), (iii)(B).

[666] Final rule §§ ____.10(c)(15)(v)(B).

[667] Final rule § ____.10(c)(15)(ii)(A).

[668] *See* 85 FR 12132.

[669] Final rule § ____.10(c)(15)(i)(C)(*2*).

[670] Final rule § ____.10(c)(15)(iii)(A).

[671] Final rule § ____.10(c)(15)(iii)(B).

[672] Final rule § ____.10(c)(16).

[673] *See supra* Section IV.C.2. (Venture Capital Funds).

[674] *See id.* for a discussion of the SEC's definition of ''venture capital fund'' in 17 CFR 275.203(l)–1. Following enactment of the RBIC Advisers Relief Act, *supra* note 577, the SEC's definition of ''venture capital fund'' includes any RBIC and any SBIC. *See* 15 U.S.C. 80b–3(l).

equity funds and hedge funds.[675] Moreover, the SEC explained that these criteria reflect the Congressional understanding that venture capital funds are less connected with the public markets and therefore may have less potential for systemic risk.[676] The SEC further explained that the restriction on the amount of borrowing, debt obligations, guarantees or other incurrence of leverage are appropriate to differentiate venture capital funds from other types of private funds that may engage in trading strategies that use financial leverage and may contribute to systemic risk.[677] The SEC believes that its definition includes criteria reflecting the characteristics of venture capital funds that may pose less potential risk to a banking entity sponsoring or investing in venture capital funds and to the financial system—specifically, the smaller role of leverage financing and a lesser degree of interconnectedness with public markets.

As discussed in the 2020 proposal, the SEC has received comments supporting an exclusion for venture capital funds and stating that venture capital funds do not commonly engage in short-term, high-risk activities, and that, by their nature, venture capital funds make long-term investments in private firms.[678] Moreover, the SEC received comment that venture capital funds promote economic growth and competitiveness of the United States more effectively than investments in expressly permissible vehicles, such as small business investment companies.[679] The SEC has also received comment that, by virtue of their investment strategy, long-term investment horizon, and intermediation between companies in need of capital and institutional investors seeking to deploy capital in efficient ways, venture capital funds may play a significant role in capital formation, economic growth, and efficient market function.[680]

In response to the 2020 proposal, the agencies received comments supporting the proposed definition of ''qualifying venture capital fund.'' [681] At the same time, two commenters expressed opposition to the 2020 proposal.[682]

The final rule largely adopts the exclusion as proposed.[683] As adopted, the exclusion for qualifying venture capital funds is available to an issuer that is a venture capital fund as defined in 17 CFR 275.203(l)–1 and does not engage in any activity that would constitute proprietary trading, under § ____.3(b)(1)(i), as if it were a banking entity.[684] With respect to any banking entity that acts as sponsor, investment adviser, or commodity trading advisor to the issuer, the banking entity is required (1) to provide in writing to any prospective and actual investor the disclosures required under § ____.11(a)(8), as if the issuer were a covered fund, (2) to ensure that the activities of the issuer are consistent with the safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly, and (3) to comply with the restrictions in § ____.14 (except the banking entity may acquire and retain any ownership interest in the issuer), as if the issuer were a covered fund.[685]

As in the 2020 proposal, a banking entity that relies on the exclusion may not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the issuer.[686] Finally, the banking entity's ownership interest in or relationship with a qualifying venture capital fund must comply with the limitations imposed in § ____.15 of the implementing regulations (regarding, among other subjects, material conflicts of interest and high-risk investments), as if the issuer were a covered fund; and must be conducted in compliance with and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.[687]

The qualifying venture capital fund exclusion being adopted may provide banking entities with greater flexibility in their investments in private firms generally and in private firms with a broader range of financing sources, in each case to the extent that those investments are made through a fund structure. In addition, it is widely noted that the availability of venture capital and other financing from funds is not uniform throughout the United States and is generally available on a competitive basis for companies with a significant presence in certain geographic regions (*e.g.,* the New York metropolitan area, the Boston metropolitan area, and ''Silicon Valley'' and surrounding areas).[688] This view was shared by several commenters on the 2020 proposal, who indicated that an exclusion for venture capital funds would benefit underserved regions where venture capital funding is not readily available currently.[689] In this respect, the qualifying venture capital fund exclusion could allow banking entities with a presence in and knowledge of the areas where venture capital and other types of financing are less readily available to businesses to provide this type of financing in those areas, further promoting capital formation.

The SEC remains cognizant of the fact that the overall level and structure of activities of banking entities that involve risk stems from a variety of permissible sources, including traditional capital provision, underwriting, and market-making. To the degree that qualifying venture capital funds may enable greater formation of capital by banking entities, this may influence the risks and returns of such funds individually and of banking entities as a whole. However, the exclusion has a number of conditions, including a prohibition on direct or indirect guarantees by the banking entity, disclosures to investors, and compliance with applicable safety and soundness standards.

The SEC recognizes that venture capital funds commonly invest in

[675] *See, e.g.,* Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, 76 FR 39645, 39652 (July 6, 2011).

[676] *See id. at* 39648 (''[T]he proposed definition of venture capital fund was designed to . . . address concerns expressed by Congress regarding the potential for systemic risk.''); and at 39656 (''Congressional testimony asserted that these funds may be less connected with the public markets and may involve less potential for systemic risk. This appears to be a key consideration by Congress that led to the enactment of the venture capital exemption. As we discussed in the Proposing Release, the rule we proposed sought to incorporate this Congressional understanding of the nature of investments of a venture capital fund, and these principles guided our consideration of the proposed venture capital fund definition.'').

[677] *See id.* at 39661–62. *See also id.* at 39657 (''We proposed these elements of the qualifying portfolio company definition because of the focus on leverage in the Dodd-Frank Act as a potential contributor to systemic risk as discussed by the Senate Committee report, and the testimony before Congress that stressed the lack of leverage in venture capital investing.'').

[678] *See* 85 FR 12168.

[679] *See id.*

[680] *See id.*

[681] *See supra* note 244.

[682] *See supra* note 270.

[683] The one change from the proposal is moving the requirement that the banking entity must comply with §§ ____.14 to ____.10(c)(16)(ii). This change clarifies that this requirement applies to a banking entity that acts as sponsor, investment adviser, or commodity trading advisor to the qualifying venture capital fund and does not apply to a banking entity that merely invests in a qualifying venture capital fund.

[684] Final rule § ____.10(c)(16)(i).

[685] Final rule § ____.10(c)(16)(ii).

[686] Final rule § ____.10(c)(16)(iii).

[687] Final rule § ____.10(c)(16)(iv).

[688] *See, e.g.,* Richard Florida, Venture Capital Remains Highly Concentrated in Just a Few Cities, CITYLAB (Oct. 3, 2017), *available at https://www.citylab.com/life/2017/10/venture-capital-concentration/539775/;* PRICEWATERHOUSECOOPERS & CB INSIGHTS, MoneyTree Report (Q3 2019), *available at https://www.pwc.com/us/en/moneytree-report/assets/moneytree-report-q3-2019.pdf.*

[689] *See* FSF; SIFMA; CCMC; and NVCA.

illiquid private firms with few sources of market price information, with corresponding risks and returns. To the degree that the exclusion for qualifying venture capital funds facilitates banking entity activities related to venture capital funds, this exclusion could increase the volume and alter the structure of banking entities' activities, affecting the risks associated with those activities. At the same time, as discussed elsewhere,[690] many other traditional and permissible activities of banking entities involve risk, and the provision of capital to private firms is an important function of banking entities within the financial system and securities markets that benefits the real economy.

As an alternative, the agencies considered an additional restriction for which they are requested specific comment as part of the 2020 proposal. Under this additional restriction, and notwithstanding 17 CFR 275.203(1)–1(a)(2), the venture capital fund exclusion would be limited to funds that do not invest in companies that, at the time of the investment, have more than a limited dollar amount of total annual revenue. The agencies considered several alternative thresholds that could have been appropriate in this regard to further differentiate qualifying venture capital funds from other types of private funds. The potential benefit of including a revenue or other similar test is that it could have been more difficult for banking entities to use the exclusion to make investments through the fund that the agencies may not have intended to be permissible. However, any such anti-evasion benefits of this alternative could have been offset by the extent to which anti-evasion concerns are already addressed by the other conditions of the exclusion. In addition, such a revenue test or other similar test could have facilitated the indirect investment by banking entities in smaller companies that may have been particularly risky or would have required qualifying venture capital funds to pass up investment opportunities that would otherwise be considered typical venture capital-type investments.

Such an additional restriction as contemplated in the alternative would have made it more difficult for banking entities to sponsor and invest in qualifying venture capital funds by limiting the pool of possible investments in which those funds could invest. This difficulty may have been particularly pronounced for banking entities that would use the qualifying venture capital fund exclusion to make investments in third-party funds, which may not have been willing to restrict—and could have been prohibited from restricting under other applicable laws—the fund's investments in companies that met any such revenue or other similar test. As a result, such an additional condition could have diminished the benefits discussed above, both by limiting the utility of the exclusion for banking entities to make permissible investments and potentially reducing the availability of financing for businesses, including small businesses and start-ups in areas outside of certain major metropolitan areas.

Small Business Investment Companies

The implementing regulations exclude from the covered fund definition small business investment companies. The implementing regulations include within the scope of the exclusion SBICs and issuers that have received notice to proceed to qualify for a license as an SBIC and which have not received a revocation of the notice or license. The final rule expands the exclusion to incorporate SBICs that have voluntarily surrendered their licenses to operate and do not make new investments (other than investments in cash equivalents) after such voluntary surrender.[691]

Clarifying that SBICs that have voluntarily surrendered their licenses and are winding-down remain excluded from the covered fund definition reduces regulatory uncertainty for banking entities. Under the implementing regulations, because it is unclear whether an SBIC that has voluntarily surrendered its license is still excluded from the definition of ''covered fund,'' banking entities must make a determination whether or not the SBIC that is winding-down is a covered fund. If the banking entity determines that when the SBIC that is winding-down and has voluntarily surrendered its license no longer qualifies for the exclusion from the covered fund definition, then the implementing regulations apply and the banking entity's existing investment in, and relationship with, the SBIC is prohibited. This potential result may discourage banking entities from making investments in SBICs.

The 2020 proposal discussed comments the SEC had received indicating that the 2013 rule had limited banking entity activities in SBICs that may spur economic growth, and that banking entities faced significant regulatory burdens that are not commensurate with the risk of the underlying activities.[692] Another commenter indicated that, in the ordinary course of business, SBIC fund managers often relinquish or voluntarily surrender a license during the wind-down of the fund while liquidating assets in the dissolution process (since the license is no longer necessary or an efficient use of partnership funds).[693]

The agencies proposed revising the exclusion for SBICs to clarify how the exclusion would apply to SBICs that voluntarily surrender their licenses during wind-down phases.[694] Specifically, the agencies proposed revising the exclusion for SBICs to apply explicitly to an issuer that has voluntarily surrendered its license to operate as an SBIC and does not make new investments (other than investments in cash equivalents) after such voluntary surrender.[695]

Most commenters that directly addressed the 2020 proposal's revisions concerning SBICs supported the proposed revisions, stating that the proposed revisions would provide greater certainty to banking entities wishing to invest in SBICs and would increase investment in small businesses.[696] The final rule adopts the 2020 proposal's revisions concerning SBICs without modification.

SBICs are an important mechanism for capital allocation by banking entities and one important channel of capital raising for issuers. The final rule clarifies that banking entities are able to continue to participate in SBIC-related activities during the dissolution of such funds, as long as certain conditions are met. To the degree that banking entities have been reluctant to invest in SBICs to avoid the risk of an SBIC being treated as a covered fund during SBIC dissolution, the final rule may increase the willingness of some banking entities to participate in SBICs. The final rule requires that SBICs that have voluntarily surrendered their license may not make new investments during the wind-down process. This aspect of the final rule seeks to address the possibility of banking entities becoming exposed to greater risk as part of their participation in SBICs during their wind-down process, even though such exposure may not be common in an SBIC's ordinary course of business. In any case, both the risks and the returns arising out of a banking entity's investment in a SBIC at all stages of its lifecycle are

[690] *See* 2019 amendments, 84 FR 62037–92.

[691] Final rule § ____.10(c)(11)(i).

[692] *See* 85 FR 12169.

[693] *See id.*

[694] *See* 85 FR 12131.

[695] *See id.*

[696] *See* SIFMA; BPI; ABA; PNC; and SBIA.

likely to flow through to the banking entity's shareholders. Moreover, banking entities participating in SBICs remain subject to applicable safety and soundness regulations and requirements.

Public Welfare Funds

The implementing regulations exclude from the definition of ''covered fund'' issuers that make investments that are designed primarily to promote the public welfare, of the type permitted under paragraph 11 of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs) (public welfare investment exclusion).[697]

As discussed in the 2020 proposal, the SEC has received comment that the implementing regulations' exclusion for public welfare funds may not capture community development investments made through investment vehicles and comment supporting an exclusion of investments that qualify for Community Reinvestment Act (CRA) credit, including direct and indirect investments in a community development fund, SBIC, or similar fund.[698]

The 2020 proposal posed a number of questions related to the scope of the public welfare investment exclusion. For example, the 2020 proposal asked whether investments that would receive consideration as qualified investments under the regulations implementing the CRA should be excluded from the definition of covered fund, either by incorporating these investments into the public welfare investment exclusion or by establishing a new exclusion for CRA-qualifying investments.[699] In addition, the 2020 proposal requested comment on whether RBICs are typically excluded from the definition of ''covered fund'' because of the public welfare investment exclusion or another exclusion and on whether the agencies should expressly exclude RBICs from the definition of covered fund.[700] Finally, the 2020 proposal requested comment on whether many or all QOFs would meet the terms of the public welfare investment exclusion and on whether the agencies should expressly exclude QOFs from the definition of covered fund.[701]

The final rule revises the public welfare investment exclusion of the implementing regulations to incorporate issuers explicitly, the business of which is to make investments that qualify for consideration under the regulations implementing the CRA.[702]

To the degree that some banking entities have faced uncertainty about their ability to make CRA-qualified investments and qualify for the exclusion, the explicit exclusion for such funds may increase the willingness of banking entities to intermediate such community development investments. At the same time, to the degree that banking entities have financed community development projects eligible for the CRA through other fund structures and have relied on corresponding exemptions, the economic effects of the explicit exclusion for CRA-qualified investments may be limited to the difference in compliance burdens between the new explicit exclusion and any existing covered fund exclusions.

Commenters on the 2020 proposal generally favored explicitly excluding RBICs from the definition of ''covered fund,'' either by adopting a new exclusion, or by further clarifying the scope of the public welfare investment exclusion.[703] The final rule provides a separate specific exclusion for RBICs, similar to the separate, specific exclusion for SBICs.[704] As discussed elsewhere,[705] RBICs are intended to promote economic development and the creation of wealth and job opportunities in rural areas and among individuals living in such areas,[706] and their purpose is similar to the purpose of SBICs and public welfare companies.[707] Because SBICs and RBICs share the common purpose of promoting capital formation in their respective sectors, advisers to SBICs and RBICs are treated similarly under the Advisers Act (in that they have the opportunity to take advantage of exemptions from investment adviser registration).[708] The final rule's specific exclusion for RBICs should expand the economic effects of the SBIC exclusion discussed above and may facilitate capital formation by banking entities in growth stage businesses.

The SEC understands that RBICs may already have been excluded from the definition of covered fund under the implementing regulations.[709] For example, RBICs may qualify for the public welfare exclusion under the implementing regulations or may not be a covered fund by virtue of relying on an exclusion from the definition of ''investment company'' under the Investment Company Act other than section 3(c)(1) or 3(c)(7). An express exclusion for RBICs nevertheless should reduce compliance costs for banking entities, which may otherwise have been required to conduct a case-by-case analysis of each RBIC to determine whether it qualifies for an exclusion or exemption under the implementing regulations.

In response to a request for comment in the 2020 proposal, commenters generally favored explicitly excluding QOFs from the definition of ''covered fund.'' [710] The final rule provides a specific exclusion for QOFs similar to that provided to RBICs.[711] As discussed above, the QOF program allows taxpayers to defer and reduce taxes on capital gains by reinvesting gains in QOFs that are required to have at least 90 percent of their assets in designated low-income zones. In this regard, QOFs are similar to SBICs and public welfare companies. The QOF exclusion should expand the economic effects of the SBIC exclusion and public welfare exclusion discussed above, and may facilitate capital formation by banking entities.

QOFs already may have been excluded from the definition of covered fund under the implementing regulations. For example, QOFs may qualify for the public welfare exclusion under the implementing regulations or may not be covered funds by virtue of relying on an exclusion from the definition of ''investment company'' under the Investment Company Act other than section 3(c)(1) or 3(c)(7), such as section 3(c)(5)(C).[712] In addition, depending on the facts and circumstances, an issuer that holds securities issued by a QOF may not meet the definition of ''investment company'' under section 3(a)(1) of the Investment Company Act, may be excluded under Rule 3a–1 thereunder, or may qualify for the exclusion under

[697] Implementing regulations § ____.10(c)(11)(ii)(A).

[698] *See* 85 FR 12169.

[699] *See id.*

[700] *See id.*

[701] *See id.*

[702] *See* Final rule § ____.10(c)(11)(ii)(A).

[703] *See* SIFMA; FSF; and SBIA.

[704] *See supra* note 575.

[705] *See supra* note 576.

[706] *See* U.S. Dep't of Agriculture, Rural Business Investment Program Overview, *available at http://www.rd.usda.gov/programs-services/rural-business-investment-program.*

[707] SBICs are intended to increase access to capital for growth stage businesses. *See* U.S. Small Bus. Admin., SBIC Program Overview, *available at https://www.sba.gov/partners/sbics.*

[708] *See supra* note 578. The private fund adviser exemption excludes the assets of RBICs and SBICs from counting towards the $150 million threshold. 15 U.S.C. 80b–3(m).

[709] In addition, RBICs may be excluded from the definition of ''covered fund'' under the qualifying venture capital fund exclusion in the final rule. *See supra* note 578.

[710] *See* SIFMA; FSF; and ABA.

[711] Final rule § ____.10(c)(11)(iv).

[712] *See* Opportunity Zone Statement, *supra* note 581.

section 3(c)(6) of the Investment Company Act.[713] The express exclusion for QOFs, similar to the express exclusion for RBICs, should reduce compliance costs for banking entities, which may otherwise be required to conduct a case-by-case analysis of each QOF to determine whether it qualifies for an exclusion or exemption under the implementing regulations.

Family Wealth Management Vehicles

As discussed in the 2020 proposal, family wealth management vehicles commonly engage in asset management activities, as well as estate planning and other related activities.[714] The SEC understands that some banking entities may have been constrained in providing traditional banking and asset management services, including, for example, investment advice, brokerage execution, financing, clearing, and settlement services, to family wealth management vehicles due to the implementing regulations.[715] In addition, the SEC understands that certain family wealth management vehicles that are structured as trusts may prefer to appoint banking entities as trustees acting in a fiduciary capacity.[716]

In the 2020 proposal, the agencies requested comment on whether to exclude family wealth management vehicles from the definition of ''covered fund.'' [717] Several commenters supported this exclusion, stating generally that it would reduce uncertainty for banking entities about the permissibility of providing traditional banking, investment management, and trust and estate planning services to family wealth management vehicle clients.[718]

As discussed above, the agencies are adopting an exclusion from the definition of ''covered fund'' for any entity that acts as a ''family wealth management vehicle.'' By specifically excluding family wealth management vehicles, the final rule may benefit such banking entities and their family customers by permitting the banking entities to offer services to and engage in transactions with family wealth management vehicle customers.

Importantly, the final rule may benefit family wealth management vehicles and their investment advisers by increasing the number of banking entity counterparties willing to provide traditional client-oriented financial and asset management services. Thus, the final rule may enhance competition among banking and non-banking entities providing financial services to family wealth management vehicles and may lead to more efficient capital allocation of family wealth management vehicles' funds. To the degree banking entities pass compliance costs on to customers, family wealth vehicles may experience costs savings from the final rule as well.

Some commenters on the 2020 proposal opposed the exclusion for family wealth management vehicles. One commenter stated that rather than providing an exclusion for family wealth management vehicles through an agency rulemaking, the agencies should instead provide no-action relief to such vehicles on a case-by-case basis.[719] The SEC believes that such an approach would be unnecessarily burdensome and difficult to administer. The compliance costs of such an approach could impact the willingness of banking entities to provide traditional client-oriented financial and asset management services to their family customers. This approach would also unnecessarily deviate from the agencies' treatment of other excluded entities under the implementing regulations and hinder transparency and consistency.

The SEC recognizes that some banking entities may respond to the exclusion by seeking to structure other entities as family wealth management vehicles. However, as discussed in detail above, the exclusion is only available under a number of conditions.[720] Specifically, if the entity is a trust, the grantor(s) of the entity must all be family customers; if the entity is not a trust, a majority of the voting interests in the entity must be owned (directly or indirectly) by family customers, a majority of the interests in the entity must be owned by family customers, and the entity must be owned only by family customers and up to five closely related persons of the family customers.[721] Moreover, up to an aggregate 0.5 percent of the family wealth management vehicle's outstanding ownership interests may be acquired or retained by one or more entities that are not family customers or closely related persons for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.[722] In addition, banking entities may rely on this exclusion only if they: (1) Provide bona fide trust, fiduciary, investment advisory, or commodity trading advisory services to the entity; [723] (2) do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such entity; [724] (3) comply with the disclosure obligations under § ____.11(a)(8), as if such entity were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the entity; [725] (4) comply with the requirements of §§ ____.14(b) and ____.15, as if such entity were a covered fund; [726] and (5) except for riskless principal transactions as defined in § ____.10(d)(11), comply with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the entity were an affiliate thereof.[727]

The definition of ''family customer'' includes any ''family client'' as defined in Rule 202(a)(11)(G)–1(d)(4) of the Investment Advisers Act of 1940, and any natural person who is a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law of a family client, or a spouse or a spousal equivalent of any of the foregoing.[728] The SEC believes that the conditions for the exclusion and the definition of ''family customer'' will result in family wealth management vehicles being used as vehicles for providing customer-oriented financial services on arms-length, market terms, which the SEC believes will reduce the risk that banking entities' involvement in these vehicles will give rise to the types of risks that the covered funds provisions are meant to mitigate.

In the 2020 proposal, the agencies proposed to permit up to three closely related persons to hold ownership interests in a family wealth management vehicle. Several commenters supported allowing a finite number of closely related persons to hold ownership interests, but suggested that the proposed limit of three did not reflect the typical manner in which family

[713] *See id.*

[714] *See* 85 FR 12170.

[715] *See id.*

[716] *See id.*

[717] *See* 85 FR 12170.

[718] *See, e.g.,* Goldman Sachs; FSF; CCMR; IAA; ABA; BPI; PNC; and SIFMA.

[719] *See* Data Boiler.

[720] *See supra* Section IV.C.3. (Family Wealth Management Vehicles).

[721] *See* final rule § ____.10(c)(17)(i).

[722] *See* final rule § ____.10(c)(17)(i)(C).

[723] *See* final rule § ____.10(c)(17)(ii)(A).

[724] *See* final rule § ____.10(c)(17)(ii)(B).

[725] The disclosure content may be modified to prevent the disclosure from being misleading, and the manner of disclosure may be modified to accommodate the specific circumstances of the entity. *See* final rule § ____.10(c)(17)(ii)(C).

[726] *See* final rule § ____.10(c)(17)(ii)(E).

[727] *See* final rule § ____.10(c)(17)(ii)(F).

[728] *See* final rule § ____.10(c)(17)(iii)(B).

wealth management vehicles are constituted and would unnecessarily constrain the availability of the exclusion.[729]

The final rule allows for five closely related persons to hold ownership interests in a family wealth management vehicle. The agencies understand that many family wealth management vehicles currently include more than three closely related persons.[730] The agencies believe that the final rule will more closely align the exclusion with the current composition of family wealth management vehicles, thereby increasing the utility of the exclusion without allowing such a large number of non-family customer owners to suggest the entity is in reality a hedge fund or private equity fund.

In the 2020 proposal, a banking entity could rely on the family wealth management vehicle exclusion only if the banking entity and its affiliates did not acquire or retain, as principal, an ownership interest in the entity, other than up to 0.5 percent of the entity's outstanding ownership interests. In addition, such *de minimis* interest could be held only for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.[731] Some commenters requested that unaffiliated third parties—such as third-party trustees or similar service providers—be permitted to hold the *de minimis* interest.[732]

As adopted, the final rule allows up to an aggregate 0.5 percent of the vehicle's outstanding ownership interests to be acquired or retained by third parties (that is, entities other than family customers or closely related persons). The SEC believes that permitting *de minimis* ownership by these third parties reflects a common structure of family wealth management vehicles. The SEC recognizes that without this modification, family wealth management vehicles may be forced to engage in less effective and/or efficient means of structuring and organization because the exclusion could limit the vehicle's access to some customary service providers that have traditionally taken small ownership interests for structuring purposes. To the extent that a family customer prefers a particular person or entity to act as a service provider, allowing third-party service providers to acquire the *de minimis* ownership interest may enable the family customer to choose to establish a family wealth management vehicle. Whether the *de minimis* amount is held by a banking entity or some other third party is not likely to raise any concerns that are not sufficiently addressed by the aggregate ownership limit and the narrow circumstances in which such *de minimis* ownership interest may be held. At the same time, when circumstances require that a *de minimis* ownership interest be held (*e.g.,* for establishing corporate separateness), if the *de minimis* ownership interest is held by a third party and not a banking entity, then no banking entity will be exposed to any risk associated with holding the interest, however minimal that risk may be.

In the 2020 proposal, banking entities could rely on the family wealth management vehicle exclusion only if the banking entity complied with the disclosure obligations under § ____.11(a)(8), as if such vehicle were a covered fund. Commenters on the 2020 proposal requested that the agencies clarify that the disclosures could be modified (1) to reflect the specific circumstances of the banking entity's relationship with, and the particular structure of, its family wealth management vehicle clients; and (2) to allow the banking entity to satisfy the written disclosure requirement by means other than including such disclosures in the governing document(s) of the family wealth management vehicle(s).

The final rule provides such clarity and change the disclosure requirement to permit banking entities and their affiliates (1) to modify the content of such disclosures to prevent them from being misleading and (2) to modify the manner of disclosure to accommodate the specific circumstances of the vehicle. The SEC believes that these disclosures will provide important information to the customers for whom these vehicles will be established. Because the final rule permits modification of the disclosures for certain reasons, the SEC expects that the disclosures provided to any particular family customer will be more accurate and better tailored to the particular circumstances of the family wealth management vehicle than the disclosures might have been under the 2020 proposal. These disclosures may result in the family customers being better able to understand the information included in these disclosures and being better able to weigh that information in determining whether to establish a family wealth management vehicle. To the extent that these tailored disclosures assist family customers in determining whether or how to structure a family wealth management vehicle, they may assist family customers in deciding how best to receive services from or otherwise interact with banking entities. The SEC expects that these benefits will justify any costs incurred by banking entities in tailoring the disclosures of § ____.11(a)(8) or in providing them to customers (either by including them in existing documents or preparing a new disclosure document).

The agencies are adopting, with modifications, the condition requiring a banking entity relying on the exclusion for family wealth management vehicles to comply with the requirements of 12 CFR 223.15(a), as if such banking entity were a member bank and the vehicle were an affiliate thereof.[733] This condition prohibits banking entity purchases of low-quality assets from these vehicles and is intended to prevent banking entities from ''bailing out'' family wealth management vehicles. Several commenters on the 2020 proposal stated that the agencies should clarify that the exclusion permits banking entities to engage in riskless principal transactions to purchase assets—including low quality assets for purposes of section 223.15 of Regulation W—from family wealth management vehicles.[734] According to these commenters, allowing a banking entity to engage in such riskless principal transactions would facilitate the family customer's sale of assets,[735] while posing minimal market or credit risk to the banking entity because the banking entity would purchase and sell the same asset contemporaneously.[736] Furthermore, commenters stated that absent clarity on the permissiveness of riskless principal transactions, a family wealth management vehicle would be forced to obtain the services of a third party service provider to sell low quality assets, which in turn would increase the vehicle's costs and operational complexity without providing a meaningful benefit to furthering the aims of section 13 of the BHC or the implementing regulations.[737]

The SEC believes that permitting a banking entity to engage in riskless principal transactions that involve the purchase of low-quality assets from a

[729] *See, e.g.,* BPI; SIFMA; ABA; and PNC.

[730] *See, e.g.,* BPI; ABA; and PNC.

[731] *See* 85 FR 12139.

[732] *See, e.g.,* SIFMA and BPI.

[733] *See* final rule § ____.10(c)(17)(ii)(F). 12 CFR 223.15(a) provides that a member bank may not purchase a low-quality asset from an affiliate unless, pursuant to an independent credit evaluation, the member bank had committed itself to purchase the asset before the time the asset was acquired by the affiliate. 12 CFR 223.15(a).

[734] *See, e.g.,* BPI and SIFMA.

[735] *See, e.g.,* SIFMA.

[736] *See, e.g.,* SIFMA and BPI.

[737] *See, e.g.,* SIFMA.

family wealth management vehicle is unlikely to pose a substantive risk of evading section 13 of the BHC Act. Accordingly, in a change from the 2020 proposal and in response to the concerns raised by commenters, the condition will explicitly exclude from the requirements of 12 CFR 223.15(a) transactions that meet the definition of riskless principal transactions as defined in § ____.10(d)(11). The SEC expects that, together, the adopted criteria for the family wealth management vehicle exclusion will prevent a banking entity from being able to bail out such vehicles in periods of financial stress or otherwise expose the banking entity to the types of risks that the covered fund provisions of section 13 were intended to address.

Alternative forms of relief with respect to family wealth management vehicles—for example, alternatives that define ''family customers'' more broadly or narrowly, or that remove some of the conditions for the exclusion—would have increased or reduced the availability of the exclusion relative to the final rule. Alternatively, the agencies could have amended the limitations on relationships with a covered fund to permit banking entity transactions with family wealth management vehicles that would otherwise be considered covered transactions (*e.g.,* ordinary extensions of credit) without subjecting them to 12 CFR 223.15(a) or section 23B of the Federal Reserve Act, as if such banking entity were a member bank and such family wealth management vehicle were an affiliate thereof.

Broader (narrower) alternative forms of relief may have increased (decreased) the magnitude of the economic benefits for capital formation, allocative efficiency, and the ability of banking entities to provide traditional customer oriented services to family wealth management vehicles. At the same time, such broader relief may have increased the risk that some banking entities would have responded to such relief by attempting to evade the intent of the rule, increasing the volume of their activities with family wealth management vehicles. Such risks of the alternatives, as compared to the exclusion contained in the final rule, may have been mitigated by the fact that banking entities would have remained subject to the full scope of broker-dealer and prudential capital, margin, and other rules aimed at facilitating safety and soundness. Nonetheless, by providing relief that is narrower than the broader alternative, the final rule should reduce those possible risks even further. Moreover, as discussed above, the SEC believes that traditional banking and asset management services involving family wealth management vehicles in general do not involve the types of risks that section 13 of the BHC Act was designed to address.[738] Accordingly, any narrower relief than that provided by the final rule with respect to family wealth management vehicles may have constrained the economic benefits of the final rule (including with respect to capital formation and allocative efficiency) unnecessarily.

Customer Facilitation Vehicles

As discussed in the 2020 proposal, the SEC has received comments that, because of the implementing regulations' covered fund restrictions, some banking entities have been unable to engage in traditional banking and asset management services with respect to vehicles provided for customers, even though banking entities are otherwise able to provide such exposures and services to customers directly (outside of the fund structure).[739] The SEC has also received comment that some clients, particularly clients in markets such as Brazil, Germany, Hong Kong, and Japan, prefer to transact with or through such vehicles rather than banking entities directly because of a variety of legal, counterparty risk management, and accounting factors.[740] Moreover, the SEC is aware that limitations of the implementing regulations on the activities of such vehicles may have disrupted client relationships, reducing the efficiency of customer-facing financial services, and raising compliance costs of banking entities.[741]

The final rule establishes an exclusion from the definition of ''covered fund'' for any issuer that acts as a ''customer facilitation vehicle.'' The customer facilitation vehicle exclusion will, as proposed, be available for any issuer that is formed by or at the request of a customer of the banking entity for the purpose of providing such customer (which may include one or more affiliates of such customer) with exposure to a transaction, investment strategy, or other service provided by the banking entity.[742]

A banking entity may only rely on the exclusion with respect to an issuer provided that: (1) All of the ownership interests of the issuer are owned by the customer (which may include one or more of its affiliates) for whom the issuer was created;[743] and (2) the banking entity and its affiliates: (i) Maintain documentation outlining how the banking entity intends to facilitate the customer's exposure to such transaction, investment strategy, or service; (ii) do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such issuer; (iii) comply with the disclosure obligations under § ____.11(a)(8), as if such issuer were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the issuer; (iv) do not acquire or retain, as principal, an ownership interest in the issuer, other than up to an aggregate 0.5 percent of the issuer's outstanding ownership interests for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns; (v) comply with the requirements of §§ ____.14(b) and ____.15, as if such issuer were a covered fund; and (vi) except for riskless principal transactions as defined in § ____.10(d)(11), comply with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the entity were an affiliate thereof.

The exclusion in the final rule should reduce or eliminate the costs imposed by the implementing regulations that limit the services that banking entities can provide to customer facilitation vehicles, which in turn may limit the activities of these vehicles. These costs include those associated with the disruption of client relationships and the reduction in the efficiency of customer-facing financial services. The final rule should reduce these baseline costs and inefficiencies by allowing banking entities to provide customer-oriented financial services through vehicles, the purpose of which is to provide such customers with exposure to a transaction, investment strategy, or other service. As a result, banking entities may become better able to engage in the full range of customer facilitation activities through special

[738] *See supra* Section IV.C.3. (Customer Facilitation Vehicles).

[739] *See* 85 FR 12171.

[740] *See id.*

[741] *See id.*

[742] *See* final rule § ____.10(c)(18)(i).

[743] Notwithstanding this condition, up to an aggregate 0.5 percent of the issuer's outstanding ownership interests may be acquired or retained by one or more entities that are not customers if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns. *See* § ____.10(c)(18)(ii)(B).

purpose vehicles and fund structures, which could benefit banking entities, their customers, and securities markets more broadly.

Most commenters on the 2020 proposal that addressed this exclusion were supportive,[744] stating that it would provide banking entities with greater flexibility to meet client needs and objectives.[745] Some commenters found the exclusion's conditions to be reasonable and sufficient.[746] However, two commenters recommended that the agencies impose additional limitations on the exclusion.[747] One of these commenters argued that the exclusion would permit, and possibly encourage, banking entities to increase their risk exposures through the use of customer facilitation vehicles, and the agencies should minimize such risk exposures and promote risk monitoring and management.[748]

In the 2020 proposal, banking entities could rely on the customer facilitation vehicle exclusion only if the banking entity complied with the disclosure obligations under § ____.11(a)(8), as if such vehicle were a covered fund. Commenters on the 2020 proposal requested that the agencies provide clarification in the context of family wealth management vehicles that the content of the disclosure may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the issuer.

As with family wealth management vehicles, the final rule includes a modification to the proposed exclusion clarifying that the content of the disclosure may be modified to accommodate the specific circumstances of the issuer.[749] The SEC believes that these disclosures will provide important information to the customers for whom these vehicles will be used to provide services—whether they are family customers under the family wealth management vehicle exclusion or other customers under this exclusion. As discussed above with respect to family wealth management vehicles, the SEC believes that the clarification in the final rule regarding permissible modifications of the disclosures required by § ____.11(a)(8) will provide benefits that will justify any costs from tailoring and providing the disclosures.

In the 2020 proposal, as with family wealth management vehicles, a banking entity could rely on the customer facilitation vehicle exclusion only if the banking entity and its affiliates did not acquire or retain, as principal, an ownership interest in the entity, other than up to 0.5 percent of the entity's outstanding ownership interests. In addition, such *de minimis* interest could be held only for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.[750] As with family wealth management vehicles, commenters suggested that the agencies specifically allow any party that is unaffiliated with the customer, rather than only the banking entity and its affiliates, to own this *de minimis* interest.[751]

As adopted, the final rule allows up to an aggregate 0.5 percent of the vehicle's outstanding ownership interests to be acquired or retained by third parties (that is, entities other than the customer) if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.[752] The SEC recognize that without this modification, customer facilitation vehicles may be forced to engage in less effective and/or efficient means of structuring and organization because the exclusion could limit the vehicle's access to some customary service providers that have traditionally taken or may otherwise take small ownership interests for structuring purposes. To the extent that a customer prefers a particular person or entity to act as a service provider, allowing third-party service providers to acquire the *de minimis* ownership interest may make the customer more willing to establish a customer facilitation vehicle. Whether the *de minimis* amount is held by a banking entity or some other third party is not likely to raise any concerns that are not sufficiently addressed by the aggregate ownership limit and the narrow circumstances in which the *de minimis* ownership interest may be held.

The SEC recognizes that the provision of financial services related to customer facilitation vehicles may involve market risk, and the exclusion in the final rule may enable banking entities to provide a greater array of financial services to, and otherwise transact with, such vehicles. The SEC believes that such risks may be mitigated by at least two of the conditions of the exclusion. First, similar to the family wealth management vehicle discussed above, other than the *de minimis* ownership interest, a banking entity and its affiliates may not acquire or retain, as principal, any ownership in interest in the issuer.[753] Second, a banking entity and its affiliates may not directly or indirectly guarantee, assume, or otherwise insure the obligations or performance of the vehicle.[754] These conditions, among the other conditions of the exclusion, may mitigate risks that may be borne by individual banking entities and by banking entities as a whole as a result of the exclusion, and may facilitate banking entities' ongoing compliance with section 13 of the BHC Act and the final rule. Moreover, the SEC continues to believe that the provision of customer-oriented financial services by banking entities may benefit customers, counterparties, and securities markets.

The final rule creates new recordkeeping requirements for a banking entity that relies on the exclusion for customer facilitation vehicles.[755] Specifically, the banking entity and its affiliates must maintain documentation outlining how the banking entity intends to facilitate the customer's exposure to a transaction, investment strategy or service offered by the banking entity. As discussed in Section V.B[756] and above, these recordkeeping burdens may impose a total initial burden of $1,078,650[757] and a total ongoing annual burden of 1,0798,650.[758]

The agencies are adopting, with modifications, the condition requiring a banking entity relying on the exclusion for customer facilitation vehicles to comply with the requirements of 12 CFR 223.15(a), as if such banking entity were a member bank and the vehicle were an affiliate thereof.[759] The purpose of the proposed requirement that a customer facilitation vehicle must comply with 12 CFR 223.15(a) was the same for both the family wealth management vehicle and the customer facilitation vehicle

[744] *See, e.g.,* SIFMA; BPI; ABA; Credit Suisse; FSF; Goldman Sachs; and IAA.

[745] *See, e.g.,* SIFMA; BPI; ABA; and Goldman Sachs.

[746] *See, e.g.,* SIFMA; FSF; and SAF.

[747] *See* Better Markets and Data Boiler.

[748] *See* Better Markets.

[749] *See* final rule § ____.10(c)(18)(ii)(C)(3).

[750] *See* 85 FR 12139.

[751] *See* SIFMA; BPI; and FSF.

[752] *See* final rule § ____.10(c)(18)(ii)(B).

[753] Final rule § ____.10(c)(18)(ii)(B)(4).

[754] Final rule § ____.10(c)(18)(ii)(B)(2).

[755] Final rule § ____.10(c)(18)(ii)(B)(1).

[756] *See supra* note 585.

[757] *See supra* note 586.

[758] *See supra* note 587.

[759] *See* final rule § ____.10(c)(18)(ii)(C)(6). 12 CFR 223.15(a) provides that a member bank may not purchase a low-quality asset from an affiliate unless, pursuant to an independent credit evaluation, the member bank had committed itself to purchase the asset before the time the asset was acquired by the affiliate. 12 CFR 223.15(a).

exclusions—to help ensure that the exclusions do not allow banking entities to ''bail out'' either vehicle.[760] For the same reasons discussed above with respect to family wealth management vehicles, the agencies have modified the requirement to exclude from the requirements of 12 CFR 223.15(a) any transactions that meet the definition of riskless principal transactions as defined in § ____.10(d)(11).

As with the discussion of family wealth management vehicles above, the SEC believes that the ability of a banking entity to engage in riskless principal transactions with a customer facilitation vehicle will lower costs for the vehicle by allowing it to avoid finding a third party to intermediate trades for low quality assets. At the same time, allowing these riskless principal transactions should not pose the type of risk to the banking entity that section 13 of the BHC Act was intended to prevent. The SEC expects that the conditions for the customer facilitation vehicle exclusion will prevent a banking entity from being able to bail out such vehicles in periods of financial stress or otherwise expose the banking entity to the types of risks that the covered fund provisions of section 13 were intended to address.

The agencies considered alternative forms of relief with respect to customer facilitation vehicles. For example, the agencies could have adopted a higher third party ownership limit (of, for example, 5% or 10%). Alternatively, the agencies could have adopted a 0.5% ownership interest limit, but without specifying a list of purposes for which such interest may be held, leading to banking entities accumulating greater ownership interests in such vehicles. As another example, the agencies could have adopted an exclusion for customer facilitation vehicles without subjecting the banking entity relying on the exclusion to 12 CFR 223.15(a) or section 23B of the Federal Reserve Act, as if such banking entity were a member bank and such customer facilitation vehicles were an affiliate thereof. Such alternatives would have removed or loosened the conditions of the exclusion, which may have increased the risk that customer facilitation vehicles could be used for evasion purposes or could have exposed banking entities to additional risk, but could also have further reduced compliance burdens and provided greater flexibility to banking entities and their customers.

[760] *See* 85 FR 12140.

ii. Limitations on Relationships Between Banking Entities and Covered Funds

As discussed above, under the implementing regulations, banking entities that either: (1) Serve, directly or indirectly, as a sponsor, investment adviser, commodity trading advisor, or investment manager to a covered fund; (2) organize and offer a covered fund under § ____.11; or (3) hold an ownership interest under § ____.11(b) have been unable to engage in any covered transactions with such funds.[761] This prohibition may have limited the services that such banking entities and their affiliates have been able to provide to certain entities that are covered funds under the implementing regulations. For example, as noted above, banking entities have been significantly limited in their ability to both organize and offer a covered fund, as well as to provide custody or other services to the fund.

The final rule permits a banking entity to engage in certain covered transactions with a related covered fund that would be exempt from the quantitative limits, collateral requirements, and low-quality asset prohibition under section 23A of the Federal Reserve Act, including certain transactions that would be exempt pursuant to section 223.42 of the Board's Regulation W.[762] In addition, the final rule authorizes banking entities to engage in certain transactions, such as extensions of intraday credit for purchases of assets from covered funds in connection with payment, clearing, and settlement services.[763] Finally, in a modification from the 2020 proposal, the final rule expressly permits banking entities to enter into certain riskless principal transactions with a related covered fund, including in circumstances where the covered fund is not a ''securities affiliate.'' [764]

As discussed in the 2020 proposal, the SEC received comment suggesting that section 13(f)(1) of the BHC Act should be interpreted to include the exemptions provided under section 23A of the Federal Reserve Act, and that banking entities should be permitted to engage in a limited amount of covered transactions with related covered funds.[765] The SEC recognizes that outsourcing such activities to third parties may have adversely affected customer relationships, increasing costs and decreasing operational efficiency for banking entities and covered funds. The final rule provides banking entities greater flexibility to provide these and other services directly to covered funds. If being able to provide custody, clearing, and other services to related covered funds reduces the costs of these services and risks of operational failure of fund custodians, then fund advisers and, indirectly, fund investors, may benefit from the final rule. Many direct benefits are likely to accrue to banking entity advisers to covered funds that have been relying on third-party service providers as a result of the requirements of the implementing regulations.

The final rule includes a standalone provision that permits banking entities to enter into riskless principal transactions with a related covered fund, including in circumstances where the covered fund is not a ''securities affiliate.'' The 2020 proposal would have permitted a banking entity to enter into a riskless principal transaction with a covered fund provided it met the criteria in Regulation W. The SEC believes that providing a standalone exception will provide clarity and certainty to banking entities about the extent to which they are able to enter into riskless principal transactions with related covered funds. In addition, by permitting more riskless principal transactions than would have been the case under the 2020 proposal (*i.e.,* those that do not or may not meet the criteria of Regulation W), the final rule may facilitate banking entities entering into more of these transactions than they would have, reducing the likelihood that the covered fund would incur additional costs in buying or selling securities.[766] As described above, in a riskless principal transaction, the riskless principal (the banking entity) buys and sells the same security contemporaneously, and the asset risk passes promptly from the affiliate (the related covered fund) through the riskless principal to a third party. Accordingly, the SEC does not believe that an increase in riskless principal transactions overall will increase the risks borne by any particular banking entity or banking entities in general.

The final rule increases banking entities' ability to engage in custody, clearing, and other transactions with related covered funds and will benefit banking entities that have been unable

[761] *See* 12 U.S.C. 1851(f)(1).

[762] *See* final rule § ____.14(a)(2)(iii).

[763] *See* final rule § ____.14(a)(2)(v).

[764] *See* final rule § ____.14(a)(2)(iv).

[765] *See* 85 FR 12144.

[766] As discussed above, the final rule includes a definition of riskless principal transaction that is similar to the definition adopted in Regulation W. To the extent these definitions are sufficiently similar, the SEC expects that compliance costs will be low for banking entities seeking to enter into riskless principal transactions with related covered funds.

to engage in otherwise profitable or efficient activities with related covered funds. Moreover, this may enhance operational efficiency and reduce operational risks and costs incurred by covered funds, which have been unable to rely on banking entities with which they have certain relationships for custody, clearing, and other transactions. As discussed above, reducing operational risk as well as the interconnectedness between financial firms that would result from such services being provided by the banking entities and their affiliates, would promote the financial stability of the U.S. financial system.[767]

In the 2020 proposal, the SEC discussed a prior comment that opposed incorporating the Federal Reserve Act section 23A exemptions or quantitative limits.[768] To the extent that the final rule may increase transactions between banking entities and related covered funds, banking entities could incur risks associated with these transactions. However, as discussed above, the final rule imposes a number of conditions aimed at reducing overall risks to banking entities, the ability of banking entities to lever up related covered funds, and the incentive of banking entities to bail out related covered funds, while enhancing their ability to provide ordinary-course banking, custody, and asset management services, and to facilitate capital formation in covered funds.

The agencies could have adopted broader or narrower forms of relief. For example, in addition to the relief under the final rule, the agencies could have permitted banking entities to engage in additional covered transactions in connection with payment, clearing, and settlement services beyond extensions of credit and purchases of assets. Further, under the final rule, each extension of credit must be repaid, sold, or terminated by the end of five business days.[769] As another alternative, the agencies could have allowed extensions of credit in connection with payment transactions, clearing, or settlement services for periods that are longer than five business days. However, the five business day criteria is consistent with the federal banking agencies' capital rule and generally requires banking entities to rely on transactions with normal settlement periods, which have lower risk of delayed settlement or failure, when providing short-term extensions of credit.[770] In addition, the agencies could have imposed quantitative limits on the newly permitted covered transactions tied to bank capital or fund size. Relative to the final rule, alternatives providing greater relief with respect to covered transactions with covered funds could have magnified the cost savings and operational risk benefits described above, but may also have increased risk to banking entities or the incentives for banking entities to bail out related covered funds. Similarly, narrower alternative forms of relief may have dampened the economic effects of the final rule discussed above.

iii. Definition of Ownership Interest

As discussed above, the implementing regulations define ''ownership interest'' in a covered fund to mean any equity, partnership, or ''other similar interest.'' This definition focuses on the attributes of the interest and whether it provides a banking entity with voting rights or economic exposure to the profits and losses of the covered fund, rather than its form. ''Other similar interest'' is defined, in part, as an interest that:

> ''Has the right to participate in the selection or removal of a general partner, managing member, member of the board of directors or trustees, investment manager, investment adviser, or commodity trading advisor of the covered fund (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event).'' [771]

As discussed in the 2020 proposal, the SEC has received comment that the implementing regulations' definition of ownership interest has captured instruments that do not have equity-like features and constrained banking entity investments in debt securitizations and client facilitation services.[772] For example, one commenter indicated that analyzing the ownership interest definition in the context of securitizations had resulted in added time and costs of executing transactions, as well as impeded securitization transactions.[773] Moreover, the commenter indicated that the ''other similar interest'' prong of the definition precluded some banking entities from investing in collateralized loan obligation (CLO) senior debt instruments, which affects lending to CLOs, and that banking entities with pre-existing CLO exposures have had to waive credit-enhancing remedies to avoid triggering the ownership interest restrictions.[774] In addition, the SEC received comment that the ownership interest definition in the implementing regulations may have required an extensive legal analysis and documentation review and that, as a result, some banking entities may have defaulted to treating interests without controlling positions or equity-like features as ownership interests.[775]

The final rule modifies the definition of ownership interest in several ways. First, the final rule moves the existing exclusion from the definition of ''other similar interest'' in § ____.10(d)(6)(A) (''for the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event'') from the parenthetical to its own provision.[776] The final rule also creates a new exclusion, for ''the right to participate in the removal of an investment manager for ''cause'' or participate in the selection of a replacement manager upon an investment manager's resignation or removal.'' [777]

Commenters on the 2020 proposal asserted that creditors' rights are also provided to debt holders in circumstances other than an event of default or acceleration. These commenters therefore recommended the proposed exclusion be expanded to include additional for cause events that are independent of an event of default or acceleration, such as the insolvency of the investment manager or breach of the investment management or collateral management agreement.[778] The final rule reflects those comments and provide clarity about the types of creditor rights that may attach to an interest without that interest being deemed an ownership interest. In particular, under § ____.10(d)(6)(A)(*2*), the definition of ownership interest does not include rights of an interest that allows a creditor to participate in the removal of an investment manager for ''cause.'' The final rule defines ''cause'' for removal to mean one or more of the following events:

(1) The bankruptcy, insolvency, conservatorship or receivership of the investment manager;

(2) The breach by the investment manager of any material provision of the covered fund's transaction agreements applicable to the investment manager;

(3) The breach by the investment manager of material representations or warranties;

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[767] *See supra* Section IV.D. (Limitations on Relationships with a Covered Fund).

[768] *See* 85 FR 12172.

[769] *See* final rule § ____.14(a)(2)(iv)(B).

[770] *See supra* note 435.

[771] *See* implementing regulations § ____.10(d)(6)(i)(A). *See also supra* Section IV.E.1. (Ownership Interest).

[772] *See* 85 FR 12173.

[773] *See id.*

[774] *See id.*

[775] *See id.*

[776] *See* final rule § ____.10(d)(6)(i)(A)(*1*).

[777] *See* final rule § ____.10(d)(6)(i)(A)(*2*).

[778] *See* SIFMA.

(4) The occurrence of an act that constitutes fraud or criminal activity in the performance of the investment manager's obligations under the covered fund's transaction agreements;

(5) The indictment of the investment manager for a criminal offense, or the indictment of any officer, member, partner or other principal of the investment manager for a criminal offense materially related to his or her investment management activities;

(6) A change in control with respect to the investment manager;

(7) The loss, separation or incapacitation of an individual critical to the operation of the investment manager or primarily responsible for the management of the covered fund's assets; or

(8) Other similar events that constitute ''cause'' for removal of an investment manager, provided that such events are not solely related to the performance of the covered fund or to the investment manager's exercise of investment discretion under the covered fund's transaction agreements.

The final rule also modifies the definition of ownership interest to add to the list of interests that are excluded from the definition of ownership interest. Specifically, the final rule provides a safe harbor excluding any senior loan or senior debt interest that has specific characteristics.[779] Those characteristics are: (1) Under the terms of the interest, the holders do not have the right to receive a share of the income, gains, or profits of the covered fund, but are entitled to receive only certain interest and fees, and repayment of a fixed principal amount on or before a maturity date in a contractually-determined manner (which may include prepayment premiums intended solely to reflect, and compensate holders of the interest for, forgone income resulting from an early prepayment); (2) the entitlement to payments is absolute and cannot be reduced because of the losses arising from the covered fund's underlying assets; and (3) the holders of the interest are not entitled to receive the underlying assets of the covered fund after all other interests have been redeemed or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event).[780]

The final rule should simplify the analysis banking entities must perform to determine whether they have an ownership interest under section 13 of the BHC Act and the final rule. Moreover, to the degree that banking entities may have responded to the ownership interest definition in the implementing regulations by reducing their investments in certain debt instruments, the final rule may result in greater banking entity investments in covered funds and a greater ability of covered funds to allocate capital to the underlying assets.

The SEC recognizes that such debt instrument investments carry risk,[781] and that the risks and returns of such investments flow through to banking entities' shareholders. While the final rule's ownership interest definition may permit banking entities to increase exposures to certain debt instruments, three key considerations may mitigate the risks associated with such activities. First, the final rule does not change any of the applicable prudential capital, margin, or liquidity requirements intended to ensure safety and soundness of banking entities. Second, to the degree that the ownership interest definition has actually discouraged banking entities from obtaining credit enhancements to avoid triggering the ownership interest restrictions, the final rule may result in banking entities receiving credit enhancements that reduce the risk of the debt instrument or loan and are therefore stronger than what banking entities may have received in the absence of the final rule. Finally, the final rule includes a number of conditions and restrictions aimed at reducing the risk to banking entities while facilitating traditional lending activity.

The agencies could have adopted broader relief by limiting the particular forms of a banking entity's interest (*e.g.,* equity or partnership shares) that would qualify as an ownership interest or by limiting the definition of ownership interest to ''voting securities'' as defined by the Board's Regulation Y. By providing broader relief relative to the final rule, such an alternative may have produced greater reductions in uncertainty and compliance burdens, and a greater willingness of banking entities to become involved in certain debt transactions. However, such greater involvement in certain debt transactions may also have given rise to greater risks being borne by banking entities. The final rule is intended to provide sufficient safeguards and limitations to prevent banking entities from acquiring interests in covered funds that run counter to the intentions of the implementing regulations and limit a banking entity's exposure to the economic risks of covered funds and their underlying assets, while reducing compliance uncertainty and increasing the willingness of banking entities to participate in covered funds.

iv. Parallel Investments

As discussed above, the preamble to the 2013 rule stated that if a banking entity makes investments side by side in substantially the same positions as a covered fund, then the value of such investments would be included for the purposes of determining the value of the banking entity's investment in the covered fund.[782] The agencies also stated that a banking entity that sponsors a covered fund should not make any additional side-by-side co-investment with the covered fund in a privately negotiated investment unless the value of such co-investment is less than three percent of the value of the total amount co-invested by other investors in such investment.[783]

As discussed in the 2020 proposal, the SEC has received comment that argued the implementing regulations should not impose a limit on parallel investments and noted that such a restriction is not reflected in the text of the 2013 rule.[784] The final rule includes a rule of construction that (1) a banking entity will not be required to include in the calculation of the investment limits under § ____.12(a)(2) any investment the banking entity makes alongside a covered fund, as long as the investment is made in compliance with applicable laws and regulations, and (2) a banking entity shall not be restricted in the amount of any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.[785]

The SEC recognizes that this rule of construction may increase the incentive for banking entities to make parallel investments alongside a covered fund that is organized and offered by the banking entity for the purposes of artificially maintaining or increasing the value of the fund's positions. Supporting a fund with a direct investment in such a manner would increase these banking entities' exposures to the covered fund's assets and, as discussed above, could be inconsistent with the final rule's restriction on a banking entity guaranteeing, assuming, or otherwise

[779] *See* final rule § ____.10(d)(6)(ii)(B).

[780] *See id. See also, supra* Section IV.E.1. (Ownership Interest).

[781] *See* Occupy.

[782] *See supra* Section IV.F. (Parallel Investments) and references therein.

[783] *See id.*

[784] *See* 85 FR 12174.

[785] *See* final rule § ____.12(b)(5)(i).

insuring the obligations or performance of such covered fund.[786]

Further, as stated above, the agencies would expect that any investments made alongside a covered fund by a director or employee of a banking entity or its affiliate, if made in compliance with applicable laws and regulations, would not be treated as an investment by the director or employee in the covered fund. Accordingly, such an investment would not be attributed to the banking entity as an investment in the covered fund, regardless of whether the banking entity arranged the transaction on behalf of the director or employee or provided financing for the investment.

The SEC recognizes that the rule of construction may remove a restriction on investments made alongside a covered fund that may have interfered with banking entities' ability to make otherwise permissible investments directly on their balance sheets.[787] In particular, the rule of construction may allow banking entities to make parallel investments alongside their covered funds without including the value of those parallel investments within the ownership limits imposed on a banking entity. Similarly, the rule of construction may provide clarity to banking entities such that they will not be prevented from making investments alongside their covered funds, as long as those investments are otherwise permissible under applicable laws and regulations.[788] In addition to removing impediments for banking entities' otherwise permissible investments, the rule of construction in the final rule may enable banking entities to make investments alongside a covered fund that will credibly signal the banking entity's view of the quality of the investment(s) to investors in the fund, and may also help align the incentives of banking entities, and their directors and employees, with those of the covered funds and their investors.

4. Efficiency, Competition, and Capital Formation

As discussed above, the final rule excludes certain groups of private funds and other entities from the scope of the covered fund definition and modifies other covered fund restrictions applicable to banking entities subject to the final rule. Moreover, the final rule reduces compliance obligations of banking entities subject to the final rule. The SEC believes that the final rule may impact competition, capital formation, and allocative efficiency.

The final rule may have three groups of competitive effects. First, the final rule may make it easier for bank affiliated broker-dealers, SBSDs, and RIAs to compete with bank unaffiliated broker-dealers, SBSDs, and RIAs in their activities with certain groups of private funds and other entities. Second, the final rule may reduce competitive disparities between banking entities subject to the final rule and affected by the final rule, and banking entities that are not. Third, certain aspects of the final rule (such as those related to foreign excluded funds and foreign public funds) may reduce competitive disparities between U.S. banking entities and foreign banking entities in their covered fund activities. Because competition may reduce costs or increase quality, and because some affected banking entities may face economies of scale or scope in the provision of services to certain private funds, these competitive effects may flow through to customers, clients, and investors in the form of reduced transaction costs and greater quality of private fund and other offerings and related financial services.

The final rule may also impact capital formation. For example, by reducing the scope of application of covered fund restrictions in the final rule, the final rule relaxes restrictions related to banking entity underwriting and market-making of certain private funds. Moreover, the final rule modifies certain restrictions related to banking entity relationships with certain covered funds. Further, as discussed above, the final rule enables banking entities to engage indirectly (through a fund structure) in certain of the same activities that they are currently able to engage in directly (extending credit or direct ownership stakes). To the degree that the implementing regulations impede or otherwise constrain banking entity activities in such funds, the final rule may result in a greater number of such private funds being launched by banking entities, increasing capital formation via private funds. The effects of the final rule on capital formation are likely to flow through to investors (in the form of greater availability or variety or private funds available for investors) as well as an increase in the supply of capital available to firms seeking to raise capital or obtain financing from private funds.[789]

The possible effects of the final rule on allocative efficiency are related to the final rule's likely impact on capital formation. Specifically, as discussed above, the SEC believes that the final rule may result in a greater number and variety of private funds launched by banking entities. To the degree that banking entities may be able to provide superior private funds due to their expertise or economies of scale or scope, and to the degree that fund structures may be more efficient than direct investments (due to, *e.g.,* superior risk sharing and pooling of expertise across fund investors), the final rule may enhance the ability of market participants, investors, and issuers to allocate their capital efficiently.

The SEC recognizes that the final rule may increase the ability of banking entities to engage in certain types of activities involving risk, and that increases in risk exposures of large groups of banking entities may negatively impact capital formation, securities markets, and the real economy, particularly during times of adverse economic conditions. Moreover, losses on investment portfolios may discourage capital market participation by various groups of investors. Three important considerations may mitigate these potential risks. First, as discussed throughout this economic analysis, banking entities already engage in a variety of permissible activities involving risk, including extensions of credit, underwriting, and market-making, and the activities of many types of private funds that are excluded under the final rule largely replicate permissible and traditional activities of banking entities. Second, banking entities subject to the final rule may also be subject to multiple prudential capital, margin, and liquidity requirements that facilitate the safety and soundness of banking entities and promote financial stability. Third, the additional exclusions from the definition of covered fund each include a number of conditions aimed at preventing evasion of section 13 of the BHC Act and the final rule, promoting safety and soundness, and/or allowing for customer oriented financial services provided on arms-length, market terms.

Under the final rule, a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund if the banking entity organizes or offers the covered fund and satisfies other requirements. One such requirement is that the banking entity provide specified disclosures to prospective and actual

[786] *Id.*

[787] *See supra* note 784.

[788] *See id.*

[789] For example, the final rule could result in additional venture capital being available in geographic areas where it has been relatively less available. *See supra* Section V.F.3.i. (Venture Capital Funds).

investors in the covered fund.[790] Under the final rule, banking entities must provide the disclosures specified by § ____.11(a)(8) to satisfy the exclusions for family wealth management vehicles and customer facilitation vehicles and to satisfy the exclusions for credit funds and venture capital funds if the banking entity is a sponsor, investment adviser, or commodity trading advisor of the fund. To the extent that the final rule leads banking entities to establish or provide services to more of these vehicles, the volume of information available to market participants could increase. Specifically, if banking entities respond to the final rule by establishing or providing services to more of these vehicles because they are excluded from the definition of ''covered fund,'' then the amount of such disclosures would increase accordingly.

Importantly, the magnitude of all of the above effects on competition, capital formation, and allocative efficiency will be influenced by a large number of factors, such as prevailing macroeconomic conditions, the financial condition of firms seeking to raise capital, and of funds seeking to transact with banking entities, market saturation, and search for higher yields by investors during low interest rate environments. Moreover, the relative efficiency between fund structures and the direct provision of capital is likely to vary widely among banking entities and funds. The SEC recognizes that such economic effects may be dampened or magnified in different phases of the macroeconomic cycle and across various types of banking entities.

G. Congressional Review Act

For the OCC, Board, FDIC, SEC, and CFTC, the Office of Information and Regulatory Affairs, pursuant to the Congressional Review Act, has designated this rule as a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects

12 CFR Part 44

Banks, Banking, Compensation, Credit, Derivatives, Government securities, Insurance, Investments, National banks, Penalties, Reporting and recordkeeping requirements, Risk, Risk retention, Securities, Trusts and trustees.

12 CFR Part 248

Administrative practice and procedure, Banks, banking, Conflict of interests, Credit, Foreign banking, Government securities, Holding companies, Insurance, Insurance companies, Investments, Penalties, Reporting and recordkeeping requirements, Securities, State nonmember banks, State savings associations, Trusts and trustees.

12 CFR Part 351

Banks, Banking, Capital, Compensation, Conflicts of interest, Credit, Derivatives, Government securities, Insurance, Insurance companies, Investments, Penalties, Reporting and recordkeeping requirements, Risk, Risk retention, Securities, Trusts and trustees.

17 CFR Part 75

Banks, Banking, Compensation, Credit, Derivatives, Federal branches and agencies, Federal savings associations, Government securities, Hedge funds, Insurance, Investments, National banks, Penalties, Proprietary trading, Reporting and recordkeeping requirements, Risk, Risk retention, Securities, Swap dealers, Trusts and trustees, Volcker rule.

17 CFR Part 255

Banks, Brokers, Dealers, Investment advisers, Recordkeeping, Reporting, Securities.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Chapter I

Authority and Issuance

For the reasons stated in the Common Preamble, the Office of the Comptroller of the Currency amends chapter I of title 12, Code of Federal Regulations as follows:

PART 44—PROPRIETARY TRADING AND CERTAIN INTERESTS IN AND RELATIONSHIPS WITH COVERED FUNDS

■ 1. The authority citation for part 44 continues to read as follows:

Authority: 7 U.S.C. 27 *et seq.,* 12 U.S.C. 1, 24, 92a, 93a, 161, 1461, 1462a, 1463, 1464, 1467a, 1813(q), 1818, 1851, 3101, 3102, 3108, 5412.

Subpart B—Proprietary Trading

■ 2. Amend § 44.6 by adding paragraph (f) to read as follows:

§ 44.6 Other permitted proprietary trading activities.

* * * * *

(f) *Permitted trading activities of qualifying foreign excluded funds.* The prohibition contained in § 44.3(a) does not apply to the purchase or sale of a financial instrument by a qualifying foreign excluded fund. For purposes of this paragraph (f), a qualifying foreign excluded fund means a banking entity that:

(1) Is organized or established outside the United States, and the ownership interests of which are offered and sold solely outside the United States;

(2)(i) Would be a covered fund if the entity were organized or established in the United States, or

(ii) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;

(3) Would not otherwise be a banking entity except by virtue of the acquisition or retention of an ownership interest in, sponsorship of, or relationship with the entity, by another banking entity that meets the following:

(i) The banking entity is not organized, or directly or indirectly controlled by a banking entity that is organized, under the laws of the United States or of any State; and

(ii) The banking entity's acquisition or retention of an ownership interest in or sponsorship of the fund meets the requirements for permitted covered fund activities and investments solely outside the United States, as provided in § 44.13(b);

(4) Is established and operated as part of a bona fide asset management business; and

(5) Is not operated in a manner that enables the banking entity that sponsors or controls the qualifying foreign excluded fund, or any of its affiliates, to evade the requirements of section 13 of the BHC Act or this part.

Subpart C—Covered Funds Activities and Investments

■ 3. Amend § 44.10 by:
■ a. Revising paragraph (c)(1);
■ b. Revising paragraph (c)(3)(i);
■ c. Revising paragraph (c)(8);
■ d. Revising the heading of paragraph (c)(10) and revising paragraph (c)(10)(i);
■ e. Revising paragraph (c)(11);
■ f. Adding paragraphs (c)(15), (16), (17), and (18);
■ g. Revising paragraph (d)(6); and
■ h. Adding paragraph (d)(11).

The revisions and additions read as follows:

§ 44.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

* * * * *

(c) * * *

(1) *Foreign public funds.* (i) Subject to paragraphs (c)(1)(ii) and (iii) of this section, an issuer that:

[790] Implementing regulations § ____.11(a)(8).

(A) Is organized or established outside of the United States; and

(B) Is authorized to offer and sell ownership interests, and such interests are offered and sold, through one or more public offerings.

(ii) With respect to a banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State and any issuer for which such banking entity acts as sponsor, the sponsoring banking entity may not rely on the exemption in paragraph (c)(1)(i) of this section for such issuer unless more than 75 percent of the ownership interests in the issuer are sold to persons other than:

(A) Such sponsoring banking entity;

(B) Such issuer;

(C) Affiliates of such sponsoring banking entity or such issuer; and

(D) Directors and senior executive officers as defined in § 225.71(c) of the Board's Regulation Y (12 CFR 225.71(c)) of such entities.

(iii) For purposes of paragraph (c)(1)(i)(B) of this section, the term ''public offering'' means a distribution (as defined in § 44.4(a)(3)) of securities in any jurisdiction outside the United States to investors, including retail investors, provided that:

(A) The distribution is subject to substantive disclosure and retail investor protection laws or regulations;

(B) With respect to an issuer for which the banking entity serves as the investment manager, investment adviser, commodity trading advisor, commodity pool operator, or sponsor, the distribution complies with all applicable requirements in the jurisdiction in which such distribution is being made;

(C) The distribution does not restrict availability to investors having a minimum level of net worth or net investment assets; and

(D) The issuer has filed or submitted, with the appropriate regulatory authority in such jurisdiction, offering disclosure documents that are publicly available.

* * * * *

(3) * * *

(i) Is composed of no more than 10 unaffiliated co-venturers;

* * * * *

(8) *Loan securitizations.* (i) *Scope.* An issuing entity for asset-backed securities that satisfies all the conditions of this paragraph (c)(8) and the assets or holdings of which are composed solely of:

(A) Loans as defined in § 44.2(t);

(B) Rights or other assets designed to assure the servicing or timely distribution of proceeds to holders of such securities and rights or other assets that are related or incidental to purchasing or otherwise acquiring and holding the loans, provided that each asset that is a security (other than special units of beneficial interest and collateral certificates meeting the requirements of paragraph (c)(8)(v) of this section) meets the requirements of paragraph (c)(8)(iii) of this section;

(C) Interest rate or foreign exchange derivatives that meet the requirements of paragraph (c)(8)(iv) of this section;

(D) Special units of beneficial interest and collateral certificates that meet the requirements of paragraph (c)(8)(v) of this section; and

(E) Debt securities, other than asset-backed securities and convertible securities, provided that:

(*1*) The aggregate value of such debt securities does not exceed five percent of the aggregate value of loans held under paragraph (c)(8)(i)(A) of this section, cash and cash equivalents held under paragraph (c)(8)(iii)(A) of this section, and debt securities held under this paragraph (c)(8)(i)(E); and

(*2*) The aggregate value of the loans, cash and cash equivalents, and debt securities for purposes of this paragraph is calculated at par value at the most recent time any such debt security is acquired, except that the issuing entity may instead determine the value of any such loan, cash equivalent, or debt security based on its fair market value if:

(*i*) The issuing entity is required to use the fair market value of such assets for purposes of calculating compliance with concentration limitations or other similar calculations under its transaction agreements, and

(*ii*) The issuing entity's valuation methodology values similarly situated assets consistently.

(ii) *Impermissible assets.* For purposes of this paragraph (c)(8), except as permitted under paragraph (c)(8)(i)(E) of this section, the assets or holdings of the issuing entity shall not include any of the following:

(A) A security, including an asset-backed security, or an interest in an equity or debt security other than as permitted in paragraphs (c)(8)(iii), (iv), or (v) of this section;

(B) A derivative, other than a derivative that meets the requirements of paragraph (c)(8)(iv) of this section; or

(C) A commodity forward contract.

(iii) *Permitted securities.* Notwithstanding paragraph (c)(8)(ii)(A) of this section, the issuing entity may hold securities, other than debt securities permitted under paragraph (c)(8)(i)(E) of this section, if those securities are:

(A) Cash equivalents—which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the securitization's expected or potential need for funds and whose currency corresponds to either the underlying loans or the asset-backed securities—for purposes of the rights and assets in paragraph (c)(8)(i)(B) of this section; or

(B) Securities received in lieu of debts previously contracted with respect to the loans supporting the asset-backed securities.

(iv) *Derivatives.* The holdings of derivatives by the issuing entity shall be limited to interest rate or foreign exchange derivatives that satisfy all of the following conditions:

(A) The written terms of the derivatives directly relate to the loans, the asset-backed securities, the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section, or the debt securities described in paragraph (c)(8)(i)(E) of this section; and

(B) The derivatives reduce the interest rate and/or foreign exchange risks related to the loans, the asset-backed securities, the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section, or the debt securities described in paragraph (c)(8)(i)(E) of this section.

(v) *Special units of beneficial interest and collateral certificates.* The assets or holdings of the issuing entity may include collateral certificates and special units of beneficial interest issued by a special purpose vehicle, provided that:

(A) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate meets the requirements in this paragraph (c)(8);

(B) The special unit of beneficial interest or collateral certificate is used for the sole purpose of transferring to the issuing entity for the loan securitization the economic risks and benefits of the assets that are permissible for loan securitizations under this paragraph (c)(8) and does not directly or indirectly transfer any interest in any other economic or financial exposure;

(C) The special unit of beneficial interest or collateral certificate is created solely to satisfy legal requirements or otherwise facilitate the structuring of the loan securitization; and

(D) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate and the

issuing entity are established under the direction of the same entity that initiated the loan securitization.

* * * * *

(10) *Qualifying covered bonds.* (i) *Scope.* An entity owning or holding a dynamic or fixed pool of loans or other assets as provided in paragraph (c)(8) of this section for the benefit of the holders of covered bonds, provided that the assets in the pool are composed solely of assets that meet the conditions in paragraph (c)(8)(i) of this section.

* * * * *

(11) *SBICs and public welfare investment funds.* An issuer:

(i) That is a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), or that has received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company, which notice or license has not been revoked, or that has voluntarily surrendered its license to operate as a small business investment company in accordance with 13 CFR 107.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets) after such voluntary surrender;

(ii) The business of which is to make investments that are:

(A) Designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs) and including investments that qualify for consideration under the regulations implementing the Community Reinvestment Act (12 U.S.C. 2901 *et seq.*); or

(B) Qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program;

(iii) That has elected to be regulated or is regulated as a rural business investment company, as described in 15 U.S.C. 80b–3(b)(8)(A) or (B), or that has terminated its participation as a rural business investment company in accordance with 7 CFR 4290.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets) after such termination; or

(iv) That is a qualified opportunity fund, as defined in 26 U.S.C. 1400Z–2(d).

* * * * *

(15) *Credit funds.* Subject to paragraphs (c)(15)(iii), (iv), and (v) of this section, an issuer that satisfies the asset and activity requirements of paragraphs (c)(15)(i) and (ii) of this section.

(i) *Asset requirements.* The issuer's assets must be composed solely of:

(A) Loans as defined in § 44.2(t);

(B) Debt instruments, subject to paragraph (c)(15)(iv) of this section;

(C) Rights and other assets that are related or incidental to acquiring, holding, servicing, or selling such loans or debt instruments, provided that:

(*1*) Each right or asset held under this paragraph (c)(15)(i)(C) that is a security is either:

(*i*) A cash equivalent (which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to either the underlying loans or the debt instruments);

(*ii*) A security received in lieu of debts previously contracted with respect to such loans or debt instruments; or

(*iii*) An equity security (or right to acquire an equity security) received on customary terms in connection with such loans or debt instruments; and

(*2*) Rights or other assets held under this paragraph (c)(15)(i)(C) of this section may not include commodity forward contracts or any derivative; and

(D) Interest rate or foreign exchange derivatives, if:

(*1*) The written terms of the derivative directly relate to the loans, debt instruments, or other rights or assets described in paragraph (c)(15)(i)(C) of this section; and

(*2*) The derivative reduces the interest rate and/or foreign exchange risks related to the loans, debt instruments, or other rights or assets described in paragraph (c)(15)(i)(C) of this section.

(ii) *Activity requirements.* To be eligible for the exclusion of paragraph (c)(15) of this section, an issuer must:

(A) Not engage in any activity that would constitute proprietary trading under § 44.3(b)(l)(i), as if the issuer were a banking entity; and

(B) Not issue asset-backed securities.

(iii) *Requirements for a sponsor, investment adviser, or commodity trading advisor.* A banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an issuer that meets the conditions in paragraphs (c)(15)(i) and (ii) of this section may not rely on this exclusion unless the banking entity:

(A) Provides in writing to any prospective and actual investor in the issuer the disclosures required under § 44.11(a)(8) of this subpart, as if the issuer were a covered fund;

(B) Ensures that the activities of the issuer are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly; and

(C) Complies with the limitations imposed in § 44.14, as if the issuer were a covered fund, except the banking entity may acquire and retain any ownership interest in the issuer.

(iv) *Additional Banking Entity Requirements.* A banking entity may not rely on this exclusion with respect to an issuer that meets the conditions in paragraphs (c)(15)(i) and (ii) of this section unless:

(A) The banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the issuer or of any entity to which such issuer extends credit or in which such issuer invests; and

(B) Any assets the issuer holds pursuant to paragraphs (c)(15)(i)(B) or (i)(C)(*1*)(*iii*) of this section would be permissible for the banking entity to acquire and hold directly under applicable federal banking laws and regulations.

(v) *Investment and Relationship Limits.* A banking entity's investment in, and relationship with, the issuer must:

(A) Comply with the limitations imposed in § 44.15, as if the issuer were a covered fund; and

(B) Be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.

(16) *Qualifying venture capital funds.* (i) Subject to paragraphs (c)(16)(ii) through (iv) of this section, an issuer that:

(A) Is a venture capital fund as defined in 17 CFR 275.203(l)–1; and

(B) Does not engage in any activity that would constitute proprietary trading under § 44.3(b)(1)(i), as if the issuer were a banking entity.

(ii) A banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an issuer

that meets the conditions in paragraph (c)(16)(i) of this section may not rely on this exclusion unless the banking entity:

(A) Provides in writing to any prospective and actual investor in the issuer the disclosures required under § 44.11(a)(8), as if the issuer were a covered fund;

(B) Ensures that the activities of the issuer are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly; and

(C) Complies with the restrictions in § 44.14 as if the issuer were a covered fund (except the banking entity may acquire and retain any ownership interest in the issuer).

(iii) The banking entity must not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the issuer.

(iv) A banking entity's ownership interest in or relationship with the issuer must:

(A) Comply with the limitations imposed in § 44.15, as if the issuer were a covered fund; and

(B) Be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.

(17) *Family wealth management vehicles.* (i) Subject to paragraph (c)(17)(ii) of this section, any entity that is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities, and:

(A) If the entity is a trust, the grantor(s) of the entity are all family customers; and

(B) If the entity is not a trust:

(*1*) A majority of the voting interests in the entity are owned (directly or indirectly) by family customers;

(*2*) A majority of the interests in the entity are owned (directly or indirectly) by family customers;

(*3*) The entity is owned only by family customers and up to 5 closely related persons of the family customers; and

(C) Notwithstanding paragraph (c)(17)(i)(A) and (B) of this section, up to an aggregate 0.5 percent of the entity's outstanding ownership interests may be acquired or retained by one or more entities that are not family customers or closely related persons if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.

(ii) A banking entity may rely on the exclusion in paragraph (c)(17)(i) of this section with respect to an entity provided that the banking entity (or an affiliate):

(A) Provides bona fide trust, fiduciary, investment advisory, or commodity trading advisory services to the entity;

(B) Does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such entity;

(C) Complies with the disclosure obligations under § 44.11(a)(8), as if such entity were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the entity;

(D) Does not acquire or retain, as principal, an ownership interest in the entity, other than as described in paragraph (c)(17)(i)(C) of this section;

(E) Complies with the requirements of §§ 44.14(b) and 44.15, as if such entity were a covered fund; and

(F) Except for riskless principal transactions as defined in paragraph (d)(11) of this section, complies with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the entity were an affiliate thereof.

(iii) For purposes of paragraph (c)(17) of this section, the following definitions apply:

(A) *Closely related person* means a natural person (including the estate and estate planning vehicles of such person) who has longstanding business or personal relationships with any family customer.

(B) *Family customer* means:

(*1*) A family client, as defined in Rule 202(a)(11)(G)–1(d)(4) of the Investment Advisers Act of 1940 (17 CFR 275.202(a)(11)(G)–1(d)(4)); or

(*2*) Any natural person who is a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law of a family client, or a spouse or a spousal equivalent of any of the foregoing.

(18) *Customer facilitation vehicles.* (i) Subject to paragraph (c)(18)(ii) of this section, an issuer that is formed by or at the request of a customer of the banking entity for the purpose of providing such customer (which may include one or more affiliates of such customer) with exposure to a transaction, investment strategy, or other service provided by the banking entity.

(ii) A banking entity may rely on the exclusion in paragraph (c)(18)(i) of this section with respect to an issuer provided that:

(A) All of the ownership interests of the issuer are owned by the customer (which may include one or more of its affiliates) for whom the issuer was created;

(B) Notwithstanding paragraph (c)(18)(ii)(A) of this section, up to an aggregate 0.5 percent of the issuer's outstanding ownership interests may be acquired or retained by one or more entities that are not customers if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns; and

(C) The banking entity and its affiliates:

(*1*) Maintain documentation outlining how the banking entity intends to facilitate the customer's exposure to such transaction, investment strategy, or service;

(*2*) Do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such issuer;

(*3*) Comply with the disclosure obligations under § 44.11(a)(8), as if such issuer were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the issuer;

(*4*) Do not acquire or retain, as principal, an ownership interest in the issuer, other than as described in paragraph (c)(18)(ii)(B) of this section;

(*5*) Comply with the requirements of §§ 44.14(b) and 44.15, as if such issuer were a covered fund; and

(*6*) Except for riskless principal transactions as defined in paragraph (d)(11) of this section, comply with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the issuer were an affiliate thereof.

* * * * *

(d) * * *

(6) *Ownership interest.* (i) *Ownership interest* means any equity, partnership, or other similar interest. An ''other similar interest'' means an interest that:

(A) Has the right to participate in the selection or removal of a general partner, managing member, member of the board of directors or trustees, investment manager, investment adviser, or commodity trading advisor of the covered fund, excluding:

(*1*) The rights of a creditor to exercise remedies upon the occurrence of an

event of default or an acceleration event; and

(*2*) The right to participate in the removal of an investment manager for ''cause'' or participate in the selection of a replacement manager upon an investment manager's resignation or removal. For purposes of this paragraph (d)(6)(i)(A)(*2*), ''cause'' for removal of an investment manager means one or more of the following events:

(i) The bankruptcy, insolvency, conservatorship or receivership of the investment manager;

(ii) The breach by the investment manager of any material provision of the covered fund's transaction agreements applicable to the investment manager;

(iii) The breach by the investment manager of material representations or warranties;

(iv) The occurrence of an act that constitutes fraud or criminal activity in the performance of the investment manager's obligations under the covered fund's transaction agreements;

(v) The indictment of the investment manager for a criminal offense, or the indictment of any officer, member, partner or other principal of the investment manager for a criminal offense materially related to his or her investment management activities;

(vi) A change in control with respect to the investment manager;

(vii) The loss, separation or incapacitation of an individual critical to the operation of the investment manager or primarily responsible for the management of the covered fund's assets; or

(viii) Other similar events that constitute ''cause'' for removal of an investment manager, provided that such events are not solely related to the performance of the covered fund or the investment manager's exercise of investment discretion under the covered fund's transaction agreements;

(B) Has the right under the terms of the interest to receive a share of the income, gains or profits of the covered fund;

(C) Has the right to receive the underlying assets of the covered fund after all other interests have been redeemed and/or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(D) Has the right to receive all or a portion of excess spread (the positive difference, if any, between the aggregate interest payments received from the underlying assets of the covered fund and the aggregate interest paid to the holders of other outstanding interests);

(E) Provides under the terms of the interest that the amounts payable by the covered fund with respect to the interest could be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest;

(F) Receives income on a pass-through basis from the covered fund, or has a rate of return that is determined by reference to the performance of the underlying assets of the covered fund; or

(G) Any synthetic right to have, receive, or be allocated any of the rights in paragraphs (d)(6)(i)(A) through (F) of this section.

(ii) Ownership interest does not include:

(A) Restricted profit interest, which is an interest held by an entity (or an employee or former employee thereof) in a covered fund for which the entity (or employee thereof) serves as investment manager, investment adviser, commodity trading advisor, or other service provider, so long as:

(*1*) The sole purpose and effect of the interest is to allow the entity (or employee or former employee thereof) to share in the profits of the covered fund as performance compensation for the investment management, investment advisory, commodity trading advisory, or other services provided to the covered fund by the entity (or employee or former employee thereof), provided that the entity (or employee or former employee thereof) may be obligated under the terms of such interest to return profits previously received;

(*2*) All such profit, once allocated, is distributed to the entity (or employee or former employee thereof) promptly after being earned or, if not so distributed, is retained by the covered fund for the sole purpose of establishing a reserve amount to satisfy contractual obligations with respect to subsequent losses of the covered fund and such undistributed profit of the entity (or employee or former employee thereof) does not share in the subsequent investment gains of the covered fund;

(*3*) Any amounts invested in the covered fund, including any amounts paid by the entity in connection with obtaining the restricted profit interest, are within the limits of § 44.12 of this subpart; and

(*4*) The interest is not transferable by the entity (or employee or former employee thereof) except to an affiliate thereof (or an employee of the banking entity or affiliate), to immediate family members, or through the intestacy, of the employee or former employee, or in connection with a sale of the business that gave rise to the restricted profit interest by the entity (or employee or former employee thereof) to an unaffiliated party that provides investment management, investment advisory, commodity trading advisory, or other services to the fund.

(B) Any senior loan or senior debt interest that has the following characteristics:

(*1*) Under the terms of the interest the holders of such interest do not have the right to receive a share of the income, gains, or profits of the covered fund, but are entitled to receive only:

(*i*) Interest at a stated interest rate, as well as commitment fees or other fees, which are not determined by reference to the performance of the underlying assets of the covered fund; and

(*ii*) Repayment of a fixed principal amount, on or before a maturity date, in a contractually-determined manner (which may include prepayment premiums intended solely to reflect, and compensate holders of the interest for, forgone income resulting from an early prepayment);

(*2*) The entitlement to payments under the terms of the interest are absolute and could not be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest; and

(*3*) The holders of the interest are not entitled to receive the underlying assets of the covered fund after all other interests have been redeemed or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event).

* * * * *

(11) *Riskless principal transaction.* Riskless principal transaction means a transaction in which a banking entity, after receiving an order from a customer to buy (or sell) a security, purchases (or sells) the security in the secondary market for its own account to offset a contemporaneous sale to (or purchase from) the customer.

■ 4. Amend § 44.12 by:

■ a. Revising paragraph (b)(1)(ii);

■ b. Revising paragraph (b)(4);

■ c. Adding paragraph (b)(5);

■ d. Revising paragraph (c)(1); and

■ e. Revising paragraphs (d) and (e).

The revisions and addition read as follows:

§ 44.12 Permitted investment in a covered fund.

* * * * *

(b) * * *

(1) * * *

(ii) *Treatment of registered investment companies, SEC-regulated business development companies, and foreign public funds.* For purposes of paragraph (b)(1)(i) of this section, a registered investment company, SEC-regulated business development companies, or foreign public fund as described in § 44.10(c)(1) will not be considered to be an affiliate of the banking entity so long as:

(A) The banking entity, together with its affiliates, does not own, control, or hold with the power to vote 25 percent or more of the voting shares of the company or fund; and

(B) The banking entity, or an affiliate of the banking entity, provides investment advisory, commodity trading advisory, administrative, and other services to the company or fund in compliance with the limitations under applicable regulation, order, or other authority.

* * * * *

(4) *Multi-tier fund investments.* (i) *Master-feeder fund investments.* If the principal investment strategy of a covered fund (the ''feeder fund'') is to invest substantially all of its assets in another single covered fund (the ''master fund''), then for purposes of the investment limitations in paragraphs (a)(2)(i)(B) and (a)(2)(ii) of this section, the banking entity's permitted investment in such funds shall be measured only by reference to the value of the master fund. The banking entity's permitted investment in the master fund shall include any investment by the banking entity in the master fund, as well as the banking entity's pro-rata share of any ownership interest in the master fund that is held through the feeder fund; and

(ii) *Fund-of-funds investments.* If a banking entity organizes and offers a covered fund pursuant to § 44.11 for the purpose of investing in other covered funds (a ''fund of funds'') and that fund of funds itself invests in another covered fund that the banking entity is permitted to own, then the banking entity's permitted investment in that other fund shall include any investment by the banking entity in that other fund, as well as the banking entity's pro-rata share of any ownership interest in the fund that is held through the fund of funds. The investment of the banking entity may not represent more than 3 percent of the amount or value of any single covered fund.

(5) *Parallel Investments and Co-Investments.* (i) A banking entity shall not be required to include in the calculation of the investment limits under paragraph (a)(2) of this section any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.

(ii) A banking entity shall not be restricted under this section in the amount of any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.

(c) * * *

(1)(i) For purposes of paragraph (a)(2)(iii) of this section, the aggregate value of all ownership interests held by a banking entity shall be the sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest in covered funds (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 44.10(d)(6)(ii)), on a historical cost basis;

(ii) Treatment of employee and director restricted profit interests financed by the banking entity. For purposes of paragraph (c)(1)(i) of this section, an investment by a director or employee of a banking entity who acquires a restricted profit interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the restricted profit interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

* * * * *

(d) *Capital treatment for a permitted investment in a covered fund.* For purposes of calculating compliance with the applicable regulatory capital requirements, a banking entity shall deduct from the banking entity's tier 1 capital (as determined under paragraph (c)(2) of this section) the greater of:

(1)(i) The sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 44.10(d)(6)(ii) of subpart C of this part), on a historical cost basis, plus any earnings received; and

(ii) The fair market value of the banking entity's ownership interests in the covered fund as determined under paragraph (b)(2)(ii) or (b)(3) of this section (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 44.10(d)(6)(ii) of subpart C of this part), if the banking entity accounts for the profits (or losses) of the fund investment in its financial statements.

(2) Treatment of employee and director restricted profit interests financed by the banking entity. For purposes of paragraph (d)(1) of this section, an investment by a director or employee of a banking entity who acquires a restricted profit interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the restricted profit interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(e) *Extension of time to divest an ownership interest.* (1) *Extension period.* Upon application by a banking entity, the Board may extend the period under paragraph (a)(2)(i) of this section for up to 2 additional years if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest.

(2) *Application requirements.* An application for extension must:

(i) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(ii) Provide the reasons for application, including information that addresses the factors in paragraph (e)(3) of this section; and

(iii) Explain the banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods as required in paragraph (a)(2) of this section.

(3) *Factors governing the Board determinations.* In reviewing any application under paragraph (e)(1) of this section, the Board may consider all the facts and circumstances related to the permitted investment in a covered fund, including:

(i) Whether the investment would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies;

(ii) The contractual terms governing the banking entity's interest in the covered fund;

(iii) The date on which the covered fund is expected to have attracted

sufficient investments from investors unaffiliated with the banking entity to enable the banking entity to comply with the limitations in paragraph (a)(2)(i) of this section;

(iv) The total exposure of the covered banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the banking entity and the financial stability of the United States;

(v) The cost to the banking entity of divesting or disposing of the investment within the applicable period;

(vi) Whether the investment or the divestiture or conformance of the investment would involve or result in a material conflict of interest between the banking entity and unaffiliated parties, including clients, customers, or counterparties to which it owes a duty;

(vii) The banking entity's prior efforts to reduce through redemption, sale, dilution, or other methods its ownership interests in the covered fund, including activities related to the marketing of interests in such covered fund;

(viii) Market conditions; and

(ix) Any other factor that the Board believes appropriate.

(4) *Authority to impose restrictions on activities or investment during any extension period.* The Board may impose such conditions on any extension approved under paragraph (e)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the BHC Act and this part.

(5) *Consultation.* In the case of a banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to acting on an application by the banking entity for an extension under paragraph (e)(1) of this section.

■ 5. Amend § 44.13 by adding paragraph (d) to read as follows:

§ 44.13 Other permitted covered fund activities and investments.

* * * * *

(d) *Permitted covered fund activities and investments of qualifying foreign excluded funds.* (1) The prohibition contained in § 44.10(a) does not apply to a qualifying foreign excluded fund.

(2) For purposes of this paragraph (d), a qualifying foreign excluded fund means a banking entity that:

(i) Is organized or established outside the United States, and the ownership interests of which are offered and sold solely outside the United States;

(ii)(A) Would be a covered fund if the entity were organized or established in the United States, or

(B) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;

(iii) Would not otherwise be a banking entity except by virtue of the acquisition or retention of an ownership interest in, sponsorship of, or relationship with the entity, by another banking entity that meets the following:

(A) The banking entity is not organized, or directly or indirectly controlled by a banking entity that is organized, under the laws of the United States or of any State; and

(B) The banking entity's acquisition of an ownership interest in or sponsorship of the fund by the foreign banking entity meets the requirements for permitted covered fund activities and investments solely outside the United States, as provided in § 44.13(b);

(iv) Is established and operated as part of a bona fide asset management business; and

(v) Is not operated in a manner that enables the banking entity that sponsors or controls the qualifying foreign excluded fund, or any of its affiliates, to evade the requirements of section 13 of the BHC Act or this part.

■ 6. Amend § 44.14 by:

■ a. Revising paragraph (a)(2)(i);

■ b. Revising paragraph (a)(2)(ii)(C);

■ c. Adding paragraphs (a)(2)(iii), (iv), (v), and (3); and

■ d. Revising paragraph (c).

The revisions and additions read as follows:

§ 44.14 Limitations on relationships with a covered fund.

(a) * * *

(2) * * *

(i) Acquire and retain any ownership interest in a covered fund in accordance with the requirements of §§ 44.11, 44.12, or 44.13;

(ii) * * *

(C) The Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity; and

(iii) Enter into a transaction with a covered fund that would be an exempt covered transaction under 12 U.S.C. 371c(d) or § 223.42 of the Board's Regulation W (12 CFR 223.42) subject to the limitations specified under 12 U.S.C. 371c(d) or § 223.42 of the Board's Regulation W (12 CFR 223.42), as applicable,

(iv) Enter into a riskless principal transaction with a covered fund; and

(v) Extend credit to or purchase assets from a covered fund, provided:

(A) Each extension of credit or purchase of assets is in the ordinary course of business in connection with payment transactions; settlement services; or futures, derivatives, and securities clearing;

(B) Each extension of credit is repaid, sold, or terminated by the end of five business days; and

(C) The banking entity making each extension of credit meets the requirements of § 223.42(l)(1)(i) and (ii) of the Board's Regulation W (12 CFR 223.42(l)(1)(i) and(ii)), as if the extension of credit was an intraday extension of credit, regardless of the duration of the extension of credit.

(3) Any transaction or activity permitted under paragraphs (a)(2)(iii), (iv) or (v) of this section must comply with the limitations in § 44.15.

* * * * *

(c) *Restrictions on other permitted transactions.* Any transaction permitted under paragraphs (a)(2)(ii), (iii), or (iv) of this section shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1) as if the counterparty were an affiliate of the banking entity under section 23B.

Subpart D—Compliance Program Requirements; Violations

■ 7. Amend § 44.20 by:

■ a. Revising paragraph (a);

■ b. Revising the heading of paragraph (d) and revising paragraph (d)(1); and

■ c. Revising the introductory text of paragraph (e).

The revisions and addition read as follows:

§ 44.20 Program for compliance; reporting.

(a) *Program requirement.* Each banking entity (other than a banking entity with limited trading assets and liabilities or a qualifying foreign excluded fund under section 44.6(f) or 44.13(d)) shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope, and detail of the compliance program shall be appropriate for the types, size, scope, and complexity of activities and business structure of the banking entity.

* * * * *

(d) *Reporting requirements under appendix A to this part.* (1) A banking

entity (other than a qualifying foreign excluded fund under section 44.6(f) or 44.13(d)) engaged in proprietary trading activity permitted under subpart B shall comply with the reporting requirements described in appendix A to this part, if:

* * * * *

(e) *Additional documentation for covered funds.* A banking entity with significant trading assets and liabilities (other than a qualifying foreign excluded fund under section 44.6(f) or 44.13(d)) shall maintain records that include:

* * * * *

BOARD OF GOVERNORS OF THE FEDERAL RESERVE

12 CFR Chapter II

Authority and Issuance

For the reasons stated in the Common Preamble, the Board amends chapter II of title 12, Code of Federal Regulations as follows:

PART 248—PROPRIETARY TRADING AND CERTAIN INTERESTS IN AND RELATIONSHIPS WITH COVERED FUNDS (Regulation VV)

■ 8. The authority citation for part 248 continues to read as follows:

Authority: 12 U.S.C. 1851, 12 U.S.C. 221 *et seq.,* 12 U.S.C. 1818, 12 U.S.C. 1841 *et seq.,* and 12 U.S.C. 3103 *et seq.*

Subpart B—Proprietary Trading

■ 9. Amend § 248.6 by adding paragraph (f) to read as follows:

§ 248.6 Other permitted proprietary trading activities.

* * * * *

(f) *Permitted trading activities of qualifying foreign excluded funds.* The prohibition contained in § 248.3(a) does not apply to the purchase or sale of a financial instrument by a qualifying foreign excluded fund. For purposes of this paragraph (f), a qualifying foreign excluded fund means a banking entity that:

(1) Is organized or established outside the United States, and the ownership interests of which are offered and sold solely outside the United States;

(2)(i) Would be a covered fund if the entity were organized or established in the United States, or

(ii) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;

(3) Would not otherwise be a banking entity except by virtue of the acquisition or retention of an ownership interest in, sponsorship of, or relationship with the entity, by another banking entity that meets the following:

(i) The banking entity is not organized, or directly or indirectly controlled by a banking entity that is organized, under the laws of the United States or of any State; and

(ii) The banking entity's acquisition or retention of an ownership interest in or sponsorship of the fund meets the requirements for permitted covered fund activities and investments solely outside the United States, as provided in § 248.13(b);

(4) Is established and operated as part of a bona fide asset management business; and

(5) Is not operated in a manner that enables the banking entity that sponsors or controls the qualifying foreign excluded fund, or any of its affiliates, to evade the requirements of section 13 of the BHC Act or this part.

Subpart C—Covered Funds Activities and Investments

■ 10. Amend § 248.10 by:
■ a. Revising paragraph (c)(1);
■ b. Revising paragraph (c)(3)(i);
■ c. Revising paragraph (c)(8);
■ d. Revising the heading of paragraph (c)(10) and revising paragraph (c)(10)(i);
■ e. Revising paragraph (c)(11);
■ f. Adding paragraphs (c)(15), (16), (17), and (18);
■ g. Revising paragraph (d)(6); and
■ h. Adding paragraph (d)(11).

The revisions and additions read as follows:

§ 248.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

* * * * *

(c) * * *

(1) *Foreign public funds.* (i) Subject to paragraphs (c)(1)(ii) and (iii) of this section, an issuer that:

(A) Is organized or established outside of the United States; and

(B) Is authorized to offer and sell ownership interests, and such interests are offered and sold, through one or more public offerings.

(ii) With respect to a banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State and any issuer for which such banking entity acts as sponsor, the sponsoring banking entity may not rely on the exemption in paragraph (c)(1)(i) of this section for such issuer unless more than 75 percent of the ownership interests in the issuer are sold to persons other than:

(A) Such sponsoring banking entity;

(B) Such issuer;

(C) Affiliates of such sponsoring banking entity or such issuer; and

(D) Directors and senior executive officers as defined in § 225.71(c) of the Board's Regulation Y (12 CFR 225.71(c)) of such entities.

(iii) For purposes of paragraph (c)(1)(i)(B) of this section, the term ''public offering'' means a distribution (as defined in § 248.4(a)(3)) of securities in any jurisdiction outside the United States to investors, including retail investors, provided that:

(A) The distribution is subject to substantive disclosure and retail investor protection laws or regulations;

(B) With respect to an issuer for which the banking entity serves as the investment manager, investment adviser, commodity trading advisor, commodity pool operator, or sponsor, the distribution complies with all applicable requirements in the jurisdiction in which such distribution is being made;

(C) The distribution does not restrict availability to investors having a minimum level of net worth or net investment assets; and

(D) The issuer has filed or submitted, with the appropriate regulatory authority in such jurisdiction, offering disclosure documents that are publicly available.

* * * * *

(3) * * *

(i) Is composed of no more than 10 unaffiliated co-venturers;

* * * * *

(8) *Loan securitizations.* (i) *Scope.* An issuing entity for asset-backed securities that satisfies all the conditions of this paragraph (c)(8) and the assets or holdings of which are composed solely of:

(A) Loans as defined in § 248.2(t);

(B) Rights or other assets designed to assure the servicing or timely distribution of proceeds to holders of such securities and rights or other assets that are related or incidental to purchasing or otherwise acquiring and holding the loans, provided that each asset that is a security (other than special units of beneficial interest and collateral certificates meeting the requirements of paragraph (c)(8)(v) of this section) meets the requirements of paragraph (c)(8)(iii) of this section;

(C) Interest rate or foreign exchange derivatives that meet the requirements of paragraph (c)(8)(iv) of this section;

(D) Special units of beneficial interest and collateral certificates that meet the requirements of paragraph (c)(8)(v) of this section; and

(E) Debt securities, other than asset-backed securities and convertible securities, provided that:

(*1*) The aggregate value of such debt securities does not exceed five percent of the aggregate value of loans held under paragraph (c)(8)(i)(A) of this section, cash and cash equivalents held under paragraph (c)(8)(iii)(A) of this section, and debt securities held under this paragraph (c)(8)(i)(E); and

(*2*) The aggregate value of the loans, cash and cash equivalents, and debt securities for purposes of this paragraph is calculated at par value at the most recent time any such debt security is acquired, except that the issuing entity may instead determine the value of any such loan, cash equivalent, or debt security based on its fair market value if:

(*i*) The issuing entity is required to use the fair market value of such assets for purposes of calculating compliance with concentration limitations or other similar calculations under its transaction agreements, and

(*ii*) The issuing entity's valuation methodology values similarly situated assets consistently.

(ii) *Impermissible assets.* For purposes of this paragraph (c)(8), except as permitted under paragraph (c)(8)(i)(E) of this section, the assets or holdings of the issuing entity shall not include any of the following:

(A) A security, including an asset-backed security, or an interest in an equity or debt security other than as permitted in paragraphs (c)(8)(iii), (iv), or (v) of this section;

(B) A derivative, other than a derivative that meets the requirements of paragraph (c)(8)(iv) of this section; or

(C) A commodity forward contract.

(iii) *Permitted securities.* Notwithstanding paragraph (c)(8)(ii)(A) of this section, the issuing entity may hold securities, other than debt securities permitted under paragraph (c)(8)(i)(E) of this section, if those securities are:

(A) Cash equivalents—which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the securitization's expected or potential need for funds and whose currency corresponds to either the underlying loans or the asset-backed securities—for purposes of the rights and assets in paragraph (c)(8)(i)(B) of this section; or

(B) Securities received in lieu of debts previously contracted with respect to the loans supporting the asset-backed securities.

(iv) *Derivatives.* The holdings of derivatives by the issuing entity shall be limited to interest rate or foreign exchange derivatives that satisfy all of the following conditions:

(A) The written terms of the derivatives directly relate to the loans, the asset-backed securities, the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section, or the debt securities described in paragraph (c)(8)(i)(E) of this section; and

(B) The derivatives reduce the interest rate and/or foreign exchange risks related to the loans, the asset-backed securities, the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section, or the debt securities described in paragraph (c)(8)(i)(E) of this section.

(v) *Special units of beneficial interest and collateral certificates.* The assets or holdings of the issuing entity may include collateral certificates and special units of beneficial interest issued by a special purpose vehicle, provided that:

(A) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate meets the requirements in this paragraph (c)(8);

(B) The special unit of beneficial interest or collateral certificate is used for the sole purpose of transferring to the issuing entity for the loan securitization the economic risks and benefits of the assets that are permissible for loan securitizations under this paragraph (c)(8) and does not directly or indirectly transfer any interest in any other economic or financial exposure;

(C) The special unit of beneficial interest or collateral certificate is created solely to satisfy legal requirements or otherwise facilitate the structuring of the loan securitization; and

(D) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate and the issuing entity are established under the direction of the same entity that initiated the loan securitization.

* * * * *

(10) *Qualifying covered bonds.* (i) *Scope.* An entity owning or holding a dynamic or fixed pool of loans or other assets as provided in paragraph (c)(8) of this section for the benefit of the holders of covered bonds, provided that the assets in the pool are composed solely of assets that meet the conditions in paragraph (c)(8)(i) of this section.

* * * * *

(11) *SBICs and public welfare investment funds.* An issuer:

(i) That is a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), or that has received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company, which notice or license has not been revoked, or that has voluntarily surrendered its license to operate as a small business investment company in accordance with 13 CFR 107.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets) after such voluntary surrender;

(ii) The business of which is to make investments that are:

(A) Designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs) and including investments that qualify for consideration under the regulations implementing the Community Reinvestment Act (12 U.S.C. 2901 *et seq.*); or

(B) Qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program;

(iii) That has elected to be regulated or is regulated as a rural business investment company, as described in 15 U.S.C. 80b-3(b)(8)(A) or (B), or that has terminated its participation as a rural business investment company in accordance with 7 CFR 4290.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets) after such termination; or

(iv) That is a qualified opportunity fund, as defined in 26 U.S.C. 1400Z–2(d).

* * * * *

(15) *Credit funds.* Subject to paragraphs (c)(15)(iii), (iv), and (v) of this section, an issuer that satisfies the asset and activity requirements of paragraphs (c)(15)(i) and (ii) of this section.

(i) *Asset requirements.* The issuer's assets must be composed solely of:

(A) Loans as defined in § 248.2(t);

(B) Debt instruments, subject to paragraph (c)(15)(iv) of this section;

(C) Rights and other assets that are related or incidental to acquiring, holding, servicing, or selling such loans or debt instruments, provided that:

(*1*) Each right or asset held under this paragraph (c)(15)(i)(C) that is a security is either:

(*i*) A cash equivalent (which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to either the underlying loans or the debt instruments);

(*ii*) A security received in lieu of debts previously contracted with respect to such loans or debt instruments; or

(*iii*) An equity security (or right to acquire an equity security) received on customary terms in connection with such loans or debt instruments; and

(*2*) Rights or other assets held under this paragraph (c)(15)(i)(C) of this section may not include commodity forward contracts or any derivative; and

(D) Interest rate or foreign exchange derivatives, if:

(*1*) The written terms of the derivative directly relate to the loans, debt instruments, or other rights or assets described in paragraph (c)(15)(i)(C) of this section; and

(*2*) The derivative reduces the interest rate and/or foreign exchange risks related to the loans, debt instruments, or other rights or assets described in paragraph (c)(15)(i)(C) of this section.

(ii) *Activity requirements.* To be eligible for the exclusion of paragraph (c)(15) of this section, an issuer must:

(A) Not engage in any activity that would constitute proprietary trading under § 248.3(b)(l)(i), as if the issuer were a banking entity; and

(B) Not issue asset-backed securities.

(iii) *Requirements for a sponsor, investment adviser, or commodity trading advisor.* A banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an issuer that meets the conditions in paragraphs (c)(15)(i) and (ii) of this section may not rely on this exclusion unless the banking entity:

(A) Provides in writing to any prospective and actual investor in the issuer the disclosures required under § 248.11(a)(8) of this subpart, as if the issuer were a covered fund;

(B) Ensures that the activities of the issuer are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly; and

(C) Complies with the limitations imposed in § 248.14, as if the issuer were a covered fund, except the banking entity may acquire and retain any ownership interest in the issuer.

(iv) *Additional Banking Entity Requirements.* A banking entity may not rely on this exclusion with respect to an issuer that meets the conditions in paragraphs (c)(15)(i) and (ii) of this section unless:

(A) The banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the issuer or of any entity to which such issuer extends credit or in which such issuer invests; and

(B) Any assets the issuer holds pursuant to paragraphs (c)(15)(i)(B) or (i)(C)(*1*)(*iii*) of this section would be permissible for the banking entity to acquire and hold directly under applicable federal banking laws and regulations.

(v) *Investment and Relationship Limits.* A banking entity's investment in, and relationship with, the issuer must:

(A) Comply with the limitations imposed in § 248.15, as if the issuer were a covered fund; and

(B) Be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.

(16) *Qualifying venture capital funds.* (i) Subject to paragraphs (c)(16)(ii) through (iv) of this section, an issuer that:

(A) Is a venture capital fund as defined in 17 CFR 275.203(l)–1; and

(B) Does not engage in any activity that would constitute proprietary trading under § 248.3(b)(1)(i), as if the issuer were a banking entity.

(ii) A banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an issuer that meets the conditions in paragraph (c)(16)(i) of this section may not rely on this exclusion unless the banking entity:

(A) Provides in writing to any prospective and actual investor in the issuer the disclosures required under § 248.11(a)(8), as if the issuer were a covered fund;

(B) Ensures that the activities of the issuer are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly; and

(C) Complies with the restrictions in § 248.14 as if the issuer were a covered fund (except the banking entity may acquire and retain any ownership interest in the issuer).

(iii) The banking entity must not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the issuer.

(iv) A banking entity's ownership interest in or relationship with the issuer must:

(A) Comply with the limitations imposed in § 248.15, as if the issuer were a covered fund; and

(B) Be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.

(17) *Family wealth management vehicles.* (i) Subject to paragraph (c)(17)(ii) of this section, any entity that is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities, and:

(A) If the entity is a trust, the grantor(s) of the entity are all family customers; and

(B) If the entity is not a trust:

(*1*) A majority of the voting interests in the entity are owned (directly or indirectly) by family customers;

(*2*) A majority of the interests in the entity are owned (directly or indirectly) by family customers;

(*3*) The entity is owned only by family customers and up to 5 closely related persons of the family customers; and

(C) Notwithstanding paragraph (c)(17)(i)(A) and (B) of this section, up to an aggregate 0.5 percent of the entity's outstanding ownership interests may be acquired or retained by one or more entities that are not family customers or closely related persons if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.

(ii) A banking entity may rely on the exclusion in paragraph (c)(17)(i) of this section with respect to an entity provided that the banking entity (or an affiliate):

(A) Provides bona fide trust, fiduciary, investment advisory, or commodity trading advisory services to the entity;

(B) Does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such entity;

(C) Complies with the disclosure obligations under § 248.11(a)(8), as if such entity were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to

accommodate the specific circumstances of the entity;

(D) Does not acquire or retain, as principal, an ownership interest in the entity, other than as described in paragraph (c)(17)(i)(C) of this section;

(E) Complies with the requirements of §§ 248.14(b) and 248.15, as if such entity were a covered fund; and

(F) Except for riskless principal transactions as defined in paragraph (d)(11) of this section, complies with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the entity were an affiliate thereof.

(iii) For purposes of paragraph (c)(17) of this section, the following definitions apply:

(A) *Closely related person* means a natural person (including the estate and estate planning vehicles of such person) who has longstanding business or personal relationships with any family customer.

(B) *Family customer* means:

(*1*) A family client, as defined in Rule 202(a)(11)(G)–1(d)(4) of the Investment Advisers Act of 1940 (17 CFR 275.202(a)(11)(G)–1(d)(4)); or

(*2*) Any natural person who is a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law of a family client, or a spouse or a spousal equivalent of any of the foregoing.

(18) *Customer facilitation vehicles.* (i) Subject to paragraph (c)(18)(ii) of this section, an issuer that is formed by or at the request of a customer of the banking entity for the purpose of providing such customer (which may include one or more affiliates of such customer) with exposure to a transaction, investment strategy, or other service provided by the banking entity.

(ii) A banking entity may rely on the exclusion in paragraph (c)(18)(i) of this section with respect to an issuer provided that:

(A) All of the ownership interests of the issuer are owned by the customer (which may include one or more of its affiliates) for whom the issuer was created;

(B) Notwithstanding paragraph (c)(18)(ii)(A) of this section, up to an aggregate 0.5 percent of the issuer's outstanding ownership interests may be acquired or retained by one or more entities that are not customers if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns; and

(C) The banking entity and its affiliates:

(*1*) Maintain documentation outlining how the banking entity intends to facilitate the customer's exposure to such transaction, investment strategy, or service;

(*2*) Do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such issuer;

(*3*) Comply with the disclosure obligations under § 248.11(a)(8), as if such issuer were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the issuer;

(*4*) Do not acquire or retain, as principal, an ownership interest in the issuer, other than as described in paragraph (c)(18)(ii)(B) of this section;

(*5*) Comply with the requirements of §§ 248.14(b) and 248.15, as if such issuer were a covered fund; and

(*6*) Except for riskless principal transactions as defined in paragraph (d)(11) of this section, comply with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the issuer were an affiliate thereof.

* * * * *

(d) * * *

(6) *Ownership interest.* (i) *Ownership interest* means any equity, partnership, or other similar interest. An ''other similar interest'' means an interest that:

(A) Has the right to participate in the selection or removal of a general partner, managing member, member of the board of directors or trustees, investment manager, investment adviser, or commodity trading advisor of the covered fund, excluding:

(*1*) The rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event; and

(*2*) The right to participate in the removal of an investment manager for ''cause'' or participate in the selection of a replacement manager upon an investment manager's resignation or removal. For purposes of this paragraph (d)(6)(i)(A)(*2*), ''cause'' for removal of an investment manager means one or more of the following events:

(i) The bankruptcy, insolvency, conservatorship or receivership of the investment manager;

(ii) The breach by the investment manager of any material provision of the covered fund's transaction agreements applicable to the investment manager;

(iii) The breach by the investment manager of material representations or warranties;

(iv) The occurrence of an act that constitutes fraud or criminal activity in the performance of the investment manager's obligations under the covered fund's transaction agreements;

(v) The indictment of the investment manager for a criminal offense, or the indictment of any officer, member, partner or other principal of the investment manager for a criminal offense materially related to his or her investment management activities;

(vi) A change in control with respect to the investment manager;

(vii) The loss, separation or incapacitation of an individual critical to the operation of the investment manager or primarily responsible for the management of the covered fund's assets; or

(viii) Other similar events that constitute ''cause'' for removal of an investment manager, provided that such events are not solely related to the performance of the covered fund or the investment manager's exercise of investment discretion under the covered fund's transaction agreements;

(B) Has the right under the terms of the interest to receive a share of the income, gains or profits of the covered fund;

(C) Has the right to receive the underlying assets of the covered fund after all other interests have been redeemed and/or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(D) Has the right to receive all or a portion of excess spread (the positive difference, if any, between the aggregate interest payments received from the underlying assets of the covered fund and the aggregate interest paid to the holders of other outstanding interests);

(E) Provides under the terms of the interest that the amounts payable by the covered fund with respect to the interest could be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest;

(F) Receives income on a pass-through basis from the covered fund, or has a rate of return that is determined by reference to the performance of the underlying assets of the covered fund; or

(G) Any synthetic right to have, receive, or be allocated any of the rights

in paragraphs (d)(6)(i)(A) through (F) of this section.

(ii) Ownership interest does not include:

(A) Restricted profit interest, which is an interest held by an entity (or an employee or former employee thereof) in a covered fund for which the entity (or employee thereof) serves as investment manager, investment adviser, commodity trading advisor, or other service provider, so long as:

(*1*) The sole purpose and effect of the interest is to allow the entity (or employee or former employee thereof) to share in the profits of the covered fund as performance compensation for the investment management, investment advisory, commodity trading advisory, or other services provided to the covered fund by the entity (or employee or former employee thereof), provided that the entity (or employee or former employee thereof) may be obligated under the terms of such interest to return profits previously received;

(*2*) All such profit, once allocated, is distributed to the entity (or employee or former employee thereof) promptly after being earned or, if not so distributed, is retained by the covered fund for the sole purpose of establishing a reserve amount to satisfy contractual obligations with respect to subsequent losses of the covered fund and such undistributed profit of the entity (or employee or former employee thereof) does not share in the subsequent investment gains of the covered fund;

(*3*) Any amounts invested in the covered fund, including any amounts paid by the entity in connection with obtaining the restricted profit interest, are within the limits of § 248.12 of this subpart; and

(*4*) The interest is not transferable by the entity (or employee or former employee thereof) except to an affiliate thereof (or an employee of the banking entity or affiliate), to immediate family members, or through the intestacy, of the employee or former employee, or in connection with a sale of the business that gave rise to the restricted profit interest by the entity (or employee or former employee thereof) to an unaffiliated party that provides investment management, investment advisory, commodity trading advisory, or other services to the fund.

(B) Any senior loan or senior debt interest that has the following characteristics:

(*1*) Under the terms of the interest the holders of such interest do not have the right to receive a share of the income, gains, or profits of the covered fund, but are entitled to receive only:

(*i*) Interest at a stated interest rate, as well as commitment fees or other fees, which are not determined by reference to the performance of the underlying assets of the covered fund; and

(*ii*) Repayment of a fixed principal amount, on or before a maturity date, in a contractually-determined manner (which may include prepayment premiums intended solely to reflect, and compensate holders of the interest for, forgone income resulting from an early prepayment);

(*2*) The entitlement to payments under the terms of the interest are absolute and could not be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest; and

(*3*) The holders of the interest are not entitled to receive the underlying assets of the covered fund after all other interests have been redeemed or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event).

* * * * *

(11) *Riskless principal transaction.* Riskless principal transaction means a transaction in which a banking entity, after receiving an order from a customer to buy (or sell) a security, purchases (or sells) the security in the secondary market for its own account to offset a contemporaneous sale to (or purchase from) the customer.

■ 11. Amend § 248.12 by:
■ a. Revising paragraph (b)(1)(ii);
■ b. Revising paragraph (b)(4);
■ c. Adding paragraph (b)(5);
■ d. Revising paragraph (c)(1); and
■ e. Revising paragraphs (d) and (e).

The revisions and addition read as follows:

§ 248.12 Permitted investment in a covered fund.

* * * * *

(b) * * *

(1) * * *

(ii) *Treatment of registered investment companies, SEC-regulated business development companies, and foreign public funds.* For purposes of paragraph (b)(1)(i) of this section, a registered investment company, SEC-regulated business development companies, or foreign public fund as described in § 248.10(c)(1) will not be considered to be an affiliate of the banking entity so long as:

(A) The banking entity, together with its affiliates, does not own, control, or hold with the power to vote 25 percent or more of the voting shares of the company or fund; and

(B) The banking entity, or an affiliate of the banking entity, provides investment advisory, commodity trading advisory, administrative, and other services to the company or fund in compliance with the limitations under applicable regulation, order, or other authority.

* * * * *

(4) *Multi-tier fund investments.* (i) *Master-feeder fund investments.* If the principal investment strategy of a covered fund (the ''feeder fund'') is to invest substantially all of its assets in another single covered fund (the ''master fund''), then for purposes of the investment limitations in paragraphs (a)(2)(i)(B) and (a)(2)(ii) of this section, the banking entity's permitted investment in such funds shall be measured only by reference to the value of the master fund. The banking entity's permitted investment in the master fund shall include any investment by the banking entity in the master fund, as well as the banking entity's pro-rata share of any ownership interest in the master fund that is held through the feeder fund; and

(ii) *Fund-of-funds investments.* If a banking entity organizes and offers a covered fund pursuant to § 248.11 for the purpose of investing in other covered funds (a ''fund of funds'') and that fund of funds itself invests in another covered fund that the banking entity is permitted to own, then the banking entity's permitted investment in that other fund shall include any investment by the banking entity in that other fund, as well as the banking entity's pro-rata share of any ownership interest in the fund that is held through the fund of funds. The investment of the banking entity may not represent more than 3 percent of the amount or value of any single covered fund.

(5) *Parallel Investments and Co-Investments.* (i) A banking entity shall not be required to include in the calculation of the investment limits under paragraph (a)(2) of this section any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.

(ii) A banking entity shall not be restricted under this section in the amount of any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.

(c) * * *

(1)(i) For purposes of paragraph (a)(2)(iii) of this section, the aggregate value of all ownership interests held by a banking entity shall be the sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest in covered funds (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 248.10(d)(6)(ii)), on a historical cost basis;

(ii) Treatment of employee and director restricted profit interests financed by the banking entity. For purposes of paragraph (c)(1)(i) of this section, an investment by a director or employee of a banking entity who acquires a restricted profit interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the restricted profit interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

* * * * *

(d) *Capital treatment for a permitted investment in a covered fund.* For purposes of calculating compliance with the applicable regulatory capital requirements, a banking entity shall deduct from the banking entity's tier 1 capital (as determined under paragraph (c)(2) of this section) the greater of:

(1)(i) The sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 248.10(d)(6)(ii) of subpart C of this part), on a historical cost basis, plus any earnings received; and

(ii) The fair market value of the banking entity's ownership interests in the covered fund as determined under paragraph (b)(2)(ii) or (b)(3) of this section (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 248.10(d)(6)(ii) of subpart C of this part), if the banking entity accounts for the profits (or losses) of the fund investment in its financial statements.

(2) Treatment of employee and director restricted profit interests financed by the banking entity. For purposes of paragraph (d)(1) of this section, an investment by a director or employee of a banking entity who acquires a restricted profit interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the restricted profit interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(e) *Extension of time to divest an ownership interest.* (1) *Extension period.* Upon application by a banking entity, the Board may extend the period under paragraph (a)(2)(i) of this section for up to 2 additional years if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest.

(2) *Application requirements.* An application for extension must:

(i) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(ii) Provide the reasons for application, including information that addresses the factors in paragraph (e)(3) of this section; and

(iii) Explain the banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods as required in paragraph (a)(2) of this section.

(3) *Factors governing the Board determinations.* In reviewing any application under paragraph (e)(1) of this section, the Board may consider all the facts and circumstances related to the permitted investment in a covered fund, including:

(i) Whether the investment would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies;

(ii) The contractual terms governing the banking entity's interest in the covered fund;

(iii) The date on which the covered fund is expected to have attracted sufficient investments from investors unaffiliated with the banking entity to enable the banking entity to comply with the limitations in paragraph (a)(2)(i) of this section;

(iv) The total exposure of the covered banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the banking entity and the financial stability of the United States;

(v) The cost to the banking entity of divesting or disposing of the investment within the applicable period;

(vi) Whether the investment or the divestiture or conformance of the investment would involve or result in a material conflict of interest between the banking entity and unaffiliated parties, including clients, customers, or counterparties to which it owes a duty;

(vii) The banking entity's prior efforts to reduce through redemption, sale, dilution, or other methods its ownership interests in the covered fund, including activities related to the marketing of interests in such covered fund;

(viii) Market conditions; and

(ix) Any other factor that the Board believes appropriate.

(4) *Authority to impose restrictions on activities or investment during any extension period.* The Board may impose such conditions on any extension approved under paragraph (e)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the BHC Act and this part.

(5) *Consultation.* In the case of a banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to acting on an application by the banking entity for an extension under paragraph (e)(1) of this section.

■ 12. Amend § 248.13 by adding paragraph (d) to read as follows:

§ 248.13 Other permitted covered fund activities and investments.

* * * * *

(d) *Permitted covered fund activities and investments of qualifying foreign excluded funds.* (1) The prohibition contained in § 248.10(a) does not apply to a qualifying foreign excluded fund.

(2) For purposes of this paragraph (d), a qualifying foreign excluded fund means a banking entity that:

(i) Is organized or established outside the United States, and the ownership interests of which are offered and sold solely outside the United States;

(ii)(A) Would be a covered fund if the entity were organized or established in the United States, or

(B) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;

(iii) Would not otherwise be a banking entity except by virtue of the acquisition or retention of an ownership interest in, sponsorship of, or relationship with the entity, by another banking entity that meets the following:

(A) The banking entity is not organized, or directly or indirectly controlled by a banking entity that is

organized, under the laws of the United States or of any State; and

(B) The banking entity's acquisition of an ownership interest in or sponsorship of the fund by the foreign banking entity meets the requirements for permitted covered fund activities and investments solely outside the United States, as provided in § 248.13(b);

(iv) Is established and operated as part of a bona fide asset management business; and

(v) Is not operated in a manner that enables the banking entity that sponsors or controls the qualifying foreign excluded fund, or any of its affiliates, to evade the requirements of section 13 of the BHC Act or this part.

■ 13. Amend § 248.14 by:

■ a. Revising paragraph (a)(2)(i);

■ b. Revising paragraph (a)(2)(ii)(C);

■ c. Adding paragraphs (a)(2)(iii), (iv), (v), and (3); and

■ d. Revising paragraph (c).

The revisions and additions read as follows:

§ 248.14 Limitations on relationships with a covered fund.

(a) * * *

(2) * * *

(i) Acquire and retain any ownership interest in a covered fund in accordance with the requirements of §§ 248.11, 248.12, or 248.13;

(ii) * * *

(C) The Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity; and

(iii) Enter into a transaction with a covered fund that would be an exempt covered transaction under 12 U.S.C. 371c(d) or § 223.42 of the Board's Regulation W (12 CFR 223.42) subject to the limitations specified under 12 U.S.C. 371c(d) or § 223.42 of the Board's Regulation W (12 CFR 223.42), as applicable,

(iv) Enter into a riskless principal transaction with a covered fund; and

(v) Extend credit to or purchase assets from a covered fund, provided:

(A) Each extension of credit or purchase of assets is in the ordinary course of business in connection with payment transactions; settlement services; or futures, derivatives, and securities clearing;

(B) Each extension of credit is repaid, sold, or terminated by the end of five business days; and

(C) The banking entity making each extension of credit meets the requirements of § 223.42(l)(1)(i) and (ii) of the Board's Regulation W (12 CFR 223.42(l)(1)(i) and(ii)), as if the extension of credit was an intraday extension of credit, regardless of the duration of the extension of credit.

(3) Any transaction or activity permitted under paragraphs (a)(2)(iii), (iv) or (v) must comply with the limitations in § 248.15.

* * * * *

(c) *Restrictions on other permitted transactions.* Any transaction permitted under paragraphs (a)(2)(ii), (iii), or (iv) of this section shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1) as if the counterparty were an affiliate of the banking entity under section 23B.

Subpart D—Compliance Program Requirements; Violations

■ 14. Amend § 248.20 by:

■ a. Revising paragraph (a);

■ b. Revising the heading of paragraph (d) and revising paragraph (d)(1) ; and

■ c. Revising the introductory text of paragraph (e).

The revisions and addition read as follows:

§ 248.20 Program for compliance; reporting.

(a) *Program requirement.* Each banking entity (other than a banking entity with limited trading assets and liabilities or a qualifying foreign excluded fund under §§ 248.6(f) or 248.13(d)) shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope, and detail of the compliance program shall be appropriate for the types, size, scope, and complexity of activities and business structure of the banking entity.

* * * * *

(d) *Reporting requirements under appendix A to this part.* (1) A banking entity (other than a qualifying foreign excluded fund under section 248.6(f) or 248.13(d)) engaged in proprietary trading activity permitted under subpart B shall comply with the reporting requirements described in appendix A to this part, if:

* * * * *

(e) *Additional documentation for covered funds.* A banking entity with significant trading assets and liabilities (other than a qualifying foreign excluded fund under section 248.6(f) or 248.13(d)) shall maintain records that include:

* * * * *

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Chapter III

Authority and Issuance

For the reasons set forth in the Common Preamble, the Federal Deposit Insurance Corporation amends chapter III of title 12, Code of Federal Regulations as follows:

PART 351—PROPRIETARY TRADING AND CERTAIN INTERESTS IN AND RELATIONSHIPS WITH COVERED FUNDS

■ 15. The authority citation for part 351 continues to read as follows:

Authority: 12 U.S.C. 1851; 1811 *et seq.;* 3101 *et seq.;* and 5412.

Subpart B—Proprietary Trading

■ 16. Amend § 351.6 by adding paragraph (f) to read as follows:

§ 351.6 Other permitted proprietary trading activities.

* * * * *

(f) *Permitted trading activities of qualifying foreign excluded funds.* The prohibition contained in § 351.3(a) does not apply to the purchase or sale of a financial instrument by a qualifying foreign excluded fund. For purposes of this paragraph (f), a qualifying foreign excluded fund means a banking entity that:

(1) Is organized or established outside the United States, and the ownership interests of which are offered and sold solely outside the United States;

(2)(i) Would be a covered fund if the entity were organized or established in the United States, or

(ii) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;

(3) Would not otherwise be a banking entity except by virtue of the acquisition or retention of an ownership interest in, sponsorship of, or relationship with the entity, by another banking entity that meets the following:

(i) The banking entity is not organized, or directly or indirectly controlled by a banking entity that is organized, under the laws of the United States or of any State; and

(ii) The banking entity's acquisition or retention of an ownership interest in or sponsorship of the fund meets the requirements for permitted covered fund activities and investments solely outside the United States, as provided in § 351.13(b);

(4) Is established and operated as part of a bona fide asset management business; and

(5) Is not operated in a manner that enables the banking entity that sponsors or controls the qualifying foreign excluded fund, or any of its affiliates, to evade the requirements of section 13 of the BHC Act or this part.

Subpart C—Covered Funds Activities and Investments

■ 17. Amend § 351.10 by:
■ a. Revising paragraph (c)(1);
■ b. Revising paragraph (c)(3)(i);
■ c. Revising paragraph (c)(8);
■ d. Revising the heading of paragraph (c)(10) and revising paragraph (c)(10)(i);
■ e. Revising paragraph (c)(11);
■ f. Adding paragraphs (c)(15), (16), (17), and (18);
■ g. Revising paragraph (d)(6); and
■ h. Adding paragraph (d)(11).

The revisions and additions read as follows:

§ 351.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

* * * * *

(c) * * *

(1) *Foreign public funds.* (i) Subject to paragraphs (c)(1)(ii) and (iii) of this section, an issuer that:

(A) Is organized or established outside of the United States; and

(B) Is authorized to offer and sell ownership interests, and such interests are offered and sold, through one or more public offerings.

(ii) With respect to a banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State and any issuer for which such banking entity acts as sponsor, the sponsoring banking entity may not rely on the exemption in paragraph (c)(1)(i) of this section for such issuer unless more than 75 percent of the ownership interests in the issuer are sold to persons other than:

(A) Such sponsoring banking entity;

(B) Such issuer;

(C) Affiliates of such sponsoring banking entity or such issuer; and

(D) Directors and senior executive officers as defined in § 225.71(c) of the Board's Regulation Y (12 CFR 225.71(c)) of such entities.

(iii) For purposes of paragraph (c)(1)(i)(B) of this section, the term *public offering* means a distribution (as defined in § 351.4(a)(3)) of securities in any jurisdiction outside the United States to investors, including retail investors, provided that:

(A) The distribution is subject to substantive disclosure and retail investor protection laws or regulations;

(B) With respect to an issuer for which the banking entity serves as the investment manager, investment adviser, commodity trading advisor, commodity pool operator, or sponsor, the distribution complies with all applicable requirements in the jurisdiction in which such distribution is being made;

(C) The distribution does not restrict availability to investors having a minimum level of net worth or net investment assets; and

(D) The issuer has filed or submitted, with the appropriate regulatory authority in such jurisdiction, offering disclosure documents that are publicly available.

* * * * *

(3) * * *

(i) Is composed of no more than 10 unaffiliated co-venturers;

* * * * *

(8) *Loan securitizations.* (i) *Scope.* An issuing entity for asset-backed securities that satisfies all the conditions of this paragraph (c)(8) and the assets or holdings of which are composed solely of:

(A) Loans as defined in § 351.2(t);

(B) Rights or other assets designed to assure the servicing or timely distribution of proceeds to holders of such securities and rights or other assets that are related or incidental to purchasing or otherwise acquiring and holding the loans, provided that each asset that is a security (other than special units of beneficial interest and collateral certificates meeting the requirements of paragraph (c)(8)(v) of this section) meets the requirements of paragraph (c)(8)(iii) of this section;

(C) Interest rate or foreign exchange derivatives that meet the requirements of paragraph (c)(8)(iv) of this section;

(D) Special units of beneficial interest and collateral certificates that meet the requirements of paragraph (c)(8)(v) of this section; and

(E) Debt securities, other than asset-backed securities and convertible securities, provided that:

(*1*) The aggregate value of such debt securities does not exceed five percent of the aggregate value of loans held under paragraph (c)(8)(i)(A) of this section, cash and cash equivalents held under paragraph (c)(8)(iii)(A) of this section, and debt securities held under this paragraph (c)(8)(i)(E); and

(*2*) The aggregate value of the loans, cash and cash equivalents, and debt securities for purposes of this paragraph is calculated at par value at the most recent time any such debt security is acquired, except that the issuing entity may instead determine the value of any such loan, cash equivalent, or debt security based on its fair market value if:

(*i*) The issuing entity is required to use the fair market value of such assets for purposes of calculating compliance with concentration limitations or other similar calculations under its transaction agreements, and

(*ii*) The issuing entity's valuation methodology values similarly situated assets consistently.

(ii) *Impermissible assets.* For purposes of this paragraph (c)(8), except as permitted under paragraph (c)(8)(i)(E) of this section, the assets or holdings of the issuing entity shall not include any of the following:

(A) A security, including an asset-backed security, or an interest in an equity or debt security other than as permitted in paragraphs (c)(8)(iii), (iv), or (v) of this section;

(B) A derivative, other than a derivative that meets the requirements of paragraph (c)(8)(iv) of this section; or

(C) A commodity forward contract.

(iii) *Permitted securities.* Notwithstanding paragraph (c)(8)(ii)(A) of this section, the issuing entity may hold securities, other than debt securities permitted under paragraph (c)(8)(i)(E) of this section, if those securities are:

(A) Cash equivalents—which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the securitization's expected or potential need for funds and whose currency corresponds to either the underlying loans or the asset-backed securities—for purposes of the rights and assets in paragraph (c)(8)(i)(B) of this section; or

(B) Securities received in lieu of debts previously contracted with respect to the loans supporting the asset-backed securities.

(iv) *Derivatives.* The holdings of derivatives by the issuing entity shall be limited to interest rate or foreign exchange derivatives that satisfy all of the following conditions:

(A) The written terms of the derivatives directly relate to the loans, the asset-backed securities, the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section, or the debt securities described in paragraph (c)(8)(i)(E) of this section; and

(B) The derivatives reduce the interest rate and/or foreign exchange risks related to the loans, the asset-backed securities, the contractual rights or other assets described in paragraph (c)(8)(i)(B)

of this section, or the debt securities described in paragraph (c)(8)(i)(E) of this section.

(v) *Special units of beneficial interest and collateral certificates.* The assets or holdings of the issuing entity may include collateral certificates and special units of beneficial interest issued by a special purpose vehicle, provided that:

(A) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate meets the requirements in this paragraph (c)(8);

(B) The special unit of beneficial interest or collateral certificate is used for the sole purpose of transferring to the issuing entity for the loan securitization the economic risks and benefits of the assets that are permissible for loan securitizations under this paragraph (c)(8) and does not directly or indirectly transfer any interest in any other economic or financial exposure;

(C) The special unit of beneficial interest or collateral certificate is created solely to satisfy legal requirements or otherwise facilitate the structuring of the loan securitization; and

(D) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate and the issuing entity are established under the direction of the same entity that initiated the loan securitization.

* * * * *

(10) *Qualifying covered bonds.* (i) *Scope.* An entity owning or holding a dynamic or fixed pool of loans or other assets as provided in paragraph (c)(8) of this section for the benefit of the holders of covered bonds, provided that the assets in the pool are composed solely of assets that meet the conditions in paragraph (c)(8)(i) of this section.

* * * * *

(11) *SBICs and public welfare investment funds.* An issuer:

(i) That is a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), or that has received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company, which notice or license has not been revoked, or that has voluntarily surrendered its license to operate as a small business investment company in accordance with 13 CFR 107.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets) after such voluntary surrender;

(ii) The business of which is to make investments that are:

(A) Designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs) and including investments that qualify for consideration under the regulations implementing the Community Reinvestment Act (12 U.S.C. 2901 *et seq.*); or

(B) Qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program;

(iii) That has elected to be regulated or is regulated as a rural business investment company, as described in 15 U.S.C. 80b–3(b)(8)(A) or (B), or that has terminated its participation as a rural business investment company in accordance with 7 CFR 4290.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets) after such termination; or

(iv) That is a qualified opportunity fund, as defined in 26 U.S.C. 1400Z–2(d).

* * * * *

(15) *Credit funds.* Subject to paragraphs (c)(15)(iii), (iv), and (v) of this section, an issuer that satisfies the asset and activity requirements of paragraphs (c)(15)(i) and (ii) of this section.

(i) *Asset requirements.* The issuer's assets must be composed solely of:

(A) Loans as defined in § 351.2(t);

(B) Debt instruments, subject to paragraph (c)(15)(iv) of this section;

(C) Rights and other assets that are related or incidental to acquiring, holding, servicing, or selling such loans or debt instruments, provided that:

(*1*) Each right or asset held under this paragraph (c)(15)(i)(C) that is a security is either:

(*i*) A cash equivalent (which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to either the underlying loans or the debt instruments);

(*ii*) A security received in lieu of debts previously contracted with respect to such loans or debt instruments; or

(*iii*) An equity security (or right to acquire an equity security) received on customary terms in connection with such loans or debt instruments; and

(*2*) Rights or other assets held under this paragraph (c)(15)(i)(C) of this section may not include commodity forward contracts or any derivative; and

(D) Interest rate or foreign exchange derivatives, if:

(*1*) The written terms of the derivative directly relate to the loans, debt instruments, or other rights or assets described in paragraph (c)(15)(i)(C) of this section; and

(*2*) The derivative reduces the interest rate and/or foreign exchange risks related to the loans, debt instruments, or other rights or assets described in paragraph (c)(15)(i)(C) of this section.

(ii) *Activity requirements.* To be eligible for the exclusion of paragraph (c)(15) of this section, an issuer must:

(A) Not engage in any activity that would constitute proprietary trading under § 351.3(b)(l)(i), as if the issuer were a banking entity; and

(B) Not issue asset-backed securities.

(iii) *Requirements for a sponsor, investment adviser, or commodity trading advisor.* A banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an issuer that meets the conditions in paragraphs (c)(15)(i) and (ii) of this section may not rely on this exclusion unless the banking entity:

(A) Provides in writing to any prospective and actual investor in the issuer the disclosures required under § 351.11(a)(8) of this subpart, as if the issuer were a covered fund;

(B) Ensures that the activities of the issuer are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly; and

(C) Complies with the limitations imposed in § 351.14, as if the issuer were a covered fund, except the banking entity may acquire and retain any ownership interest in the issuer.

(iv) *Additional Banking Entity Requirements.* A banking entity may not rely on this exclusion with respect to an issuer that meets the conditions in paragraphs (c)(15)(i) and (ii) of this section unless:

(A) The banking entity does not, directly or indirectly, guarantee,

assume, or otherwise insure the obligations or performance of the issuer or of any entity to which such issuer extends credit or in which such issuer invests; and

(B) Any assets the issuer holds pursuant to paragraphs (c)(15)(i)(B) or (i)(C)(*1*)(*iii*) of this section would be permissible for the banking entity to acquire and hold directly under applicable federal banking laws and regulations.

(v) *Investment and Relationship Limits.* A banking entity's investment in, and relationship with, the issuer must:

(A) Comply with the limitations imposed in § 351.15, as if the issuer were a covered fund; and

(B) Be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.

(16) *Qualifying venture capital funds.* (i) Subject to paragraphs (c)(16)(ii) through (iv) of this section, an issuer that:

(A) Is a venture capital fund as defined in 17 CFR 275.203(l)–1; and

(B) Does not engage in any activity that would constitute proprietary trading under § 351.3(b)(1)(i), as if the issuer were a banking entity.

(ii) A banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an issuer that meets the conditions in paragraph (c)(16)(i) of this section may not rely on this exclusion unless the banking entity:

(A) Provides in writing to any prospective and actual investor in the issuer the disclosures required under § 351.11(a)(8), as if the issuer were a covered fund;

(B) Ensures that the activities of the issuer are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly; and

(C) Complies with the restrictions in § 351.14 as if the issuer were a covered fund (except the banking entity may acquire and retain any ownership interest in the issuer).

(iii) The banking entity must not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the issuer.

(iv) A banking entity's ownership interest in or relationship with the issuer must:

(A) Comply with the limitations imposed in § 351.15, as if the issuer were a covered fund; and

(B) Be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.

(17) *Family wealth management vehicles.* (i) Subject to paragraph (c)(17)(ii) of this section, any entity that is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities, and:

(A) If the entity is a trust, the grantor(s) of the entity are all family customers; and

(B) If the entity is not a trust:

(*1*) A majority of the voting interests in the entity are owned (directly or indirectly) by family customers;

(*2*) A majority of the interests in the entity are owned (directly or indirectly) by family customers;

(*3*) The entity is owned only by family customers and up to 5 closely related persons of the family customers; and

(C) Notwithstanding paragraph (c)(17)(i)(A) and (B) of this section, up to an aggregate 0.5 percent of the entity's outstanding ownership interests may be acquired or retained by one or more entities that are not family customers or closely related persons if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.

(ii) A banking entity may rely on the exclusion in paragraph (c)(17)(i) of this section with respect to an entity provided that the banking entity (or an affiliate):

(A) Provides bona fide trust, fiduciary, investment advisory, or commodity trading advisory services to the entity;

(B) Does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such entity;

(C) Complies with the disclosure obligations under § 351.11(a)(8), as if such entity were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the entity;

(D) Does not acquire or retain, as principal, an ownership interest in the entity, other than as described in paragraph (c)(17)(i)(C) of this section;

(E) Complies with the requirements of §§ 351.14(b) and 351.15, as if such entity were a covered fund; and

(F) Except for riskless principal transactions as defined in paragraph (d)(11) of this section, complies with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the entity were an affiliate thereof.

(iii) For purposes of paragraph (c)(17) of this section, the following definitions apply:

(A) *Closely related person* means a natural person (including the estate and estate planning vehicles of such person) who has longstanding business or personal relationships with any family customer.

(B) *Family customer* means:

(*1*) A family client, as defined in Rule 202(a)(11)(G)–1(d)(4) of the Investment Advisers Act of 1940 (17 CFR 275.202(a)(11)(G)–1(d)(4)); or

(*2*) Any natural person who is a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law of a family client, or a spouse or a spousal equivalent of any of the foregoing.

(18) *Customer facilitation vehicles.* (i) Subject to paragraph (c)(18)(ii) of this section, an issuer that is formed by or at the request of a customer of the banking entity for the purpose of providing such customer (which may include one or more affiliates of such customer) with exposure to a transaction, investment strategy, or other service provided by the banking entity.

(ii) A banking entity may rely on the exclusion in paragraph (c)(18)(i) of this section with respect to an issuer provided that:

(A) All of the ownership interests of the issuer are owned by the customer (which may include one or more of its affiliates) for whom the issuer was created;

(B) Notwithstanding paragraph (c)(18)(ii)(A) of this section, up to an aggregate 0.5 percent of the issuer's outstanding ownership interests may be acquired or retained by one or more entities that are not customers if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns; and

(C) The banking entity and its affiliates:

(*1*) Maintain documentation outlining how the banking entity intends to facilitate the customer's exposure to such transaction, investment strategy, or service;

(*2*) Do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such issuer;

(*3*) Comply with the disclosure obligations under § 351.11(a)(8), as if such issuer were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of

disclosure may be modified to accommodate the specific circumstances of the issuer;

(*4*) Do not acquire or retain, as principal, an ownership interest in the issuer, other than as described in paragraph (c)(18)(ii)(B) of this section;

(*5*) Comply with the requirements of §§ 351.14(b) and 351.15, as if such issuer were a covered fund; and

(*6*) Except for riskless principal transactions as defined in paragraph (d)(11) of this section, comply with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the issuer were an affiliate thereof.

* * * * *

(d) * * *

(6) *Ownership interest.* (i) *Ownership interest* means any equity, partnership, or other similar interest. An other similar interest means an interest that:

(A) Has the right to participate in the selection or removal of a general partner, managing member, member of the board of directors or trustees, investment manager, investment adviser, or commodity trading advisor of the covered fund, excluding:

(*1*) The rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event; and

(*2*) The right to participate in the removal of an investment manager for ''cause'' or participate in the selection of a replacement manager upon an investment manager's resignation or removal. For purposes of this paragraph (d)(6)(i)(A)(*2*), ''cause'' for removal of an investment manager means one or more of the following events: *(i)* The bankruptcy, insolvency, conservatorship or receivership of the investment manager;

(ii) The breach by the investment manager of any material provision of the covered fund's transaction agreements applicable to the investment manager;

(iii) The breach by the investment manager of material representations or warranties;

(iv) The occurrence of an act that constitutes fraud or criminal activity in the performance of the investment manager's obligations under the covered fund's transaction agreements;

(v) The indictment of the investment manager for a criminal offense, or the indictment of any officer, member, partner or other principal of the investment manager for a criminal offense materially related to his or her investment management activities;

(vi) A change in control with respect to the investment manager;

(vii) The loss, separation or incapacitation of an individual critical to the operation of the investment manager or primarily responsible for the management of the covered fund's assets; or

(viii) Other similar events that constitute ''cause'' for removal of an investment manager, provided that such events are not solely related to the performance of the covered fund or the investment manager's exercise of investment discretion under the covered fund's transaction agreements;

(B) Has the right under the terms of the interest to receive a share of the income, gains or profits of the covered fund;

(C) Has the right to receive the underlying assets of the covered fund after all other interests have been redeemed and/or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(D) Has the right to receive all or a portion of excess spread (the positive difference, if any, between the aggregate interest payments received from the underlying assets of the covered fund and the aggregate interest paid to the holders of other outstanding interests);

(E) Provides under the terms of the interest that the amounts payable by the covered fund with respect to the interest could be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest;

(F) Receives income on a pass-through basis from the covered fund, or has a rate of return that is determined by reference to the performance of the underlying assets of the covered fund; or

(G) Any synthetic right to have, receive, or be allocated any of the rights in paragraphs (d)(6)(i)(A) through (F) of this section.

(ii) Ownership interest does not include:

(A) Restricted profit interest, which is an interest held by an entity (or an employee or former employee thereof) in a covered fund for which the entity (or employee thereof) serves as investment manager, investment adviser, commodity trading advisor, or other service provider, so long as:

(*1*) The sole purpose and effect of the interest is to allow the entity (or employee or former employee thereof) to share in the profits of the covered fund as performance compensation for the investment management, investment advisory, commodity trading advisory, or other services provided to the covered fund by the entity (or employee or former employee thereof), provided that the entity (or employee or former employee thereof) may be obligated under the terms of such interest to return profits previously received;

(*2*) All such profit, once allocated, is distributed to the entity (or employee or former employee thereof) promptly after being earned or, if not so distributed, is retained by the covered fund for the sole purpose of establishing a reserve amount to satisfy contractual obligations with respect to subsequent losses of the covered fund and such undistributed profit of the entity (or employee or former employee thereof) does not share in the subsequent investment gains of the covered fund;

(*3*) Any amounts invested in the covered fund, including any amounts paid by the entity in connection with obtaining the restricted profit interest, are within the limits of § 351.12 of this subpart; and

(*4*) The interest is not transferable by the entity (or employee or former employee thereof) except to an affiliate thereof (or an employee of the banking entity or affiliate), to immediate family members, or through the intestacy, of the employee or former employee, or in connection with a sale of the business that gave rise to the restricted profit interest by the entity (or employee or former employee thereof) to an unaffiliated party that provides investment management, investment advisory, commodity trading advisory, or other services to the fund.

(B) Any senior loan or senior debt interest that has the following characteristics:

(*1*) Under the terms of the interest the holders of such interest do not have the right to receive a share of the income, gains, or profits of the covered fund, but are entitled to receive only:

(*i*) Interest at a stated interest rate, as well as commitment fees or other fees, which are not determined by reference to the performance of the underlying assets of the covered fund; and

(*ii*) Repayment of a fixed principal amount, on or before a maturity date, in a contractually-determined manner (which may include prepayment premiums intended solely to reflect, and compensate holders of the interest for, forgone income resulting from an early prepayment);

(*2*) The entitlement to payments under the terms of the interest are absolute and could not be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the

amount of interest due and payable on the interest; and

(*3*) The holders of the interest are not entitled to receive the underlying assets of the covered fund after all other interests have been redeemed or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event).

* * * * *

(11) *Riskless principal transaction.* Riskless principal transaction means a transaction in which a banking entity, after receiving an order from a customer to buy (or sell) a security, purchases (or sells) the security in the secondary market for its own account to offset a contemporaneous sale to (or purchase from) the customer.

■ 18. Amend § 351.12 by:
■ a. Revising paragraph (b)(1)(ii);
■ b. Revising paragraph (b)(4);
■ c. Adding paragraph (b)(5);
■ d. Revising paragraph (c)(1); and
■ e. Revising paragraphs (d) and (e).

The revisions and addition read as follows:

§ 351.12 Permitted investment in a covered fund.

* * * * *

(b) * * *

(1) * * *

(ii) *Treatment of registered investment companies, SEC-regulated business development companies, and foreign public funds.* For purposes of paragraph (b)(1)(i) of this section, a registered investment company, SEC-regulated business development companies, or foreign public fund as described in § 351.10(c)(1) will not be considered to be an affiliate of the banking entity so long as:

(A) The banking entity, together with its affiliates, does not own, control, or hold with the power to vote 25 percent or more of the voting shares of the company or fund; and

(B) The banking entity, or an affiliate of the banking entity, provides investment advisory, commodity trading advisory, administrative, and other services to the company or fund in compliance with the limitations under applicable regulation, order, or other authority.

* * * * *

(4) *Multi-tier fund investments.* (i) *Master-feeder fund investments.* If the principal investment strategy of a covered fund (the ''feeder fund'') is to invest substantially all of its assets in another single covered fund (the ''master fund''), then for purposes of the investment limitations in paragraphs (a)(2)(i)(B) and (a)(2)(ii) of this section, the banking entity's permitted investment in such funds shall be measured only by reference to the value of the master fund. The banking entity's permitted investment in the master fund shall include any investment by the banking entity in the master fund, as well as the banking entity's pro-rata share of any ownership interest in the master fund that is held through the feeder fund; and

(ii) *Fund-of-funds investments.* If a banking entity organizes and offers a covered fund pursuant to § 351.11 for the purpose of investing in other covered funds (a ''fund of funds'') and that fund of funds itself invests in another covered fund that the banking entity is permitted to own, then the banking entity's permitted investment in that other fund shall include any investment by the banking entity in that other fund, as well as the banking entity's pro-rata share of any ownership interest in the fund that is held through the fund of funds. The investment of the banking entity may not represent more than 3 percent of the amount or value of any single covered fund.

(5) *Parallel Investments and Co-Investments.* (i) A banking entity shall not be required to include in the calculation of the investment limits under paragraph (a)(2) of this section any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.

(ii) A banking entity shall not be restricted under this section in the amount of any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.

(c) * * *

(1)(i) For purposes of paragraph (a)(2)(iii) of this section, the aggregate value of all ownership interests held by a banking entity shall be the sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest in covered funds (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 351.10(d)(6)(ii)), on a historical cost basis;

(ii) Treatment of employee and director restricted profit interests financed by the banking entity. For purposes of paragraph (c)(1)(i) of this section, an investment by a director or employee of a banking entity who acquires a restricted profit interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the restricted profit interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

* * * * *

(d) *Capital treatment for a permitted investment in a covered fund.* For purposes of calculating compliance with the applicable regulatory capital requirements, a banking entity shall deduct from the banking entity's tier 1 capital (as determined under paragraph (c)(2) of this section) the greater of:

(1)(i) The sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 351.10(d)(6)(ii) of subpart C of this part), on a historical cost basis, plus any earnings received; and

(ii) The fair market value of the banking entity's ownership interests in the covered fund as determined under paragraph (b)(2)(ii) or (b)(3) of this section (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 351.10(d)(6)(ii) of subpart C of this part), if the banking entity accounts for the profits (or losses) of the fund investment in its financial statements.

(2) Treatment of employee and director restricted profit interests financed by the banking entity. For purposes of paragraph (d)(1) of this section, an investment by a director or employee of a banking entity who acquires a restricted profit interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the restricted profit interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(e) *Extension of time to divest an ownership interest.* (1) *Extension period.* Upon application by a banking entity, the Board may extend the period under paragraph (a)(2)(i) of this section for up to 2 additional years if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest.

(2) *Application requirements.* An application for extension must:

(i) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(ii) Provide the reasons for application, including information that addresses the factors in paragraph (e)(3) of this section; and

(iii) Explain the banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods as required in paragraph (a)(2) of this section.

(3) *Factors governing the Board determinations.* In reviewing any application under paragraph (e)(1) of this section, the Board may consider all the facts and circumstances related to the permitted investment in a covered fund, including:

(i) Whether the investment would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies;

(ii) The contractual terms governing the banking entity's interest in the covered fund;

(iii) The date on which the covered fund is expected to have attracted sufficient investments from investors unaffiliated with the banking entity to enable the banking entity to comply with the limitations in paragraph (a)(2)(i) of this section;

(iv) The total exposure of the covered banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the banking entity and the financial stability of the United States;

(v) The cost to the banking entity of divesting or disposing of the investment within the applicable period;

(vi) Whether the investment or the divestiture or conformance of the investment would involve or result in a material conflict of interest between the banking entity and unaffiliated parties, including clients, customers, or counterparties to which it owes a duty;

(vii) The banking entity's prior efforts to reduce through redemption, sale, dilution, or other methods its ownership interests in the covered fund, including activities related to the marketing of interests in such covered fund;

(viii) Market conditions; and

(ix) Any other factor that the Board believes appropriate.

(4) *Authority to impose restrictions on activities or investment during any extension period.* The Board may impose such conditions on any extension approved under paragraph (e)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the BHC Act and this part.

(5) *Consultation.* In the case of a banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to acting on an application by the banking entity for an extension under paragraph (e)(1) of this section.

■ 19. Amend § 351.13 by adding paragraph (d) to read as follows:

§ 351.13 Other permitted covered fund activities and investments.

* * * * *

(d) *Permitted covered fund activities and investments of qualifying foreign excluded funds.* (1) The prohibition contained in § 351.10(a) does not apply to a qualifying foreign excluded fund.

(2) For purposes of this paragraph (d), a qualifying foreign excluded fund means a banking entity that:

(i) Is organized or established outside the United States, and the ownership interests of which are offered and sold solely outside the United States;

(ii)(A) Would be a covered fund if the entity were organized or established in the United States, or

(B) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;

(iii) Would not otherwise be a banking entity except by virtue of the acquisition or retention of an ownership interest in, sponsorship of, or relationship with the entity, by another banking entity that meets the following:

(A) The banking entity is not organized, or directly or indirectly controlled by a banking entity that is organized, under the laws of the United States or of any State; and

(B) The banking entity's acquisition of an ownership interest in or sponsorship of the fund by the foreign banking entity meets the requirements for permitted covered fund activities and investments solely outside the United States, as provided in § 351.13(b);

(iv) Is established and operated as part of a bona fide asset management business; and

(v) Is not operated in a manner that enables the banking entity that sponsors or controls the qualifying foreign excluded fund, or any of its affiliates, to evade the requirements of section 13 of the BHC Act or this part.

■ 20. Amend § 351.14 by:

■ a. Revising paragraph (a)(2)(i);

■ b. Revising paragraph (a)(2)(ii)(C);

■ c. Adding paragraphs (a)(2)(iii), (iv), (v), and (3); and

■ d. Revising paragraph (c).

The revisions and additions read as follows:

§ 351.14 Limitations on relationships with a covered fund.

(a) * * *

(2) * * *

(i) Acquire and retain any ownership interest in a covered fund in accordance with the requirements of §§ 351.11, 351.12, or 351.13;

(ii) * * *

(C) The Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity; and

(iii) Enter into a transaction with a covered fund that would be an exempt covered transaction under 12 U.S.C. 371c(d) or § 223.42 of the Board's Regulation W (12 CFR 223.42) subject to the limitations specified under 12 U.S.C. 371c(d) or § 223.42 of the Board's Regulation W (12 CFR 223.42), as applicable,

(iv) Enter into a riskless principal transaction with a covered fund; and

(v) Extend credit to or purchase assets from a covered fund, provided:

(A) Each extension of credit or purchase of assets is in the ordinary course of business in connection with payment transactions; settlement services; or futures, derivatives, and securities clearing;

(B) Each extension of credit is repaid, sold, or terminated by the end of five business days; and

(C) The banking entity making each extension of credit meets the requirements of § 223.42(l)(1)(i) and (ii) of the Board's Regulation W (12 CFR 223.42(l)(1)(i) and(ii)), as if the extension of credit was an intraday extension of credit, regardless of the duration of the extension of credit.

(3) Any transaction or activity permitted under paragraphs (a)(2)(iii), (iv) or (v) must comply with the limitations in § 351.15.

* * * * *

(c) *Restrictions on other permitted transactions.* Any transaction permitted under paragraphs (a)(2)(ii), (iii), or (iv) of this section shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1) as if the counterparty were an affiliate of the banking entity under section 23B.

Subpart D—Compliance Program Requirements; Violations

■ 21. Amend § 351.20 by:

■ a. Revising paragraph (a);

■ b. Revising the heading of paragraph (d) and revising paragraph (d)(1); and

■ c. Revising the introductory text of paragraph (e).

The revisions and addition read as follows:

§ 351.20 Program for compliance; reporting.

(a) *Program requirement.* Each banking entity (other than a banking entity with limited trading assets and liabilities or a qualifying foreign excluded fund under section 351.6(f) or 351.13(d)) shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope, and detail of the compliance program shall be appropriate for the types, size, scope, and complexity of activities and business structure of the banking entity.

* * * * *

(d) *Reporting requirements under appendix A to this part.* (1) A banking entity (other than a qualifying foreign excluded fund under section 351.6(f) or 351.13(d)) engaged in proprietary trading activity permitted under subpart B shall comply with the reporting requirements described in appendix A to this part, if:

* * * * *

(e) *Additional documentation for covered funds.* A banking entity with significant trading assets and liabilities (other than a qualifying foreign excluded fund under section 351.6(f) or 351.13(d)) shall maintain records that include:

* * * * *

COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter I

Authority and Issuance

For the reasons set forth in the Common Preamble, the Commodity Futures Trading Commission amends part 75 to chapter I of title 17 of the Code of Federal Regulations as follows:

PART 75—PROPRIETARY TRADING AND CERTAIN INTERESTS IN AND RELATIONSHIPS WITH COVERED FUNDS

■ 22. The authority citation for part 75 continues to read as follows:

Authority: 12 U.S.C. 1851.

Subpart B—Proprietary Trading

■ 23. Amend § 75.6 by adding paragraph (f) to read as follows:

§ 75.6 Other permitted proprietary trading activities.

* * * * *

(f) *Permitted trading activities of qualifying foreign excluded funds.* The prohibition contained in § 75.3(a) does not apply to the purchase or sale of a financial instrument by a qualifying foreign excluded fund. For purposes of this paragraph (f), a qualifying foreign excluded fund means a banking entity that:

(1) Is organized or established outside the United States, and the ownership interests of which are offered and sold solely outside the United States;

(2)(i) Would be a covered fund if the entity were organized or established in the United States, or

(ii) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;

(3) Would not otherwise be a banking entity except by virtue of the acquisition or retention of an ownership interest in, sponsorship of, or relationship with the entity, by another banking entity that meets the following:

(i) The banking entity is not organized, or directly or indirectly controlled by a banking entity that is organized, under the laws of the United States or of any State; and

(ii) The banking entity's acquisition or retention of an ownership interest in or sponsorship of the fund meets the requirements for permitted covered fund activities and investments solely outside the United States, as provided in § 75.13(b);

(4) Is established and operated as part of a bona fide asset management business; and

(5) Is not operated in a manner that enables the banking entity that sponsors or controls the qualifying foreign excluded fund, or any of its affiliates, to evade the requirements of section 13 of the BHC Act or this part.

Subpart C—Covered Funds Activities and Investments

■ 24. Amend § 75.10 by:

■ a. Revising paragraph (c)(1);

■ b. Revising paragraph (c)(3)(i);

■ c. Revising paragraph (c)(8);

■ d. Revising the heading of paragraph (c)(10) and revising paragraph (c)(10)(i);

■ e. Revising paragraph (c)(11);

■ f. Adding paragraphs (c)(15), (16), (17), and (18);

■ g. Revising paragraph (d)(6); and

■ h. Adding paragraph (d)(11).

The revisions and additions read as follows:

§ 75.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

* * * * *

(c) * * *

(1) *Foreign public funds.* (i) Subject to paragraphs (c)(1)(ii) and (iii) of this section, an issuer that:

(A) Is organized or established outside of the United States; and

(B) Is authorized to offer and sell ownership interests, and such interests are offered and sold, through one or more public offerings.

(ii) With respect to a banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State and any issuer for which such banking entity acts as sponsor, the sponsoring banking entity may not rely on the exemption in paragraph (c)(1)(i) of this section for such issuer unless more than 75 percent of the ownership interests in the issuer are sold to persons other than:

(A) Such sponsoring banking entity;

(B) Such issuer;

(C) Affiliates of such sponsoring banking entity or such issuer; and

(D) Directors and senior executive officers as defined in § 225.71(c) of the Board's Regulation Y (12 CFR 225.71(c)) of such entities.

(iii) For purposes of paragraph (c)(1)(i)(B) of this section, the term ''public offering'' means a distribution (as defined in § 75.4(a)(3)) of securities in any jurisdiction outside the United States to investors, including retail investors, provided that:

(A) The distribution is subject to substantive disclosure and retail investor protection laws or regulations;

(B) With respect to an issuer for which the banking entity serves as the investment manager, investment adviser, commodity trading advisor, commodity pool operator, or sponsor, the distribution complies with all applicable requirements in the jurisdiction in which such distribution is being made;

(C) The distribution does not restrict availability to investors having a minimum level of net worth or net investment assets; and

(D) The issuer has filed or submitted, with the appropriate regulatory authority in such jurisdiction, offering disclosure documents that are publicly available.

* * * * *

(3) * * *

(i) Is composed of no more than 10 unaffiliated co-venturers;

* * * * *

(8) *Loan securitizations.* (i) *Scope.* An issuing entity for asset-backed securities that satisfies all the conditions of this paragraph (c)(8) and the assets or holdings of which are composed solely of:

(A) Loans as defined in § 75.2(t);

(B) Rights or other assets designed to assure the servicing or timely distribution of proceeds to holders of such securities and rights or other assets that are related or incidental to purchasing or otherwise acquiring and holding the loans, provided that each asset that is a security (other than special units of beneficial interest and collateral certificates meeting the requirements of paragraph (c)(8)(v) of this section) meets the requirements of paragraph (c)(8)(iii) of this section;

(C) Interest rate or foreign exchange derivatives that meet the requirements of paragraph (c)(8)(iv) of this section;

(D) Special units of beneficial interest and collateral certificates that meet the requirements of paragraph (c)(8)(v) of this section; and

(E) Debt securities, other than asset-backed securities and convertible securities, provided that:

(*1*) The aggregate value of such debt securities does not exceed five percent of the aggregate value of loans held under paragraph (c)(8)(i)(A) of this section, cash and cash equivalents held under paragraph (c)(8)(iii)(A) of this section, and debt securities held under this paragraph (c)(8)(i)(E); and

(*2*) The aggregate value of the loans, cash and cash equivalents, and debt securities for purposes of this paragraph is calculated at par value at the most recent time any such debt security is acquired, except that the issuing entity may instead determine the value of any such loan, cash equivalent, or debt security based on its fair market value if:

(*i*) The issuing entity is required to use the fair market value of such assets for purposes of calculating compliance with concentration limitations or other similar calculations under its transaction agreements, and

(*ii*) The issuing entity's valuation methodology values similarly situated assets consistently.

(ii) *Impermissible assets.* For purposes of this paragraph (c)(8), except as permitted under paragraph (c)(8)(i)(E) of this section, the assets or holdings of the issuing entity shall not include any of the following:

(A) A security, including an asset-backed security, or an interest in an equity or debt security other than as permitted in paragraphs (c)(8)(iii), (iv), or (v) of this section;

(B) A derivative, other than a derivative that meets the requirements of paragraph (c)(8)(iv) of this section; or

(C) A commodity forward contract.

(iii) *Permitted securities.* Notwithstanding paragraph (c)(8)(ii)(A) of this section, the issuing entity may hold securities, other than debt securities permitted under paragraph (c)(8)(i)(E) of this section, if those securities are:

(A) Cash equivalents—which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the securitization's expected or potential need for funds and whose currency corresponds to either the underlying loans or the asset-backed securities—for purposes of the rights and assets in paragraph (c)(8)(i)(B) of this section; or

(B) Securities received in lieu of debts previously contracted with respect to the loans supporting the asset-backed securities.

(iv) *Derivatives.* The holdings of derivatives by the issuing entity shall be limited to interest rate or foreign exchange derivatives that satisfy all of the following conditions:

(A) The written terms of the derivatives directly relate to the loans, the asset-backed securities, the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section, or the debt securities described in paragraph (c)(8)(i)(E) of this section; and

(B) The derivatives reduce the interest rate and/or foreign exchange risks related to the loans, the asset-backed securities, the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section, or the debt securities described in paragraph (c)(8)(i)(E) of this section.

(v) *Special units of beneficial interest and collateral certificates.* The assets or holdings of the issuing entity may include collateral certificates and special units of beneficial interest issued by a special purpose vehicle, provided that:

(A) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate meets the requirements in this paragraph (c)(8);

(B) The special unit of beneficial interest or collateral certificate is used for the sole purpose of transferring to the issuing entity for the loan securitization the economic risks and benefits of the assets that are permissible for loan securitizations under this paragraph (c)(8) and does not directly or indirectly transfer any interest in any other economic or financial exposure;

(C) The special unit of beneficial interest or collateral certificate is created solely to satisfy legal requirements or otherwise facilitate the structuring of the loan securitization; and

(D) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate and the issuing entity are established under the direction of the same entity that initiated the loan securitization.

* * * * *

(10) *Qualifying covered bonds.* (i) *Scope.* An entity owning or holding a dynamic or fixed pool of loans or other assets as provided in paragraph (c)(8) of this section for the benefit of the holders of covered bonds, provided that the assets in the pool are composed solely of assets that meet the conditions in paragraph (c)(8)(i) of this section.

* * * * *

(11) * * *

(i) That is a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), or that has received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company, which notice or license has not been revoked, or that has voluntarily surrendered its license to operate as a small business investment company in accordance with 13 CFR 107.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets) after such voluntary surrender;

(ii) The business of which is to make investments that are:

(A) Designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs) and including investments that qualify for consideration under the regulations implementing the Community Reinvestment Act (12 U.S.C. 2901 *et seq.*); or

(B) Qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are

defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program;

(iii) That has elected to be regulated or is regulated as a rural business investment company, as described in 15 U.S.C. 80b–3(b)(8)(A) or (B), or that has terminated its participation as a rural business investment company in accordance with 7 CFR 4290.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets) after such termination; or

(iv) That is a qualified opportunity fund, as defined in 26 U.S.C. 1400Z–2(d).

* * * * *

(15) *Credit funds.* Subject to paragraphs (c)(15)(iii), (iv), and (v) of this section, an issuer that satisfies the asset and activity requirements of paragraphs (c)(15)(i) and (ii) of this section.

(i) *Asset requirements.* The issuer's assets must be composed solely of:

(A) Loans as defined in § 75.2(t);

(B) Debt instruments, subject to paragraph (c)(15)(iv) of this section;

(C) Rights and other assets that are related or incidental to acquiring, holding, servicing, or selling such loans or debt instruments, provided that:

(*1*) Each right or asset held under this paragraph (c)(15)(i)(C) that is a security is either:

(*i*) A cash equivalent (which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to either the underlying loans or the debt instruments);

(*ii*) A security received in lieu of debts previously contracted with respect to such loans or debt instruments; or

(*iii*) An equity security (or right to acquire an equity security) received on customary terms in connection with such loans or debt instruments; and

(*2*) Rights or other assets held under this paragraph (c)(15)(i)(C) of this section may not include commodity forward contracts or any derivative; and

(D) Interest rate or foreign exchange derivatives, if:

(*1*) The written terms of the derivative directly relate to the loans, debt instruments, or other rights or assets described in paragraph (c)(15)(i)(C) of this section; and

(*2*) The derivative reduces the interest rate and/or foreign exchange risks related to the loans, debt instruments, or other rights or assets described in paragraph (c)(15)(i)(C) of this section.

(ii) *Activity requirements.* To be eligible for the exclusion of paragraph (c)(15) of this section, an issuer must:

(A) Not engage in any activity that would constitute proprietary trading under § 75.3(b)(l)(i), as if the issuer were a banking entity; and

(B) Not issue asset-backed securities.

(iii) *Requirements for a sponsor, investment adviser, or commodity trading advisor.* A banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an issuer that meets the conditions in paragraphs (c)(15)(i) and (ii) of this section may not rely on this exclusion unless the banking entity:

(A) Provides in writing to any prospective and actual investor in the issuer the disclosures required under § 75.11(a)(8) of this subpart, as if the issuer were a covered fund;

(B) Ensures that the activities of the issuer are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly; and

(C) Complies with the limitations imposed in § 75.14, as if the issuer were a covered fund, except the banking entity may acquire and retain any ownership interest in the issuer.

(iv) *Additional Banking Entity Requirements.* A banking entity may not rely on this exclusion with respect to an issuer that meets the conditions in paragraphs (c)(15)(i) and (ii) of this section unless:

(A) The banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the issuer or of any entity to which such issuer extends credit or in which such issuer invests; and

(B) Any assets the issuer holds pursuant to paragraphs (c)(15)(i)(B) or (i)(C)(*l*)(*iii*) of this section would be permissible for the banking entity to acquire and hold directly under applicable federal banking laws and regulations.

(v) *Investment and Relationship Limits.* A banking entity's investment in, and relationship with, the issuer must:

(A) Comply with the limitations imposed in § 75.15, as if the issuer were a covered fund; and

(B) Be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.

(16) *Qualifying venture capital funds.* (i) Subject to paragraphs (c)(16)(ii) through (iv) of this section, an issuer that:

(A) Is a venture capital fund as defined in 17 CFR 275.203(l)–1; and

(B) Does not engage in any activity that would constitute proprietary trading under § 75.3(b)(1)(i), as if the issuer were a banking entity.

(ii) A banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an issuer that meets the conditions in paragraph (c)(16)(i) of this section may not rely on this exclusion unless the banking entity:

(A) Provides in writing to any prospective and actual investor in the issuer the disclosures required under § 75.11(a)(8), as if the issuer were a covered fund;

(B) Ensures that the activities of the issuer are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly; and

(C) Complies with the restrictions in § 75.14 as if the issuer were a covered fund (except the banking entity may acquire and retain any ownership interest in the issuer).

(iii) The banking entity must not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the issuer.

(iv) A banking entity's ownership interest in or relationship with the issuer must:

(A) Comply with the limitations imposed in § 75.15, as if the issuer were a covered fund; and

(B) Be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.

(17) *Family wealth management vehicles.* (i) Subject to paragraph (c)(17)(ii) of this section, any entity that is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities, and:

(A) If the entity is a trust, the grantor(s) of the entity are all family customers; and

(B) If the entity is not a trust:

(*1*) A majority of the voting interests in the entity are owned (directly or indirectly) by family customers;

(*2*) A majority of the interests in the entity are owned (directly or indirectly) by family customers;

(*3*) The entity is owned only by family customers and up to 5 closely related persons of the family customers; and

(C) Notwithstanding paragraph (c)(17)(i)(A) and (B) of this section, up to an aggregate 0.5 percent of the

entity's outstanding ownership interests may be acquired or retained by one or more entities that are not family customers or closely related persons if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.

(ii) A banking entity may rely on the exclusion in paragraph (c)(17)(i) of this section with respect to an entity provided that the banking entity (or an affiliate):

(A) Provides bona fide trust, fiduciary, investment advisory, or commodity trading advisory services to the entity;

(B) Does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such entity;

(C) Complies with the disclosure obligations under § 75.11(a)(8), as if such entity were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the entity;

(D) Does not acquire or retain, as principal, an ownership interest in the entity, other than as described in paragraph (c)(17)(i)(C) of this section;

(E) Complies with the requirements of §§ 75.14(b) and 75.15, as if such entity were a covered fund; and

(F) Except for riskless principal transactions as defined in paragraph (d)(11) of this section, complies with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the entity were an affiliate thereof.

(iii) For purposes of paragraph (c)(17) of this section, the following definitions apply:

(A) *Closely related person* means a natural person (including the estate and estate planning vehicles of such person) who has longstanding business or personal relationships with any family customer.

(B) *Family customer* means:

(*1*) A family client, as defined in Rule 202(a)(11)(G)–1(d)(4) of the Investment Advisers Act of 1940 (17 CFR 275.202(a)(11)(G)–1(d)(4)); or

(*2*) Any natural person who is a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law of a family client, or a spouse or a spousal equivalent of any of the foregoing.

(18) *Customer facilitation vehicles.* (i) Subject to paragraph (c)(18)(ii) of this section, an issuer that is formed by or at the request of a customer of the banking entity for the purpose of providing such customer (which may include one or more affiliates of such customer) with exposure to a transaction, investment strategy, or other service provided by the banking entity.

(ii) A banking entity may rely on the exclusion in paragraph (c)(18)(i) of this section with respect to an issuer provided that:

(A) All of the ownership interests of the issuer are owned by the customer (which may include one or more of its affiliates) for whom the issuer was created;

(B) Notwithstanding paragraph (c)(18)(ii)(A) of this section, up to an aggregate 0.5 percent of the issuer's outstanding ownership interests may be acquired or retained by one or more entities that are not customers if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns; and

(C) The banking entity and its affiliates:

(*1*) Maintain documentation outlining how the banking entity intends to facilitate the customer's exposure to such transaction, investment strategy, or service;

(*2*) Do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such issuer;

(*3*) Comply with the disclosure obligations under § 75.11(a)(8), as if such issuer were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the issuer;

(*4*) Do not acquire or retain, as principal, an ownership interest in the issuer, other than as described in paragraph (c)(18)(ii)(B) of this section;

(*5*) Comply with the requirements of §§ 75.14(b) and 75.15, as if such issuer were a covered fund; and

(*6*) Except for riskless principal transactions as defined in paragraph (d)(11) of this section, comply with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the issuer were an affiliate thereof.

* * * * *

(d) * * *

(6) *Ownership interest.* (i) *Ownership interest* means any equity, partnership, or other similar interest. An ''other similar interest'' means an interest that:

(A) Has the right to participate in the selection or removal of a general partner, managing member, member of the board of directors or trustees, investment manager, investment adviser, or commodity trading advisor of the covered fund, excluding:

(*1*) The rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event; and

(*2*) The right to participate in the removal of an investment manager for ''cause'' or participate in the selection of a replacement manager upon an investment manager's resignation or removal. For purposes of this paragraph (d)(6)(i)(A)(*2*), ''cause'' for removal of an investment manager means one or more of the following events:

(i) The bankruptcy, insolvency, conservatorship or receivership of the investment manager;

(ii) The breach by the investment manager of any material provision of the covered fund's transaction agreements applicable to the investment manager;

(iii) The breach by the investment manager of material representations or warranties;

(iv) The occurrence of an act that constitutes fraud or criminal activity in the performance of the investment manager's obligations under the covered fund's transaction agreements;

(v) The indictment of the investment manager for a criminal offense, or the indictment of any officer, member, partner or other principal of the investment manager for a criminal offense materially related to his or her investment management activities;

(vi) A change in control with respect to the investment manager;

(vii) The loss, separation or incapacitation of an individual critical to the operation of the investment manager or primarily responsible for the management of the covered fund's assets; or

(viii) Other similar events that constitute ''cause'' for removal of an investment manager, provided that such events are not solely related to the performance of the covered fund or the investment manager's exercise of investment discretion under the covered fund's transaction agreements;

(B) Has the right under the terms of the interest to receive a share of the income, gains or profits of the covered fund;

(C) Has the right to receive the underlying assets of the covered fund after all other interests have been redeemed and/or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an

event of default or an acceleration event);

(D) Has the right to receive all or a portion of excess spread (the positive difference, if any, between the aggregate interest payments received from the underlying assets of the covered fund and the aggregate interest paid to the holders of other outstanding interests);

(E) Provides under the terms of the interest that the amounts payable by the covered fund with respect to the interest could be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest;

(F) Receives income on a pass-through basis from the covered fund, or has a rate of return that is determined by reference to the performance of the underlying assets of the covered fund; or

(G) Any synthetic right to have, receive, or be allocated any of the rights in paragraphs (d)(6)(i)(A) through (F) of this section.

(ii) Ownership interest does not include:

(A) Restricted profit interest, which is an interest held by an entity (or an employee or former employee thereof) in a covered fund for which the entity (or employee thereof) serves as investment manager, investment adviser, commodity trading advisor, or other service provider, so long as:

(*1*) The sole purpose and effect of the interest is to allow the entity (or employee or former employee thereof) to share in the profits of the covered fund as performance compensation for the investment management, investment advisory, commodity trading advisory, or other services provided to the covered fund by the entity (or employee or former employee thereof), provided that the entity (or employee or former employee thereof) may be obligated under the terms of such interest to return profits previously received;

(*2*) All such profit, once allocated, is distributed to the entity (or employee or former employee thereof) promptly after being earned or, if not so distributed, is retained by the covered fund for the sole purpose of establishing a reserve amount to satisfy contractual obligations with respect to subsequent losses of the covered fund and such undistributed profit of the entity (or employee or former employee thereof) does not share in the subsequent investment gains of the covered fund;

(*3*) Any amounts invested in the covered fund, including any amounts paid by the entity in connection with obtaining the restricted profit interest, are within the limits of § 75.12 of this subpart; and

(*4*) The interest is not transferable by the entity (or employee or former employee thereof) except to an affiliate thereof (or an employee of the banking entity or affiliate), to immediate family members, or through the intestacy, of the employee or former employee, or in connection with a sale of the business that gave rise to the restricted profit interest by the entity (or employee or former employee thereof) to an unaffiliated party that provides investment management, investment advisory, commodity trading advisory, or other services to the fund.

(B) Any senior loan or senior debt interest that has the following characteristics:

(*1*) Under the terms of the interest the holders of such interest do not have the right to receive a share of the income, gains, or profits of the covered fund, but are entitled to receive only:

(*i*) Interest at a stated interest rate, as well as commitment fees or other fees, which are not determined by reference to the performance of the underlying assets of the covered fund; and

(*ii*) Repayment of a fixed principal amount, on or before a maturity date, in a contractually-determined manner (which may include prepayment premiums intended solely to reflect, and compensate holders of the interest for, forgone income resulting from an early prepayment);

(*2*) The entitlement to payments under the terms of the interest are absolute and could not be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest; and

(*3*) The holders of the interest are not entitled to receive the underlying assets of the covered fund after all other interests have been redeemed or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event).

* * * * *

(11) *Riskless principal transaction.* Riskless principal transaction means a transaction in which a banking entity, after receiving an order from a customer to buy (or sell) a security, purchases (or sells) the security in the secondary market for its own account to offset a contemporaneous sale to (or purchase from) the customer.

■ 26. Amend § 75.12 by:

■ a. Revising paragraph (b)(1)(ii);
■ b. Revising paragraph (b)(4);
■ c. Adding paragraph (b)(5);
■ d. Revising paragraph (c)(1); and
■ e. Revising paragraphs (d) and (e).

The revisions and addition read as follows:

§ 75.12 Permitted investment in a covered fund.

* * * * *

(b) * * *

(1) * * *

(ii) *Treatment of registered investment companies, SEC-regulated business development companies, and foreign public funds.* For purposes of paragraph (b)(1)(i) of this section, a registered investment company, SEC-regulated business development companies, or foreign public fund as described in § 75.10(c)(1) will not be considered to be an affiliate of the banking entity so long as:

(A) The banking entity, together with its affiliates, does not own, control, or hold with the power to vote 25 percent or more of the voting shares of the company or fund; and

(B) The banking entity, or an affiliate of the banking entity, provides investment advisory, commodity trading advisory, administrative, and other services to the company or fund in compliance with the limitations under applicable regulation, order, or other authority.

* * * * *

(4) *Multi-tier fund investments.* (i) *Master-feeder fund investments.* If the principal investment strategy of a covered fund (the ''feeder fund'') is to invest substantially all of its assets in another single covered fund (the ''master fund''), then for purposes of the investment limitations in paragraphs (a)(2)(i)(B) and (a)(2)(ii) of this section, the banking entity's permitted investment in such funds shall be measured only by reference to the value of the master fund. The banking entity's permitted investment in the master fund shall include any investment by the banking entity in the master fund, as well as the banking entity's pro-rata share of any ownership interest in the master fund that is held through the feeder fund; and

(ii) *Fund-of-funds investments.* If a banking entity organizes and offers a covered fund pursuant to § 75.11 for the purpose of investing in other covered funds (a ''fund of funds'') and that fund of funds itself invests in another covered fund that the banking entity is permitted to own, then the banking entity's permitted investment in that other fund shall include any investment by the banking entity in that other fund,

as well as the banking entity's pro-rata share of any ownership interest in the fund that is held through the fund of funds. The investment of the banking entity may not represent more than 3 percent of the amount or value of any single covered fund.

(5) *Parallel Investments and Co-Investments.* (i) A banking entity shall not be required to include in the calculation of the investment limits under paragraph (a)(2) of this section any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.

(ii) A banking entity shall not be restricted under this section in the amount of any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.

(c) * * *

(1)(i) For purposes of paragraph (a)(2)(iii) of this section, the aggregate value of all ownership interests held by a banking entity shall be the sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest in covered funds (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 75.10(d)(6)(ii)), on a historical cost basis;

(ii) Treatment of employee and director restricted profit interests financed by the banking entity. For purposes of paragraph (c)(1)(i) of this section, an investment by a director or employee of a banking entity who acquires a restricted profit interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the restricted profit interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

* * * * *

(d) *Capital treatment for a permitted investment in a covered fund.* For purposes of calculating compliance with the applicable regulatory capital requirements, a banking entity shall deduct from the banking entity's tier 1 capital (as determined under paragraph (c)(2) of this section) the greater of:

(1)(i) The sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 75.10(d)(6)(ii) of subpart C of this part), on a historical cost basis, plus any earnings received; and

(ii) The fair market value of the banking entity's ownership interests in the covered fund as determined under paragraph (b)(2)(ii) or (b)(3) of this section (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 75.10(d)(6)(ii) of subpart C of this part), if the banking entity accounts for the profits (or losses) of the fund investment in its financial statements.

(2) Treatment of employee and director restricted profit interests financed by the banking entity. For purposes of paragraph (d)(1) of this section, an investment by a director or employee of a banking entity who acquires a restricted profit interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the restricted profit interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(e) *Extension of time to divest an ownership interest.* (1) *Extension period.* Upon application by a banking entity, the Board may extend the period under paragraph (a)(2)(i) of this section for up to 2 additional years if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest.

(2) *Application requirements.* An application for extension must:

(i) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(ii) Provide the reasons for application, including information that addresses the factors in paragraph (e)(3) of this section; and

(iii) Explain the banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods as required in paragraph (a)(2) of this section.

(3) *Factors governing the Board determinations.* In reviewing any application under paragraph (e)(1) of this section, the Board may consider all the facts and circumstances related to the permitted investment in a covered fund, including:

(i) Whether the investment would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies;

(ii) The contractual terms governing the banking entity's interest in the covered fund;

(iii) The date on which the covered fund is expected to have attracted sufficient investments from investors unaffiliated with the banking entity to enable the banking entity to comply with the limitations in paragraph (a)(2)(i) of this section;

(iv) The total exposure of the covered banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the banking entity and the financial stability of the United States;

(v) The cost to the banking entity of divesting or disposing of the investment within the applicable period;

(vi) Whether the investment or the divestiture or conformance of the investment would involve or result in a material conflict of interest between the banking entity and unaffiliated parties, including clients, customers, or counterparties to which it owes a duty;

(vii) The banking entity's prior efforts to reduce through redemption, sale, dilution, or other methods its ownership interests in the covered fund, including activities related to the marketing of interests in such covered fund;

(viii) Market conditions; and

(ix) Any other factor that the Board believes appropriate.

(4) *Authority to impose restrictions on activities or investment during any extension period.* The Board may impose such conditions on any extension approved under paragraph (e)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the BHC Act and this part.

(5) *Consultation.* In the case of a banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to acting on an application by the banking entity for an extension under paragraph (e)(1) of this section.

■ 26. Amend § 75.13 by adding paragraph (d) to read as follows:

§ 75.13 Other permitted covered fund activities and investments.

* * * * *

(d) *Permitted covered fund activities and investments of qualifying foreign excluded funds.* (1) The prohibition

contained in § 75.10(a) does not apply to a qualifying foreign excluded fund.

(2) For purposes of this paragraph (d), a qualifying foreign excluded fund means a banking entity that:

(i) Is organized or established outside the United States, and the ownership interests of which are offered and sold solely outside the United States;

(ii)(A) Would be a covered fund if the entity were organized or established in the United States, or

(B) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;

(iii) Would not otherwise be a banking entity except by virtue of the acquisition or retention of an ownership interest in, sponsorship of, or relationship with the entity, by another banking entity that meets the following:

(A) The banking entity is not organized, or directly or indirectly controlled by a banking entity that is organized, under the laws of the United States or of any State; and

(B) The banking entity's acquisition of an ownership interest in or sponsorship of the fund by the foreign banking entity meets the requirements for permitted covered fund activities and investments solely outside the United States, as provided in § 75.13(b);

(iv) Is established and operated as part of a bona fide asset management business; and

(v) Is not operated in a manner that enables the banking entity that sponsors or controls the qualifying foreign excluded fund, or any of its affiliates, to evade the requirements of section 13 of the BHC Act or this part.

■ 27. Amend § 75.14 by:

■ a. Revising paragraph (a)(2)(i);

■ b. Revising paragraph (a)(2)(ii)(C);

■ c. Adding paragraphs (a)(2)(iii), (iv), (v), and (3); and

■ d. Revising paragraph (c).

The revisions and additions read as follows:

§ 75.14 Limitations on relationships with a covered fund.

(a) * * *

(2) * * *

(i) Acquire and retain any ownership interest in a covered fund in accordance with the requirements of §§ 75.11, 75.12, or 75.13;

(ii) * * *

(C) The Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity; and

(iii) Enter into a transaction with a covered fund that would be an exempt covered transaction under 12 U.S.C. 371c(d) or § 223.42 of the Board's Regulation W (12 CFR 223.42) subject to the limitations specified under 12 U.S.C. 371c(d) or § 223.42 of the Board's Regulation W (12 CFR 223.42), as applicable,

(iv) Enter into a riskless principal transaction with a covered fund; and

(v) Extend credit to or purchase assets from a covered fund, provided:

(A) Each extension of credit or purchase of assets is in the ordinary course of business in connection with payment transactions; settlement services; or futures, derivatives, and securities clearing;

(B) Each extension of credit is repaid, sold, or terminated by the end of five business days; and

(C) The banking entity making each extension of credit meets the requirements of § 223.42(l)(1)(i) and (ii) of the Board's Regulation W (12 CFR 223.42(l)(1)(i) and(ii)), as if the extension of credit was an intraday extension of credit, regardless of the duration of the extension of credit.

(3) Any transaction or activity permitted under paragraphs (a)(2)(iii), (iv) or (v) must comply with the limitations in § 75.15.

* * * * *

(c) *Restrictions on other permitted transactions.* Any transaction permitted under paragraphs (a)(2)(ii), (iii), or (iv) of this section shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1) as if the counterparty were an affiliate of the banking entity under section 23B.

Subpart D—Compliance Program Requirements; Violations

■ 28. Amend § 75.20 by:

■ a. Revising paragraph (a);

■ b. Revising the heading of paragraph (d) and revising paragraph (d)(1); and

■ c. Revising the introductory text of paragraph (e).

The revisions and addition read as follows:

§ 75.20 Program for compliance; reporting.

(a) *Program requirement.* Each banking entity (other than a banking entity with limited trading assets and liabilities or a qualifying foreign excluded fund under section 75.6(f) or 75.13(d)) shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope, and detail of the compliance program shall be appropriate for the types, size, scope, and complexity of activities and business structure of the banking entity.

* * * * *

(d) *Reporting requirements under appendix A to this part.* (1) A banking entity (other than a qualifying foreign excluded fund under section 75.6(f) or 75.13(d)) engaged in proprietary trading activity permitted under subpart B shall comply with the reporting requirements described in appendix A to this part, if:

* * * * *

(e) *Additional documentation for covered funds.* A banking entity with significant trading assets and liabilities (other than a qualifying foreign excluded fund under section 75.6(f) or 75.13(d)) shall maintain records that include:

* * * * *

SECURITIES AND EXCHANGE COMMISSION

17 CFR Chapter II

Authority and Issuance

For the reasons set forth in the Common Preamble, the Securities and Exchange Commission amends part 255 to chapter II of title 17 of the Code of Federal Regulations as follows:

PART 255—PROPRIETARY TRADING AND CERTAIN INTERESTS IN AND RELATIONSHIPS WITH COVERED FUNDS

■ 29. The authority citation for part 255 continues to read as follows:

Authority: 12 U.S.C. 1851.

Subpart B—Proprietary Trading

■ 30. Amend § 255.6 by adding paragraph (f) to read as follows:

§ 255.6 Other permitted proprietary trading activities.

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(f) *Permitted trading activities of qualifying foreign excluded funds.* The prohibition contained in § 255.3(a) does not apply to the purchase or sale of a financial instrument by a qualifying foreign excluded fund. For purposes of this paragraph (f), a qualifying foreign excluded fund means a banking entity that:

(1) Is organized or established outside the United States, and the ownership interests of which are offered and sold solely outside the United States;

(2)(i) Would be a covered fund if the entity were organized or established in the United States, or

(ii) Is, or holds itself out as being, an entity or arrangement that raises money

from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;

(3) Would not otherwise be a banking entity except by virtue of the acquisition or retention of an ownership interest in, sponsorship of, or relationship with the entity, by another banking entity that meets the following:

(i) The banking entity is not organized, or directly or indirectly controlled by a banking entity that is organized, under the laws of the United States or of any State; and

(ii) The banking entity's acquisition or retention of an ownership interest in or sponsorship of the fund meets the requirements for permitted covered fund activities and investments solely outside the United States, as provided in § 255.13(b);

(4) Is established and operated as part of a bona fide asset management business; and

(5) Is not operated in a manner that enables the banking entity that sponsors or controls the qualifying foreign excluded fund, or any of its affiliates, to evade the requirements of section 13 of the BHC Act or this part.

Subpart C—Covered Funds Activities and Investments

■ 31. Amend § 255.10 by:
■ a. Revising paragraph (c)(1);
■ b. Revising paragraph (c)(3)(i);
■ c. Revising paragraph (c)(8);
■ d. Revising the heading of paragraph (c)(10) and revising paragraph (c)(10)(i);
■ e. Revising paragraph (c)(11);
■ f. Adding paragraphs (c)(15), (16), (17), and (18);
■ g. Revising paragraph (d)(6); and
■ h. Adding paragraph (d)(11).

The revisions and additions read as follows:

§ 255.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

* * * * *

(c) * * *

(1) *Foreign public funds.* (i) Subject to paragraphs (c)(1)(ii) and (iii) of this section, an issuer that:

(A) Is organized or established outside of the United States; and

(B) Is authorized to offer and sell ownership interests, and such interests are offered and sold, through one or more public offerings.

(ii) With respect to a banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State and any issuer for which such banking entity acts as sponsor, the sponsoring banking entity may not rely on the exemption in paragraph (c)(1)(i) of this section for such issuer unless more than 75 percent of the ownership interests in the issuer are sold to persons other than:

(A) Such sponsoring banking entity;

(B) Such issuer;

(C) Affiliates of such sponsoring banking entity or such issuer; and

(D) Directors and senior executive officers as defined in § 225.71(c) of the Board's Regulation Y (12 CFR 225.71(c)) of such entities.

(iii) For purposes of paragraph (c)(1)(i)(B) of this section, the term ''public offering'' means a distribution (as defined in § 255.4(a)(3)) of securities in any jurisdiction outside the United States to investors, including retail investors, provided that:

(A) The distribution is subject to substantive disclosure and retail investor protection laws or regulations;

(B) With respect to an issuer for which the banking entity serves as the investment manager, investment adviser, commodity trading advisor, commodity pool operator, or sponsor, the distribution complies with all applicable requirements in the jurisdiction in which such distribution is being made;

(C) The distribution does not restrict availability to investors having a minimum level of net worth or net investment assets; and

(D) The issuer has filed or submitted, with the appropriate regulatory authority in such jurisdiction, offering disclosure documents that are publicly available.

* * * * *

(3) * * *

(i) Is composed of no more than 10 unaffiliated co-venturers;

* * * * *

(8) *Loan securitizations.* (i) *Scope.* An issuing entity for asset-backed securities that satisfies all the conditions of this paragraph (c)(8) and the assets or holdings of which are composed solely of:

(A) Loans as defined in § 255.2(t);

(B) Rights or other assets designed to assure the servicing or timely distribution of proceeds to holders of such securities and rights or other assets that are related or incidental to purchasing or otherwise acquiring and holding the loans, provided that each asset that is a security (other than special units of beneficial interest and collateral certificates meeting the requirements of paragraph (c)(8)(v) of this section) meets the requirements of paragraph (c)(8)(iii) of this section;

(C) Interest rate or foreign exchange derivatives that meet the requirements of paragraph (c)(8)(iv) of this section;

(D) Special units of beneficial interest and collateral certificates that meet the requirements of paragraph (c)(8)(v) of this section; and

(E) Debt securities, other than asset-backed securities and convertible securities, provided that:

(*1*) The aggregate value of such debt securities does not exceed five percent of the aggregate value of loans held under paragraph (c)(8)(i)(A) of this section, cash and cash equivalents held under paragraph (c)(8)(iii)(A) of this section, and debt securities held under this paragraph (c)(8)(i)(E); and

(*2*) The aggregate value of the loans, cash and cash equivalents, and debt securities for purposes of this paragraph is calculated at par value at the most recent time any such debt security is acquired, except that the issuing entity may instead determine the value of any such loan, cash equivalent, or debt security based on its fair market value if:

(*i*) The issuing entity is required to use the fair market value of such assets for purposes of calculating compliance with concentration limitations or other similar calculations under its transaction agreements, and

(*ii*) The issuing entity's valuation methodology values similarly situated assets consistently.

(ii) *Impermissible assets.* For purposes of this paragraph (c)(8), except as permitted under paragraph (c)(8)(i)(E) of this section, the assets or holdings of the issuing entity shall not include any of the following:

(A) A security, including an asset-backed security, or an interest in an equity or debt security other than as permitted in paragraphs (c)(8)(iii), (iv), or (v) of this section;

(B) A derivative, other than a derivative that meets the requirements of paragraph (c)(8)(iv) of this section; or

(C) A commodity forward contract.

(iii) *Permitted securities.* Notwithstanding paragraph (c)(8)(ii)(A) of this section, the issuing entity may hold securities, other than debt securities permitted under paragraph (c)(8)(i)(E) of this section, if those securities are:

(A) Cash equivalents—which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the securitization's expected or potential need for funds and whose currency corresponds to either the underlying loans or the asset-backed securities—for purposes of the rights and assets in paragraph (c)(8)(i)(B) of this section; or

(B) Securities received in lieu of debts previously contracted with respect to the loans supporting the asset-backed securities.

(iv) *Derivatives.* The holdings of derivatives by the issuing entity shall be limited to interest rate or foreign exchange derivatives that satisfy all of the following conditions:

(A) The written terms of the derivatives directly relate to the loans, the asset-backed securities, the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section, or the debt securities described in paragraph (c)(8)(i)(E) of this section; and

(B) The derivatives reduce the interest rate and/or foreign exchange risks related to the loans, the asset-backed securities, the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section, or the debt securities described in paragraph (c)(8)(i)(E) of this section.

(v) *Special units of beneficial interest and collateral certificates.* The assets or holdings of the issuing entity may include collateral certificates and special units of beneficial interest issued by a special purpose vehicle, provided that:

(A) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate meets the requirements in this paragraph (c)(8);

(B) The special unit of beneficial interest or collateral certificate is used for the sole purpose of transferring to the issuing entity for the loan securitization the economic risks and benefits of the assets that are permissible for loan securitizations under this paragraph (c)(8) and does not directly or indirectly transfer any interest in any other economic or financial exposure;

(C) The special unit of beneficial interest or collateral certificate is created solely to satisfy legal requirements or otherwise facilitate the structuring of the loan securitization; and

(D) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate and the issuing entity are established under the direction of the same entity that initiated the loan securitization.

* * * * *

(10) *Qualifying covered bonds.* (i) *Scope.* An entity owning or holding a dynamic or fixed pool of loans or other assets as provided in paragraph (c)(8) of this section for the benefit of the holders of covered bonds, provided that the assets in the pool are composed solely of assets that meet the conditions in paragraph (c)(8)(i) of this section.

* * * * *

(11) * * *

(i) That is a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), or that has received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company, which notice or license has not been revoked, or that has voluntarily surrendered its license to operate as a small business investment company in accordance with 13 CFR 107.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets) after such voluntary surrender;

(ii) The business of which is to make investments that are:

(A) Designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs) and including investments that qualify for consideration under the regulations implementing the Community Reinvestment Act (12 U.S.C. 2901 *et seq.*); or

(B) Qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program;

(iii) That has elected to be regulated or is regulated as a rural business investment company, as described in 15 U.S.C. 80b–3(b)(8)(A) or (B), or that has terminated its participation as a rural business investment company in accordance with 7 CFR 4290.1900 and does not make any new investments (other than investments in cash equivalents, which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to the issuer's assets) after such termination; or

(iv) That is a qualified opportunity fund, as defined in 26 U.S.C. 1400Z–2(d).

* * * * *

(15) *Credit funds.* Subject to paragraphs (c)(15)(iii), (iv), and (v) of this section, an issuer that satisfies the asset and activity requirements of paragraphs (c)(15)(i) and (ii) of this section.

(i) *Asset requirements.* The issuer's assets must be composed solely of:

(A) Loans as defined in § 255.2(t);

(B) Debt instruments, subject to paragraph (c)(15)(iv) of this section;

(C) Rights and other assets that are related or incidental to acquiring, holding, servicing, or selling such loans or debt instruments, provided that:

(*1*) Each right or asset held under this paragraph (c)(15)(i)(C) that is a security is either:

(*i*) A cash equivalent (which, for the purposes of this paragraph, means high quality, highly liquid investments whose maturity corresponds to the issuer's expected or potential need for funds and whose currency corresponds to either the underlying loans or the debt instruments);

(*ii*) A security received in lieu of debts previously contracted with respect to such loans or debt instruments; or

(*iii*) An equity security (or right to acquire an equity security) received on customary terms in connection with such loans or debt instruments; and

(*2*) Rights or other assets held under this paragraph (c)(15)(i)(C) of this section may not include commodity forward contracts or any derivative; and

(D) Interest rate or foreign exchange derivatives, if:

(*1*) The written terms of the derivative directly relate to the loans, debt instruments, or other rights or assets described in paragraph (c)(15)(i)(C) of this section; and

(*2*) The derivative reduces the interest rate and/or foreign exchange risks related to the loans, debt instruments, or other rights or assets described in paragraph (c)(15)(i)(C) of this section.

(ii) *Activity requirements.* To be eligible for the exclusion of paragraph (c)(15) of this section, an issuer must:

(A) Not engage in any activity that would constitute proprietary trading under § 255.3(b)(l)(i), as if the issuer were a banking entity; and

(B) Not issue asset-backed securities.

(iii) *Requirements for a sponsor, investment adviser, or commodity trading advisor.* A banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an issuer that meets the conditions in paragraphs (c)(15)(i) and (ii) of this section may not rely on this exclusion unless the banking entity:

(A) Provides in writing to any prospective and actual investor in the issuer the disclosures required under

§ 255.11(a)(8) of this subpart, as if the issuer were a covered fund;

(B) Ensures that the activities of the issuer are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly; and

(C) Complies with the limitations imposed in § 255.14, as if the issuer were a covered fund, except the banking entity may acquire and retain any ownership interest in the issuer.

(iv) *Additional Banking Entity Requirements.* A banking entity may not rely on this exclusion with respect to an issuer that meets the conditions in paragraphs (c)(15)(i) and (ii) of this section unless:

(A) The banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the issuer or of any entity to which such issuer extends credit or in which such issuer invests; and

(B) Any assets the issuer holds pursuant to paragraphs (c)(15)(i)(B) or (i)(C)(*1*)(*iii*) of this section would be permissible for the banking entity to acquire and hold directly under applicable federal banking laws and regulations.

(v) *Investment and Relationship Limits.* A banking entity's investment in, and relationship with, the issuer must:

(A) Comply with the limitations imposed in § 255.15, as if the issuer were a covered fund; and

(B) Be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.

(16) *Qualifying venture capital funds.* (i) Subject to paragraphs (c)(16)(ii) through (iv) of this section, an issuer that:

(A) Is a venture capital fund as defined in 17 CFR 275.203(l)–1; and

(B) Does not engage in any activity that would constitute proprietary trading under § 255.3(b)(1)(i), as if the issuer were a banking entity.

(ii) A banking entity that acts as a sponsor, investment adviser, or commodity trading advisor to an issuer that meets the conditions in paragraph (c)(16)(i) of this section may not rely on this exclusion unless the banking entity:

(A) Provides in writing to any prospective and actual investor in the issuer the disclosures required under § 255.11(a)(8), as if the issuer were a covered fund;

(B) Ensures that the activities of the issuer are consistent with safety and soundness standards that are substantially similar to those that would apply if the banking entity engaged in the activities directly; and

(C) Complies with the restrictions in § 255.14 as if the issuer were a covered fund (except the banking entity may acquire and retain any ownership interest in the issuer).

(iii) The banking entity must not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the issuer.

(iv) A banking entity's ownership interest in or relationship with the issuer must:

(A) Comply with the limitations imposed in § 255.15, as if the issuer were a covered fund; and

(B) Be conducted in compliance with, and subject to, applicable banking laws and regulations, including applicable safety and soundness standards.

(17) *Family wealth management vehicles.* (i) Subject to paragraph (c)(17)(ii) of this section, any entity that is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities, and:

(A) If the entity is a trust, the grantor(s) of the entity are all family customers; and

(B) If the entity is not a trust:

(*1*) A majority of the voting interests in the entity are owned (directly or indirectly) by family customers;

(*2*) A majority of the interests in the entity are owned (directly or indirectly) by family customers;

(*3*) The entity is owned only by family customers and up to 5 closely related persons of the family customers; and

(C) Notwithstanding paragraph (c)(17)(i)(A) and (B) of this section, up to an aggregate 0.5 percent of the entity's outstanding ownership interests may be acquired or retained by one or more entities that are not family customers or closely related persons if the ownership interest is acquired or retained by such parties for the purpose of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.

(ii) A banking entity may rely on the exclusion in paragraph (c)(17)(i) of this section with respect to an entity provided that the banking entity (or an affiliate):

(A) Provides bona fide trust, fiduciary, investment advisory, or commodity trading advisory services to the entity;

(B) Does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such entity;

(C) Complies with the disclosure obligations under § 255.11(a)(8), as if such entity were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the entity;

(D) Does not acquire or retain, as principal, an ownership interest in the entity, other than as described in paragraph (c)(17)(i)(C) of this section;

(E) Complies with the requirements of §§ 255.14(b) and 255.15, as if such entity were a covered fund; and

(F) Except for riskless principal transactions as defined in paragraph (d)(11) of this section, complies with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the entity were an affiliate thereof.

(iii) For purposes of paragraph (c)(17) of this section, the following definitions apply:

(A) *Closely related person* means a natural person (including the estate and estate planning vehicles of such person) who has longstanding business or personal relationships with any family customer.

(B) *Family customer* means:

(*1*) A family client, as defined in Rule 202(a)(11)(G)–1(d)(4) of the Investment Advisers Act of 1940 (17 CFR 275.202(a)(11)(G)–1(d)(4)); or

(*2*) Any natural person who is a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law of a family client, or a spouse or a spousal equivalent of any of the foregoing.

(18) *Customer facilitation vehicles.* (i) Subject to paragraph (c)(18)(ii) of this section, an issuer that is formed by or at the request of a customer of the banking entity for the purpose of providing such customer (which may include one or more affiliates of such customer) with exposure to a transaction, investment strategy, or other service provided by the banking entity.

(ii) A banking entity may rely on the exclusion in paragraph (c)(18)(i) of this section with respect to an issuer provided that:

(A) All of the ownership interests of the issuer are owned by the customer (which may include one or more of its affiliates) for whom the issuer was created;

(B) Notwithstanding paragraph (c)(18)(ii)(A) of this section, up to an aggregate 0.5 percent of the issuer's outstanding ownership interests may be acquired or retained by one or more entities that are not customers if the ownership interest is acquired or retained by such parties for the purpose

of and to the extent necessary for establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns; and

(C) The banking entity and its affiliates:

(*1*) Maintain documentation outlining how the banking entity intends to facilitate the customer's exposure to such transaction, investment strategy, or service;

(*2*) Do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of such issuer;

(*3*) Comply with the disclosure obligations under § 255.11(a)(8), as if such issuer were a covered fund, provided that the content may be modified to prevent the disclosure from being misleading and the manner of disclosure may be modified to accommodate the specific circumstances of the issuer;

(*4*) Do not acquire or retain, as principal, an ownership interest in the issuer, other than as described in paragraph (c)(18)(ii)(B) of this section;

(*5*) Comply with the requirements of §§ 255.14(b) and 255.15, as if such issuer were a covered fund; and

(*6*) Except for riskless principal transactions as defined in paragraph (d)(11) of this section, comply with the requirements of 12 CFR 223.15(a), as if such banking entity and its affiliates were a member bank and the issuer were an affiliate thereof.

* * * * *

(d) * * *

(6) *Ownership interest.* (i) *Ownership interest* means any equity, partnership, or other similar interest. An ''other similar interest'' means an interest that:

(A) Has the right to participate in the selection or removal of a general partner, managing member, member of the board of directors or trustees, investment manager, investment adviser, or commodity trading advisor of the covered fund, excluding:

(*1*) The rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event; and

(*2*) The right to participate in the removal of an investment manager for ''cause'' or participate in the selection of a replacement manager upon an investment manager's resignation or removal. For purposes of this paragraph (d)(6)(i)(A)(*2*), ''cause'' for removal of an investment manager means one or more of the following events:

(i) The bankruptcy, insolvency, conservatorship or receivership of the investment manager;

(ii) The breach by the investment manager of any material provision of the covered fund's transaction agreements applicable to the investment manager;

(iii) The breach by the investment manager of material representations or warranties;

(iv) The occurrence of an act that constitutes fraud or criminal activity in the performance of the investment manager's obligations under the covered fund's transaction agreements;

(v) The indictment of the investment manager for a criminal offense, or the indictment of any officer, member, partner or other principal of the investment manager for a criminal offense materially related to his or her investment management activities;

(vi) A change in control with respect to the investment manager;

(vii) The loss, separation or incapacitation of an individual critical to the operation of the investment manager or primarily responsible for the management of the covered fund's assets; or

(viii) Other similar events that constitute ''cause'' for removal of an investment manager, provided that such events are not solely related to the performance of the covered fund or the investment manager's exercise of investment discretion under the covered fund's transaction agreements;

(B) Has the right under the terms of the interest to receive a share of the income, gains or profits of the covered fund;

(C) Has the right to receive the underlying assets of the covered fund after all other interests have been redeemed and/or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(D) Has the right to receive all or a portion of excess spread (the positive difference, if any, between the aggregate interest payments received from the underlying assets of the covered fund and the aggregate interest paid to the holders of other outstanding interests);

(E) Provides under the terms of the interest that the amounts payable by the covered fund with respect to the interest could be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest;

(F) Receives income on a pass-through basis from the covered fund, or has a rate of return that is determined by reference to the performance of the underlying assets of the covered fund; or

(G) Any synthetic right to have, receive, or be allocated any of the rights in paragraphs (d)(6)(i)(A) through (F) of this section.

(ii) Ownership interest does not include:

(A) Restricted profit interest, which is an interest held by an entity (or an employee or former employee thereof) in a covered fund for which the entity (or employee thereof) serves as investment manager, investment adviser, commodity trading advisor, or other service provider, so long as:

(*1*) The sole purpose and effect of the interest is to allow the entity (or employee or former employee thereof) to share in the profits of the covered fund as performance compensation for the investment management, investment advisory, commodity trading advisory, or other services provided to the covered fund by the entity (or employee or former employee thereof), provided that the entity (or employee or former employee thereof) may be obligated under the terms of such interest to return profits previously received;

(*2*) All such profit, once allocated, is distributed to the entity (or employee or former employee thereof) promptly after being earned or, if not so distributed, is retained by the covered fund for the sole purpose of establishing a reserve amount to satisfy contractual obligations with respect to subsequent losses of the covered fund and such undistributed profit of the entity (or employee or former employee thereof) does not share in the subsequent investment gains of the covered fund;

(*3*) Any amounts invested in the covered fund, including any amounts paid by the entity in connection with obtaining the restricted profit interest, are within the limits of § 255.12 of this subpart; and

(*4*) The interest is not transferable by the entity (or employee or former employee thereof) except to an affiliate thereof (or an employee of the banking entity or affiliate), to immediate family members, or through the intestacy, of the employee or former employee, or in connection with a sale of the business that gave rise to the restricted profit interest by the entity (or employee or former employee thereof) to an unaffiliated party that provides investment management, investment advisory, commodity trading advisory, or other services to the fund.

(B) Any senior loan or senior debt interest that has the following characteristics:

(*1*) Under the terms of the interest the holders of such interest do not have the right to receive a share of the income,

gains, or profits of the covered fund, but are entitled to receive only:

(*i*) Interest at a stated interest rate, as well as commitment fees or other fees, which are not determined by reference to the performance of the underlying assets of the covered fund; and

(*ii*) Repayment of a fixed principal amount, on or before a maturity date, in a contractually-determined manner (which may include prepayment premiums intended solely to reflect, and compensate holders of the interest for, forgone income resulting from an early prepayment);

(*2*) The entitlement to payments under the terms of the interest are absolute and could not be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest; and

(*3*) The holders of the interest are not entitled to receive the underlying assets of the covered fund after all other interests have been redeemed or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event).

* * * * *

(11) *Riskless principal transaction.* Riskless principal transaction means a transaction in which a banking entity, after receiving an order from a customer to buy (or sell) a security, purchases (or sells) the security in the secondary market for its own account to offset a contemporaneous sale to (or purchase from) the customer.

■ 32. Amend § 255.12 by:
■ a. Revising paragraph (b)(1)(ii);
■ b. Revising paragraph (b)(4);
■ c. Adding paragraph (b)(5);
■ d. Revising paragraph (c)(1); and
■ e. Revising paragraphs (d) and (e).

The revisions and addition read as follows:

§ 255.12 Permitted investment in a covered fund.

* * * * *

(b) * * *

(1) * * *

(ii) *Treatment of registered investment companies, SEC-regulated business development companies, and foreign public funds.* For purposes of paragraph (b)(1)(i) of this section, a registered investment company, SEC-regulated business development companies, or foreign public fund as described in § 255.10(c)(1) will not be considered to be an affiliate of the banking entity so long as:

(A) The banking entity, together with its affiliates, does not own, control, or hold with the power to vote 25 percent or more of the voting shares of the company or fund; and

(B) The banking entity, or an affiliate of the banking entity, provides investment advisory, commodity trading advisory, administrative, and other services to the company or fund in compliance with the limitations under applicable regulation, order, or other authority.

* * * * *

(4) *Multi-tier fund investments.* (i) *Master-feeder fund investments.* If the principal investment strategy of a covered fund (the ''feeder fund'') is to invest substantially all of its assets in another single covered fund (the ''master fund''), then for purposes of the investment limitations in paragraphs (a)(2)(i)(B) and (a)(2)(ii) of this section, the banking entity's permitted investment in such funds shall be measured only by reference to the value of the master fund. The banking entity's permitted investment in the master fund shall include any investment by the banking entity in the master fund, as well as the banking entity's pro-rata share of any ownership interest in the master fund that is held through the feeder fund; and

(ii) *Fund-of-funds investments.* If a banking entity organizes and offers a covered fund pursuant to § 255.11 for the purpose of investing in other covered funds (a ''fund of funds'') and that fund of funds itself invests in another covered fund that the banking entity is permitted to own, then the banking entity's permitted investment in that other fund shall include any investment by the banking entity in that other fund, as well as the banking entity's pro-rata share of any ownership interest in the fund that is held through the fund of funds. The investment of the banking entity may not represent more than 3 percent of the amount or value of any single covered fund.

(5) *Parallel Investments and Co-Investments.* (i) A banking entity shall not be required to include in the calculation of the investment limits under paragraph (a)(2) of this section any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.

(ii) A banking entity shall not be restricted under this section in the amount of any investment the banking entity makes alongside a covered fund as long as the investment is made in compliance with applicable laws and regulations, including applicable safety and soundness standards.

(c) * * *

(1)(i) For purposes of paragraph (a)(2)(iii) of this section, the aggregate value of all ownership interests held by a banking entity shall be the sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest in covered funds (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 255.10(d)(6)(ii)), on a historical cost basis;

(ii) Treatment of employee and director restricted profit interests financed by the banking entity. For purposes of paragraph (c)(1)(i) of this section, an investment by a director or employee of a banking entity who acquires a restricted profit interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the restricted profit interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

* * * * *

(d) *Capital treatment for a permitted investment in a covered fund.* For purposes of calculating compliance with the applicable regulatory capital requirements, a banking entity shall deduct from the banking entity's tier 1 capital (as determined under paragraph (c)(2) of this section) the greater of:

(1)(i) The sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 255.10(d)(6)(ii) of subpart C of this part), on a historical cost basis, plus any earnings received; and

(ii) The fair market value of the banking entity's ownership interests in the covered fund as determined under paragraph (b)(2)(ii) or (b)(3) of this section (together with any amounts paid by the entity in connection with obtaining a restricted profit interest under § 255.10(d)(6)(ii) of subpart C of this part), if the banking entity accounts for the profits (or losses) of the fund investment in its financial statements.

(2) Treatment of employee and director restricted profit interests financed by the banking entity. For purposes of paragraph (d)(1) of this section, an investment by a director or

employee of a banking entity who acquires a restricted profit interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the restricted profit interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(e) *Extension of time to divest an ownership interest.* (1) *Extension period.* Upon application by a banking entity, the Board may extend the period under paragraph (a)(2)(i) of this section for up to 2 additional years if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest.

(2) *Application requirements.* An application for extension must:

(i) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(ii) Provide the reasons for application, including information that addresses the factors in paragraph (e)(3) of this section; and

(iii) Explain the banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods as required in paragraph (a)(2) of this section.

(3) *Factors governing the Board determinations.* In reviewing any application under paragraph (e)(1) of this section, the Board may consider all the facts and circumstances related to the permitted investment in a covered fund, including:

(i) Whether the investment would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies;

(ii) The contractual terms governing the banking entity's interest in the covered fund;

(iii) The date on which the covered fund is expected to have attracted sufficient investments from investors unaffiliated with the banking entity to enable the banking entity to comply with the limitations in paragraph (a)(2)(i) of this section;

(iv) The total exposure of the covered banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the banking entity and the financial stability of the United States;

(v) The cost to the banking entity of divesting or disposing of the investment within the applicable period;

(vi) Whether the investment or the divestiture or conformance of the investment would involve or result in a material conflict of interest between the banking entity and unaffiliated parties, including clients, customers, or counterparties to which it owes a duty;

(vii) The banking entity's prior efforts to reduce through redemption, sale, dilution, or other methods its ownership interests in the covered fund, including activities related to the marketing of interests in such covered fund;

(viii) Market conditions; and

(ix) Any other factor that the Board believes appropriate.

(4) *Authority to impose restrictions on activities or investment during any extension period.* The Board may impose such conditions on any extension approved under paragraph (e)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the BHC Act and this part.

(5) *Consultation.* In the case of a banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to acting on an application by the banking entity for an extension under paragraph (e)(1) of this section.

■ 33. Amend § 255.13 by adding paragraph (d) to read as follows:

§ 255.13 Other permitted covered fund activities and investments.

* * * * *

(d) *Permitted covered fund activities and investments of qualifying foreign excluded funds.* (1) The prohibition contained in § 255.10(a) does not apply to a qualifying foreign excluded fund.

(2) For purposes of this paragraph (d), a qualifying foreign excluded fund means a banking entity that:

(i) Is organized or established outside the United States, and the ownership interests of which are offered and sold solely outside the United States;

(ii)(A) Would be a covered fund if the entity were organized or established in the United States, or

(B) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in financial instruments for resale or other disposition or otherwise trading in financial instruments;

(iii) Would not otherwise be a banking entity except by virtue of the acquisition or retention of an ownership interest in, sponsorship of, or relationship with the entity, by another banking entity that meets the following:

(A) The banking entity is not organized, or directly or indirectly controlled by a banking entity that is organized, under the laws of the United States or of any State; and

(B) The banking entity's acquisition of an ownership interest in or sponsorship of the fund by the foreign banking entity meets the requirements for permitted covered fund activities and investments solely outside the United States, as provided in § 255.13(b);

(iv) Is established and operated as part of a bona fide asset management business; and

(v) Is not operated in a manner that enables the banking entity that sponsors or controls the qualifying foreign excluded fund, or any of its affiliates, to evade the requirements of section 13 of the BHC Act or this part.

■ 34. Amend § 255.14 by:

■ a. Revising paragraph (a)(2)(i);

■ b. Revising paragraph (a)(2)(ii)(C);

■ c. Adding paragraphs (a)(2)(iii), (iv), (v), and (3); and

■ d. Revising paragraph (c).

The revisions and additions read as follows:

§ 255.14 Limitations on relationships with a covered fund.

(a) * * *

(2) * * *

(i) Acquire and retain any ownership interest in a covered fund in accordance with the requirements of §§ 255.11, 255.12, or 255.13;

(ii) * * *

(C) The Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity; and

(iii) Enter into a transaction with a covered fund that would be an exempt covered transaction under 12 U.S.C. 371c(d) or § 223.42 of the Board's Regulation W (12 CFR 223.42) subject to the limitations specified under 12 U.S.C. 371c(d) or § 223.42 of the Board's Regulation W (12 CFR 223.42), as applicable,

(iv) Enter into a riskless principal transaction with a covered fund; and

(v) Extend credit to or purchase assets from a covered fund, provided:

(A) Each extension of credit or purchase of assets is in the ordinary course of business in connection with payment transactions; settlement services; or futures, derivatives, and securities clearing;

(B) Each extension of credit is repaid, sold, or terminated by the end of five business days; and

(C) The banking entity making each extension of credit meets the requirements of § 223.42(l)(1)(i) and (ii) of the Board's Regulation W (12 CFR

223.42(l)(1)(i) and(ii)), as if the extension of credit was an intraday extension of credit, regardless of the duration of the extension of credit.

(3) Any transaction or activity permitted under paragraphs (a)(2)(iii), (iv) or (v) must comply with the limitations in § 255.15.

* * * * *

(c) *Restrictions on other permitted transactions.* Any transaction permitted under paragraphs (a)(2)(ii), (iii), or (iv) of this section shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1) as if the counterparty were an affiliate of the banking entity under section 23B.

Subpart D—Compliance Program Requirements; Violations

■ 35. Amend § 255.20 by:

■ a. Revising paragraph (a);

■ b. Revising the heading of paragraph (d) and revising paragraph (d)(1); and

■ c. Revising the introductory text of paragraph (e).

The revisions and addition read as follows:

§ 255.20 Program for compliance; reporting.

(a) *Program requirement.* Each banking entity (other than a banking entity with limited trading assets and liabilities or a qualifying foreign excluded fund under section 255.6(f) or 255.13(d)) shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope, and detail of the compliance program shall be appropriate for the types, size, scope, and complexity of activities and business structure of the banking entity.

* * * * *

(d) *Reporting requirements under appendix A to this part.* (1) A banking entity (other than a qualifying foreign excluded fund under section 255.6(f) or 255.13(d)) engaged in proprietary trading activity permitted under subpart B shall comply with the reporting requirements described in appendix A to this part, if:

* * * * *

(e) *Additional documentation for covered funds.* A banking entity with significant trading assets and liabilities (other than a qualifying foreign excluded fund under section 255.6(f) or 255.13(d)) shall maintain records that include:

* * * * *

Brian P. Brooks,

Acting Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System.

Ann E. Misback,

Secretary of the Board.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on or about June 25, 2020.

James P. Sheesley,

Acting Assistant Executive Secretary.

Issued in Washington, DC, on June 25, 2020 by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

By the Securities and Exchange Commission.

Vanessa A. Countryman,

Secretary.

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

Appendices to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds—CFTC Voting Summary and CFTC Commissioners' Statements

Appendix 1—CFTC Voting Summary

On this matter, CFTC Chairman Tarbert and Commissioners Quintenz and Stump voted in the affirmative. CFTC Commissioners Behnam and Berkovitz voted in the negative. The document submitted to the CFTC Commissioners for a vote did not include Section V.F. SEC Economic Analysis.

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

As I have previously remarked, the Volcker Rule is ''among the most well-intentioned but poorly designed regulations in the history of American finance.'' [1] While today's final rule does not fix the fundamental flaws of the Volcker Rule [2]—only congressional action can do that—it at least represents a more accurate reading of the law Congress actually passed and brings us a step closer to a reasonable implementation of the rule.[3]

Specifically, the Volcker Rule will now no longer be applied to investments Congress never intended to be included in the first place, such as credit funds, venture capital funds, customer facilitation vehicles, and family wealth management vehicles. The final rule also contains important modifications to several existing exclusions from the prohibition on activities related to private equity and hedge funds (the ''covered funds'' provisions)—for foreign public funds, loan securitizations, and small business investment companies. In these ways, the final rule begins to address the over-breadth of the covered funds definition and related requirements.

I am therefore pleased to support adoption of the proposed revisions to the Volcker Rule's covered funds provisions. While only a modest step forward, these refinements will nonetheless enhance the regulatory experience and provide clarity for market participants who have struggled to comply with the Volcker Rule.

Appendix 3—Dissenting Statement of CFTC Commissioner Rostin Behnam

I respectfully dissent as to the Commission's decision to finalize additional revisions to the Volcker Rule. As we approach the ten year anniversary of the Dodd-Frank Act,[1] and cautiously begin mapping a path out of the current pandemic, I believe it is a good time to reflect on the lessons learned from the 2008 financial crisis, the efficacy of our responses, and whether our objectives have changed, or just our perspective. One of the many critically important provisions of the Dodd-Frank Act is the Volcker Rule. The Volcker Rule, in simple terms, contains two basic prohibitions: (1) Banking entities may not engage in proprietary trading; and (2) banking entities cannot have an ownership interest in, sponsor, or have certain relationships with a covered fund.

Last September, the Commission, along with other Federal agencies (the ''Agencies''),[2] approved changes that significantly weakened the prohibition on propriety trading by narrowing the scope of financial instruments subject to the Volcker Rule.[3] I did not support those changes.[4] Today, the Commission, again in tandem with the Agencies, completes the dismantling that began in 2018,[5] and votes to significantly weaken the prohibition on ownership of

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[1] See Statement of Chairman Heath P. Tarbert in Support of Revisions to the Volcker Rule (Sept. 16, 2019), *https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement091619.*

[2] See, *e.g.,* Economic Growth, Regulatory Relief, and Consumer Protection Act, Public Law No: 115–174 (May 24, 2018) (amending section 13 of the Bank Holding Company Act by narrowing the definition of ''banking entity'' in the Volcker Rule to exclude certain community banks).

[3] See Statement of Chairman Heath P. Tarbert in Support of Further Revisions to the Volcker Rule (Jan. 30, 2020), *https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement013020b.*

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[2] The Office of the Comptroller of the Currency, Treasury; the Board of Governors of the Federal Reserve System; the Federal Deposit Insurance Corporation; and the Securities and Exchange Commission.

[3] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 84 FR 61974 (Nov. 14, 2019).

[4] *Id.* at 62275.

[5] *See* Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 83 FR 33432 (proposed July 17, 2018).

covered funds. Again, I cannot support these changes.

I voted against the 2018 proposal, and earlier this year, voted against the proposal that strikes the final blow today.[6] In voting against the 2020 proposal, I quoted the late Paul Volcker's letter to the Chairman of the Federal Reserve, which he penned last September, when the Agencies approved the changes breaking down the proprietary trading prohibition.[7] Mr. Volcker warned that the amended rule ''amplifies risk in the financial system, increases moral hazard and erodes protections against conflicts of interest that were so glaringly on display during the last crisis.'' [8] Mr. Volcker's words apply equally well to the changes that the Commission finalizes today regarding covered funds—particularly the erosion of the existing protections regarding conflicts of interest.

As the tenth anniversary of the Dodd-Frank Act sadly coincides with a different kind of crisis, I think it is critical to take a hard look at how far we have come in ten years, and how well markets have adapted to carefully crafted policy intended to create a more resilient financial system. Chipping away, particularly at a time of great uncertainty, risks a reversion to the past, when in fact, we should only be looking forward.

Appendix 4—Dissenting Statement of CFTC Commissioner Dan M. Berkovitz

The Volcker covered funds final release (''Covered Funds Rule'') adopts with only minor changes the rule amendments as proposed by the agencies in January of this year (''the Proposal''). I voted against [1] the Proposal because the agencies had only superficially considered the additional risks that banks would incur under the loosened regulations. Nothing in the Covered Funds Rule final release dispels this concern. Therefore I dissent from the final release.

Congress enacted the original Volcker rule after the 2008 financial crisis to protect American taxpayers from again having to bailout banks that are insured by the FDIC or have access to Federal Reserve Bank financial support. This goal was to be achieved by preventing the government-supported banks from undertaking risky proprietary trading activities and from owning hedge funds or private equity funds. The new Covered Funds Rule, together with the rollbacks in the Volcker proprietary trading regulations adopted in 2019,[2] will undermine many of the risk-reducing benefits of the original Volcker rule.

The original Volcker covered funds regulations were not perfect. The foreign public funds exception and the so called ''super 23A'' provisions governing activities banks can undertake with covered funds needed careful adjustments. However, the Covered Funds Rule goes much, much further. It creates broad new exclusions from the covered funds definition with inadequate analysis as to whether these activities were intended to be permitted under the statute or pose serious risk to the banks and the United States financial system.

I addressed some of these new exclusions in more detail in my dissenting statement on the Proposal.[3] Of these, the new ''venture capital funds'' exclusion perhaps best illustrates the extent to which the Covered Funds Rule undermines the very purpose of the Volcker rule. Venture capital serves an important function in our financial markets by providing needed capital to startup companies. But venture capital investing is *very risky.* One study found that about 75% of venture capital-backed firms in the United States did not return capital to investors.[4] Another article on venture capital noted that ''VC funds haven't significantly outperformed the public markets since the late 1990s, and since 1997 less cash has been returned to VC investors than they have invested.'' [5] This is exactly the type of risky private equity fund [6] investing by government-supported banks that Congress intended the Volcker rule to curtail.

In adopting the Covered Funds Rule, the agencies failed to analyze any data or other information that lays out the risks of venture capital investing. The agencies simply exclude venture capital funds from Volcker regulation. The Covered Funds Rule makes, at best, a weak case that venture capital investments promote and protect the safety and soundness of banking entities and the United States financial system by allowing banks to diversify investments. The weakness of that assertion is clear when one considers that allowing any investments in hedge funds and private equity funds would do the same, and yet that risk taking activity is precisely what Congress prohibited.

The banking industry does not need to take on the additional risks permitted by the Covered Funds Rule to be successful. U.S. banks have performed well in recent years. Recent Global League Tables ranking global banks by amount of banking business activity shows that three or four U.S. banks are ranked among the top five banks in the world in almost every table, including the tables for foreign markets banking.[7] While many factors impact banking success, the relative strength of U.S. banks internationally belies suggestions that the new laws and regulations adopted in the wake of the 2008 financial crisis are hurting the competitiveness of U.S. banks. We should recognize, rather than undermine, the success of U.S. banks since the 2008 financial crisis and adoption of the Dodd-Frank Act in 2010.

To date, U.S. banks also have performed well during the Covid-19 pandemic. But our financial system continues to face many extraordinary risks from the effects of the pandemic. In the middle of this latest shock to our financial system, we should not be rushing out a final rule that permits greater risk taking by banks. Rather, we should take stock of the data available to us, and make carefully reasoned, incremental changes that are consistent with the Congressional intent for the Volcker rule.

[FR Doc. 2020–15525 Filed 7–30–20; 8:45 am]

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[6] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 85 FR 12120, 12204 (proposed Feb. 28, 2020).

[7] *Id.*

[8] Jesse Hamilton and Yalman Onaran, ''Volcker the Man Blasts Volcker the Rule in Letter to Fed Chair,'' Bloomberg (Sep. 10, 2019), *https://www.bloomberg.com/news/articles/2019-09-10/volcker-the-man-blasts-volcker-the-rule-in-letter-to-fed-chair.*

[1] Dissenting Statement of Commissioner Dan M. Berkovitz Regarding Volcker Covered Funds Proposal (Jan. 30, 2020), available at: *https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement013020.*

[2] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 84 FR 61974 (Nov. 14, 2019).

[3] *Supra* footnote 1.

[4] Deborah Gage, *The Venture Capital Secret: 3 out of 4 Start-Ups Fail,* Wall Street Journal (Sept. 20, 2012) (citing research by Shikhar Ghosh, a senior lecturer at Harvard Business School), available at *https://www.wsj.com/articles/SB10000872396390443720204578004980476429190.*

[5] Diane Mulcahy, *Six Myths About Venture Capitalists,* Harvard Business Review (May 2013), available at *https://hbr.org/2013/05/six-myths-about-venture-capitalists.*

[6] Interestingly, while the Proposal acknowledged that venture capital funds are a subset of private equity funds for purposes of Volcker, in the preamble to the Covered Funds Rule, the agencies provide a tortured, speculative analysis of statutory construction trying to explain that Congress ''may'' have meant to exclude venture capital funds, despite no real evidence to that effect. To the contrary, three of the four statements from members of Congress in the legislative record cited in the Covered Funds Rule clearly show that they assumed that venture capital funds are private equity funds under the Volcker rule. *See* Covered Funds Rule, section IV.C.2.i.

[7] *See GlobalCapital.com,* Global League Tables, available at *https://www.globalcapital.com/data/all-league-tables.*

Reader Aids

Federal Register

Vol. 85, No. 148

Friday, July 31, 2020

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Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6050**

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FEDERAL REGISTER PAGES AND DATE, JULY

39455–39828 1
39829–40086 2
40087–40568 6
40569–40866 7
40867–41168 8
41169–41320 9
41321–41904 10
41905–42298 13
42299–42686 14
42687–43118 15
43119–43412 16
43413–43680 17
43681–43986 20
43987–44144 21
44145–44450 22
44451–44684 23
44685–45056 24
45057–45302 27
45303–45504 28
45505–45760 29
45761–45966 30
45967–46530 31

CFR PARTS AFFECTED DURING JULY

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
10053 39821
10054 40085
10055 40087
10056 44449
10057 44451
10058 45743
10059 45745

Executive Orders:
13555 (superseded by EO 13935) 42683
13889 (superseded in part by EO 13935) 42683
13931 39455
13932 39457
13933 40081
13934 41165
13935 42683
13936 43413
13937 45755
13938 45757
13939 45759

Administrative Orders:
Memorandums:
Memorandum of July 7, 2020 45749
Memorandum of July 21, 2020 44679
Notices:
Notice of July 22, 2020 44683
Notice of July 23, 2020 45055
Notice of July 29, 2020 45965

Presidential Determinations:
No. 2020–09 of July 17, 2020 45751

5 CFR

185 42299
1605 40569
1650 40569
1651 40569
2429 41169
7101 43681

Proposed Rules:
531 41439
841 39851
843 39852
870 43743
875 43743
890 43743
894 43743
10201 44789

6 CFR

5 45967

7 CFR

9 ..... 41321, 41328
66 40867
201 40571
202 40571
253 42300
900 41173
930 40867
956 41323
985 41325
1200 45303
1217 45057
1260 39461
1779 42494
3575 42494
4279 42494
4287 42494
5001 42494

Proposed Rules:
66 44791
930 44792

8 CFR

103 45968

Proposed Rules:
208 41201
1208 41201

9 CFR

161 41905

10 CFR

9 44685
35 44685
72 ..... 43419, 44145

Proposed Rules:
35 41442
50 44025
52 44025
Ch. I 45809
430 43493
431 ..... 43748, 44026, 44484, 44795
1061 39495

12 CFR

3 42630
4 42630
11 42630
16 42630
19 42630
23 42630
26 42630
32 42630
34 43420
44 46422
45 ..... 39464, 39754
108 42630
112 42630
141 42630
160 42630
161 42630
163 42630
192 42630
195 42630

215.....43119
237.....39464, 39754
248.....46422
351.....46422
Ch. III.....44685
331.....44146
349.....39464, 39754
624.....39464, 39754
Ch. X.....41330
1041.....41905, 44382
1221.....39464, 39754
1281.....44159

Proposed Rules:
7 .....40794, 40827, 44223
22.....40442
145.....40794
155.....40827
160.....40794
208.....40442
303.....41442
339.....40442
347.....41442
614.....40442
760.....40442
1026 .....41448, 41716, 44228

14 CFR

25 .....41331, 41334, 43422, 43423
39 .....39470, 39829, 40584, 40586, 40873, 41175, 41177, 41180, 41906, 41910, 42687, 42689, 43682, 43987, 44453, 44456, 44459, 44462, 44464, 44686, 45059, 45062, 45066, 45069, 45073, 45075, 45079, 45081, 45761, 45762, 45765, 45767, 45769, 45773, 45776, 45779, 45990
71 .....39472, 39473, 39475, 40089, 40588, 41184, 41337, 41339, 41340, 41342, 41343, 41344, 41345, 43425, 43427, 43428, 43429, 43431, 43432, 43684, 44467, 44469, 44688, 44689, 45993, 45995, 45997
91.....45084
95.....40092
97 .....41912, 41914, 44470, 44472
121.....44692

Proposed Rules:
25.....44244
39 .....39503, 41219, 41221, 42746, 42749, 43153, 43160, 43496, 43499, 43503, 43506, 43749, 43752, 44798, 45345, 45347, 45350, 45353, 45355, 45357, 45360, 45545, 45810, 46010, 46012
71 .....40138, 40140, 40142, 43508, 43510, 43511, 44801, 46015

15 CFR

740.....45998
744.....44159

Proposed Rules:
922.....40143

16 CFR

1112.....40100
1224.....40875
1225.....40876, 46000
1228.....40876
1232.....40877
1239.....40100

Proposed Rules:
323.....43162
423.....44485

17 CFR

4.....40877
23.....41346
37.....44693
50.....44170
75.....46422
230.....45092
232.....39476, 45092
239.....39476
255.....46422

Proposed Rules:
1.....42755
23.....41463
38.....42755, 42761
40.....42755
170.....42755
240.....46016
249.....46016

18 CFR

35.....42692
153.....40113
157.....40113

Proposed Rules:
12.....45032
342.....39854

19 CFR

Ch. I.....44183, 44185
122.....44708
181.....39690
182.....39690
208.....41355
351.....41363

21 CFR

172.....41916
510.....45306
514.....45505
520.....45306, 45311
522.....45306
524.....45306
558.....45306
801.....39477
884.....44186
888.....44186
890.....44186
1271.....43989
1301.....44710
1308.....42296
1309.....44710

Proposed Rules:
300.....44803
1301.....45547
1308.....42290

22 CFR

120.....45513
126.....44188

24 CFR

Proposed Rules:
5.....44811
401.....43165
576.....44811

26 CFR

1 .....40892, 43042, 44620
31.....45514
300.....43433
602.....40892

Proposed Rules:
1 .....40610, 40927, 43512, 44246, 44650
31.....45551
40.....46032
49.....46032
54.....42782

27 CFR

Proposed Rules:
9.....43754

29 CFR

810.....39782
1910.....42582
1913.....45780
2509.....40589
2510.....40589
2560.....39831
4022.....42706

Proposed Rules:
102.....45553
825.....43513
2550.....40834
2590.....42782

30 CFR

75.....41364

Proposed Rules:
943.....43759
948.....43761

31 CFR

582.....43436
800.....45311
802.....45311

32 CFR

103.....42707
319.....40016
320.....40017
322.....40017
326.....40018

Proposed Rules:
56.....43168
286.....39856

33 CFR

100.....41368, 44190
117.....41186, 45092
165 .....39852, 40899, 41188, 41189, 41370, 42303, 43121, 43122, 43437, 43685, 43687, 44190, 44734, 44736, 45519, 45521, 45523
334.....43688

Proposed Rules:
100.....40612, 40614
110.....40153, 44247
117 .....41932, 43773, 44494
162.....41935
165.....41469
167.....40155

34 CFR

76.....39479
Ch. II.....42305
263.....41372, 43442
Ch. III.....39833, 41379, 45525

Proposed Rules:
Ch. III.....44247

36 CFR

251.....41387
701.....45313

Proposed Rules:
51.....43775

37 CFR

Proposed Rules:
1.....45812
11.....45812
210.....43517

38 CFR

17.....42724, 45532
71.....46226

Proposed Rules:
3.....41471
17.....45135

39 CFR

501.....41394
3040.....45314

Proposed Rules:
3050.....45139, 46044

40 CFR

9.....45321
35.....43452, 43457
52 .....39489, 41193, 41395, 41397, 41399, 41400, 41405, 41920, 41922, 41924, 41925, 42726, 42728, 43461, 43463, 43692, 43695, 44192, 44206, 44209, 44211, 44212, 44214, 44738, 44741, 45094, 45537, 45539, 45541
62.....45327
63 .....39980, 40386, 40594, 40740, 41100, 41276, 41411, 41680, 42074, 44216, 44752, 44960, 45476
81 .....41193, 41400, 41405, 41925, 45094
86.....40901
121.....42210
141.....43990
142.....43990
180 .....39491, 40018, 40022, 40026, 40028, 41411, 43697, 43700, 43702, 45329, 45336, 46002, 46004
260.....40594
261.....40594
278.....40594
300 .....40906, 43706, 44002, 44003, 45107
350.....44770
355.....44770
372.....42311
600.....40901
721.....45109, 45321
1500.....43304
1501.....43304
1502.....43304
1503.....43304
1504.....43304
1505.....43304
1506.....43304
1507.....43304
1508.....43304
1515.....43304
1516.....43304
1517.....43304
1518.....43304
1700.....43465

Proposed Rules:
22.....46046

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List July 28, 2020

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